OFFICIAL OPINIONS.

PAYMENT OF BILLS CREATED BY TOWNSHIP TRUSTEES WHEN ACTING AS BOARD OF HEALTH.

COLUMBUS, OHIO, January 4, 1901.

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

DEAR SIR:—On the 28th day of December, 1900, this office transmitted an opinion to you, in answer to certain questions proposed relative to the powers of Township Trustees when acting as a Board of Health, in which opinion it was held that the State Board of Health pursuant to Section (409-25) Revised Statutes, "May make and enforce orders in local matters when an emergency exists, and the local board has failed for any reason to act with sufficient promptness and efficiency."

You now inquire how the bills thus created by the State Board should be paid? The amounts of all such bills should be certified to the Township. If the Township has the funds raised by the usual levy on hand in sufficient quantity, it should pay them; otherwise it must proceed, as provided by Sections 2835 and 2836, Revised Statutes, to sell the bonds of the Township for that purpose. If the officers refuse to so proceed, they can be compelled to do so.

Very truly,

J. M. SHEETS,
Attorney General.

P. S. — You must be certain, however, that an emergency exists before you act.

COMPENSATION OF DEPUTY SUPERINTENDENT OF INSURANCE.

COLUMBUS, OHIO, January 7, 1901.

Hon. A. I. Vorys, Commissioner of Insurance:

DEAR SIR:—Your letter of December 11th came duly to hand. It appears from your statement of facts that under Section 269, R. S., as amended April 25, 1898, providing that the deputy superintendent of insurance "shall receive a salary of $1,800 per annum, and in addition, as compensation for his services for making out and forwarding annually, semi-annually, and quarterly, the interest checks and coupons accruing upon the bonds and securities deposited by foreign insurance companies, may annually charge and collect from such foreign insurance companies fees not exceeding $25 on each $100,000 of bonds required to be deposited by such companies. Provided, however, that the amount of such fees so retained shall not exceed in any one year more than $600, the balance, if any, to be turned into the State Treasury." The former deputy superintendent of insurance collected and retained $600 as his first year's compensation, about May 11th, 1898; collected and retained $600 as his second year's compensation, about April 10th, 1899; and collected and retained $600 as his third year's compensation January 2nd, 1900. He ceased to be deputy superintendent of insurance June 2, 1900, at which time his successor was appointed, qualified and took charge of the office.

The questions which you have propounded for solution, are:

1st. Whether the successor is entitled to any part of the $600 collected and retained January 2nd, 1900, for the remainder of the year which he served as such deputy and performed the duties for which this compensation is allowed?

2nd. If he is entitled to a portion of this compensation for the services thus rendered, then when does the year commence? Or, in other words, what portion of the year did his predecessor serve, and what portion did he serve?

As to the first question it is entirely clear that the deputy superintendent of insurance must perform the services thus required throughout the whole year in order to earn his $600. That is, he has not earned the $600 until the year's services are ended. The State is a party interested in the fees collected to the extent that all over $600 collected in any one year belongs to the State. Here is a service which the deputy must perform for the State in order to earn his compensation. Hence, as above stated, he must perform the services to the end of the year in order to earn his full $600.

For a full discussion of the subject I refer you to the award made by the board of arbitration, which passed upon a simlar question between Hon. D. J. Ryan and Hon. T. W. Poorman.

This involved a construction of the provisions of Section 148 of the Revised Statutes, which provides that the Secretary of State may charge the following fees: "For a copy of any document or part thereof, 10 cents per hundred words; for affixing the seal of office to copies 50 cents; for attesting registration of gas meter provers, to be paid by the persons requiring such service, $5.00 for each meter prover tested. He shall keep a complete record of all fees collected in his office, and may retain of the fees so collected in any one year, a sum not exceeding $1,000; and the balance he shall pay into the State Treasury.

It was held by this board of arbitration that the Hon. D. J. Ryan, having resigned from the office of Secretary of State before the close of the year, and having collected and retained the $1,000 herein provided for, that he must pay over to his successor such proportion of the $1,000 as the time served by his successor was to the full year. This board of arbitration consisted of two eminent lawyers, Hon. R. A. Harrison, and Judge S. N. Owen. For a full report of this award see Law Bulletin, Vol. 29, page 73 and following.

As to the second question it is equally clear that the first year commenced on the 25th day of April, 1898, the date of the passage of the act providing for this extra compensation, and ended on the 25th day of April one year later; and each succeeding year thereafter commences on the 25th day of April. Hence, the portion of the year served by the predecessor of the present incumbent commenced on the 25th day of April, 1900, and ended on the 2d day of June, 1900. Why? These foreign insurance companies were under no obligations to pay any sum for collecting this interest until the passage of the act referred to, which was April 25, 1898. Their obligation commenced with that date. It could not be retroactive, and they could not be charged in any one year, two fees for collecting their interest. That being the case, when the fee was paid for the year commencing April 25, 1898, and ending April 25, 1899, no farther fees could be charged until the commencement of the next year. Hence, the fee that was collected and retained April 10, 1899, was prematurely collected; it should not have been collected until after the 25th day of April. And, again, the fee that was collected and retained January 2, 1900, was prematurely collected, as it should not have been collected until after April 25th.

Hence, it is my opinion that the present deputy superintendent of insurance is entitled to such proportion of the $600 compensation as the time served by him is to the full year.

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

AS TO WHETHER THE MEMBERS OF THE STATE BOARD OF AGRICULTURE MAY PARTICIPATE IN THE ELECTION OF MEMBERS TO SAID BOARD.

COLUMBUS, OHIO, January 8, 1901.

W. W. Miller, Secretary Ohio State Board of Agriculture, Columbus, Ohio:

DEAR SIR:—Your letter of January 7th at hand and contents noted. You inquire whether the members of the State Board of Agrictulture may, at the annual meetings, participate in the election of members of that Board.

Section 3692, R. S., provides for an annual meeting to be held on the first Tuesday after the second Monday in January each year, at which time two members of the State Board of Agrictulture shall be elected to serve five years. This section also provides that at this meeting the president of each county agricultural society or such authorized delegates therefrom, "Shall, for the time being be ex-officio members of the State Board of Agriculture for purposes of deliberation and consultation," etc.

It is thus seen that the president of the different county agricultural societies are, at these meetings, only members of the State Board of Agriculture and entitled to take part in its deliberations. This section in no manner disqualifies the ten members who constitute the regular board from taking part in the deliberations of these annual meetings. That being the state of the law, it is the privilege and the duty of these ten members constituting the regular board to take part in all the deliberations of these annual meetings, including the election of the new members.

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

RIGHT OF COMMISSIONERS TO COMPROMISE.

COLUMBUS, OHIO, January 10, 1901.

Robert Thompson, Prosecuting Attorney, Carrollton, Ohio:

DEAR SIR:—Yours of January 9th at hand and contents noted. The inquiry you make is as to whether the commissioners have the right to compromise a claim against the county growing out of a failure on their part to keep the public roads in proper repair. Section 845 of the Revised Statutes provides, among other things,—

> "The board of commissioners shall be capable of suing and being sued, pleading and being impleaded in any court of judicature, and of bringing, maintaining and defending all suits, either in law or in equity, involving an injury to any public, state or county road, bridge or ditch, drain or water course, established by such board in their county, and for the prevention of injury to the same and any such board of commissioners shall be liable in their official capacity for any damages received by reason of the negligence or carelessness of said commissioners in keeping any such road or bridge in proper repair."

It is thus seen that the commissioners have power to sue and be sued, and also are liable in their official capacity for injuries resulting from negilgence in keeping the roads in repair. It goes without saying that where express powers are granted, all powers incidental and necessary to make effectual the express powers are impliably granted. Here, by express terms of the statute, there is a claim against the county, and the commissioners may be sued for it. If they may be sued, judgment rendered, the money collected from the county, it is entirely clear that they may settle without going to that expense.

> "It is well settled that municipal corporations have the power to effect a compromise of claims in favor of or against them. This is a corrollary to the right to sue and be sued. They may compromise doubtful controversies in which the corporation is a party either as plaintiff or defendant."
>
> Beech on Public Corporations, Section 638.

The principle above announced is elementary. The authorities are uniform, and the commissioners need have no doubt of their power to compromise such a claim against the county.

Very truly,

J. M. SHEETS,
Attorney General.

AS TO WHETHER LAND LEASED FOR THE TERM OF FIFTEEN YEARS IS TAXABLE.

COLUMBUS, OHIO, January 12, 1901.

Ohio Canal Commission, Columbus, Ohio:

GENTLEMEN:—I have your favor of January 11th containing inquiry as to whether state lands leased for the term of fifteen years are taxable. In answer thereto I would say: Your reference to "state lands" I might believe by your communication, refers to canal lands, and the power to lease the same for a term of fifteen years is found within Section 218-226 of the Revised Statutes. The policy of the law has been to exempt from taxation all lands belonging to the state, but this policy does not carry with it the exemption from taxation of such premises as the state has power to lease. This is apparent from the various sections of the statutes bearing upon this question.

Section 2744 R. S., provides for the taxation of canal companies.

Section 2972 R. S., authorizes assessors to deduct the amount of land occupied and used as a canal from the value of lands through which they may run.

Section 218-226 expressly authorizes the taxation of all buildings and structures erected upon leased lands, which lands are owned by the state.

Section 2733 R. S., provides for the leasing of all lands held under lease for any term exceeding fourteen years belonging to the state.

The power conferred by the legislature upon the Canal Commission, Board of Public Works and Chief Engineer, to lease lands as provided in Section 218-226 for the term of fifteen years, seems to have been passed with reference to Section 2744, R. S., so as to make the lease for a greater term than that provided in the latter section, and thus subject the interest thereon to taxation.

In the case of Zumstein, Treasurer, vs. Consolidated Coal and Mining Company, 54 O. S., 264, the court there construes Section 2733, and hold "that the purpose of Section 2733 is to impose a tax upon the lessee's interest in lands in the cases specified, and not a tax upon the fee." By the reasoning of the court it is shown that the tax is not levied upon the land as land, but upon the lessee's interest therein.

In my opinion, therefore, in the light of these authorities, the assessors should place a valuation upon the lessee's interest in the lands where leased for more than fourteen years, and cause the same to be listed in the name of the lessee.

Very truly,

J. M. SHEETS,
Attorney General.

DOW TAX COLLECTION AND PER CENT. ALLOWED TREASURER AND AUDITOR.

COLUMBUS, OHIO, January 15, 1901.

B. W. Rowland, Prosecuting Attorney Harrison Co., Cadiz, Ohio:

DEAR SIR:—Yours of January 12th at hand and contents noted. You desire an opinion from this office upon the following questions:

> 1st. Is the Treasurer of the county entitled to five per cent. upon the Dow assessment due from persons engaged in the traffic of intoxicating liquors, where the assessment has become delinquent, the assessment and twenty per cent. penalty has been collected, but without suit or distress?
>
> 2nd. Where the delinquent assessment and penalty have been collected by distress?
>
> 3rd.. Where the delinquent assessment and penalty have been collected by distress and suit?
>
> 4th. Where the delinquent penalty and assessment have been collected by suit filed in the Common Pleas Court?
>
> 5th. Is the Auditor entitled to four per cent. upon such an assessment, which has been placed by him upon the tax duplicate because of information coming to him that a person who has not been returned by the assessor, is engaged in the traffic of intoxicating liquors; whether he has obtained that information by his own efforts, or whether it was voluntarily furnished him by others?

The answer to the first question must be in the negative, for two reasons. The question assumes that he has made no special effort to make the collection.

It was held, in Hunter against Rorick, 51 O. S., 320, that the Treasurer could not collect five per cent. penalty under the provisions of Section 1094, of the Revised Statutes, where the tax was voluntarily paid, although delinquent. That in order to earn the five per cent. penalty he must have collected the taxes by special effort, in person, or through an agent, such as by suit, distress, etc.

Another reason is that the assessment due from persons engaged in the traffic of intoxicating liquors is not a tax on property; it is an assessment on business. The penalty of five per cent. which is allowed to be collected by the provisions of Section 1094, is upon taxes "charged against the property of any person." The moment a person engages in the traffic of intoxicating liquors, that moment an assessment is due. It does not require that any property shall be appraised and the appraisement returned to the county auditor, but simply the mere fact that he engages in that business makes him a debtor. Hence, as this is not a tax upon property, but is an assement upon business, as stated above, the provisions of Section 1094 do not apply.

The second question must also be answered in the negative, for two reasons. One is, as stated above, this is an assessment on business; not a dax due upon property. Hence, the provisions of Section 1094 do not apply.

Second: Section 4364–12 provides for compensation for collecting a Dow tax by distress; and that is four per cent. to the Treasurer. He can not get the four per cent. provided by 4364–12, and also the five per cent. provided in Section 1094.

The third question must be answered in the negative on the same grounds as stated in the answer to the second question. And so must the fourth question, as they all bear upon the collection of the Dow tax, and not upon the collection of taxes assessed against property.

Clearly the auditor is not entitled to four per cent., for reasons given above. That is, that this is an assessment upon a business, and not a tax upon property.

Section 1071, of the Revised Statutes, under which, you state in your letter, the auditor claims, provides that county auditors shall be entitled to "four per centum of the amount of tax collected and paid into the county treasury, on property omitted and placed by them on the tax duplicate." You will observe by the provisions of Section 1071, of the Revised Statutes, that it refers solely to taxes on property; not an assessment upon business.

I have not examined the provisions of the Dow law with a view to determine whether it provided any extra compensation for the auditor in the performance of the duties enjoined upon him with reference to placing assessments against those trafficking in intoxicating liquors, upon the duplicate, for the reason that that question was not involved in your inquiry.

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

AS TO WHETHER COUNTY COMMISSIONERS MAY PROCEED TO ERECT A JAIL FOR INSANE PATIENTS AT THE COUNTY INFIRMARY WITHOUT SUBMITTING THE QUESTION TO THE VOTERS OF THE COUNTY.

COLUMBUS, OHIO, January 19, 1901.

Hunter S. Armstrong, Prosecuting Attorney, St. Clairsville, Ohio:

DEAR SIR: — Yours of January 18th, making inquiry as to whether under the provisions of Section 2825 of the Revised Statutes, the county commissioners may proceed to erect a jail for the insane patients at the county infirmary costing more than $10,000.00 where the building used for that purpose has recently been destroyed by fire without submitting the question to the voters of the county is at hand.

> Section 2825 provides that "county commissioners shall not levy any tax, or appropriate any money, for the purpose of building public county buildings, purchasing sites therefor, or for lands for infirmary purposes, or for building any bridges, except in case of casualty, and except as hereinafter provided, the expenses of which will exceed $10,000.00 without first submitting to the voters of the county, the question as to the policy of building any public county building or buildings, or for purchasing sites therefor, or for the purchase of lands for infirmary purposes by general tax."

The answer to your inquiry involves the question as to whether the expression "except in case of casualty" applies only to the case of a casuality to a bridge, or whether it applies as well to the public buildings previously referred to in this section.

In my opinion the phrase "except in case of casuality" refers only to the impairment or destruction of bridges. This section as originally enacted will be found in Vol. 74, p. 95, as section three. The section as originally enacted provided in effect that the commissioners of the county shall not have power to levy a tax or appropriate money for the building of county buildings, purchasing sites therefor "or for building any bridge, except in case of casualty, as provided for in section two, the expense of which shall exceed $10,000.00, without first submitting the proposition to the qualified voters of the county." Referring then to section two of this act, we find that it does not provide for the levying and collection of taxes for any county buildings, but only for bridges necessary to be built in the county, and also provides that in case of casualty to a bridge, the commissioners may levy a special tax for the purpose of restoring the bridge and may anticipate the collection of the levy by borrowing a sum of money not to exceed the amount which will be raised by the levy for the purpose of restoring the bridge. In the revision of this section the codifying commission omitted the words "as provided for in Section 2," but otherwise it is essentially the same. In construing a statute where there has been an amendment or a revision, the original statute should be looked to with the view to determine what the legislature meant, and a mere change in the phraseology in a revised or an amended section does not change the former construction farther than appears evidently intended. And this is the construction, even though there is also an omission or an addition of words. This rule of construction is of universal application and I do not deem an extended citation of authorities necessary, but refer you, however, to Second Bates Digest, p. 2140, paragraphs 20 and 21, and cases there cited. If then, that is the construction which should be placed upon the statute as revised, the phrase, "except in case of casuality" refers only to bridges. This construction is also borne out by the last paragraph of Section 2825 of the Revised Statutes. This paragraph provides what shall be done in case of casualty, but it makes no provision whatever with reference to casuality to county buildings, only with reference to casuality to county bridges. Hence, if the legislature had intended that county buildings should also be included it certainly would have made provision as to what should be done in case of loss of these buildings as well as in case of loss of bridges.

Very truly,

J. M. SHEETS,
Attorney General.

AS TO WHETHER A SHERIFF IS ENTITLED TO PAY OUT OF THE COUNTY FOR MILEAGE IN SERVING SUBPOENAS.

COLUMBUS, OHIO, January 25, 1901.

C. R. Hornbeck, Prosecuting Attorney, London, Ohio:

DEAR SIR:—Yours of January 23rd at hand and contents noted. You request an opinion from me as to whether the sheriff is entitled to pay out of the county for mileage, copies, etc., in serving witnesses to appear before the grand and petit juries of his county. Section 1230-b of the Revised Statutes, I take it, applies to your county. This section provides fees for the sheriff as follows:

> Serving and returning subpoenas for each person named therein to appear before the grand jury, ten cents, to be paid out of the county upon the certificate of the clerk."

This section also provides that he shall have

> "traveling fees upon all writs, precepts and subpoenas, going and returning, eight cents per mile."

It will be observed that there is an express provision that he shall be paid by the county for serving and returning subpoenas before the grand jury, but there is no express provision as to how he shall be paid his traveling fees for serving such subpoenas. As there is no case in which these traveling fees can be taxed as costs, it follows as a matter of course that the sheriff must lose the fees unless paid by the county. When performing the duty of serving witnesses before the grand jury, he is performing a service for the county, and it would seem that the person for whom he was performing the service should be required to pay the bill. And I take it that as the legislature provided he should have pay for such services, that it follows of necessity that the person for whom he was performing these services should pay the bill. It does not seem to me that the legislature intended to mock the sheriff by saying that he should have pay, and at the same time knowing that there was no method by which he could get pay. In other words, it does not seem to me that this promise of a reward was intended by the legislature to turn to "dead sea ashes" upon its lips.

Hence, I am of the opinion that the sheriff should receive pay out of the county treasury for mileage and copies on subpoenas earned in serving witnesses before the grand jury.

While this question is not entirely free from doubt, yet I feel that the conclusion arrived at is the only reasonable one in view of the statute as it now exists.

Very truly,

J. M. SHEETS,
Attorney General.

FEES OF AN OFFICER OR OTHER PERSON ACCOMPANYING AN EPILEPTIC TO THE ASYLUM.

COLUMBUS, OHIO, January 25, 1901.

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

DEAR SIR:—Yours of January 23rd at hand. The question you submit is whether under the provisions of section 751-8, R. S., an officer or other person accompanying an epileptic patient to the asylum, is entitled to the regular fee of sheriffs for performing similar duties, or whether they are entitled merely to traveling and incidental expenses. This section (94 O. L., 183) provides that the "traveling and incidental expenses of a patient and also of the officer or other person or persons in charge of said patient, to and from said institution shall be paid by the county or as provided in section 631 of the Revised Statutes.

Section 631, R. S., provides that "the traveling and incidental expenses of such patients shall be paid by themselves or those having them in charge.

Construing these two sections together, they mean that the traveling and incidental expenses of the patients and the persons accompanying them shall be paid out of their estate or by those whose legal duty it is to support them. But, if without means to make such payment, then the county shall bear these expenses.

As it will be observed from the above quotations, a person accompanying a patient is not entitled to regular fees, but by express provision of statute, he is entitled to traveling and incidental expenses only.

The conclusion at which I have arrived upon the above inquiry makes it unnecessary to pass upon the second question propounded by you.

Very truly,

J. M. SHEETS,
Attorney General.

WHAT SECTION GOVERNS PUBLICATION OF COMMISSIONERS' REPORT AND MEANING OF PHRASE "COMPACT FORM."

COLUMBUS, OHIO, January 28, 1901.

Lee Stroup, Prosecuting Attorney, Elyria, Ohio:

DEAR SIR:—Your inquiry as to what section of the Revised Statutes governs the publication of the commissioners' report, and also as to what meaning shall be placed upon the phrase "compact form" contained in Section 917 R. S., is at hand. In my opinion Section 917 of the Revised Statutes makes complete provision for the publication of the commissioners' report, and that Section 4367 has no application thereto.

Section 917 as now in force was enacted April 16, 1900, hence, is of later enactment than Section 4367, and, in so far as these two sections are inconsistent, the section of last enactment must be regarded as repealing by implication so much of Section 4367 as is inconsistent with Section 917. I am of the opinion however that there is no inconsistency between these two sections, for the reason that I do not think that Section 4367 applies to the publication of commissioners' reports. That it does not so expressly apply is clear. This section provides:

> "Every proclamation for an election, order fixing the times of holding court, notice of the rates of taxation, bridge, pike, and notice to contractors, and such other advertisements of general interest to the tax payers as the auditor, treasurer, probate judge, or county commissioners may deem proper, shall be published in two newspapers of opposite politics, at the county seat, if there be such published in the county seat, and in all counties having cities of eight thousand inhabitants or more, not the county seat of such counties, additional publication of such notices shall be made in two newspapers of opposite politics in such city."

I understand however, that it is sometimes claimed that the phrase "and such other advertisements of general interest to the tax payers as the auditor, treasurer, probate judge, or county commissioners may deem proper," would include the publication of the commissioners' report. To give this phrase the most liberal construction, it would, at least, leave it to the discretion of the commissioners whether or not this report should be published in two newspapers of opposite politics at the county seat, and also two newspapers of opposite politics published in a city of eight thousand inhabitants or more outside of the county seat. I do not think however that this section will even bear that construction. Section 4366 of the Revised Statutes enumerates three classes of publications: "advertisements, notices and proclamations." Section 4367 of the Revised Statutes enumerates only that class of publications which may be denominated "advertisements." And the phrase above quoted expressly limits the authority of the auditor, treasurer, probate judge and commissioners to publish, in two newspapers of opposite politics, at the county seat, and in two newspapers published outside of the county seat in a city containing eight thousand or more, to that class of notices denominated "advertisements." An advertisement is commonly understood to be a notice of something which is to transpire in the future, while the commissioners' report is a notice of something that has already transpired. An advertisement is published in a newspaper to notify the public in order that all persons who are interested may take such action as they deem proper for their own interest; e. g. proclamation

of an election is made so that the electors may have notice, and thus have the privilege of exercising their privilege as voters; notice of the rates of taxation is made so that the tax payers may examine and determine whether there has been an illegal levy, and thus give him an opportunity to protect himself against its payment, while the publication of the commissioners' report is a notice of something that has been completely accomplished. Hence, in my opinion this publication would not come under the head of an "advertisement," but rather, under that of "notice."

As to the second inquiry with reference to the meaning of the phrase "compact form" contained in this section, I am of the opinion that it simply means that all abbreviations possible shall be used and yet make the report intelligible. There should be no leading or lead lines where unnecessary. Where an abbreviation may be used in the place of a full word, that should be used; where a single word could be used and at the same time convey to the reader a fair idea as to what was meant, it should be used rather than two or more words.

Very truly,

J. M. SHEETS,
Attorney General.

ASSESSMENTS TAKEN INTO CONSIDERATION AS TAXES.

COLUMBUS, OHIO, February 1, 1901.

John W. Zuber, Prosecuting Attorney, Paulding, Ohio:

DEAR SIR:—Your inquiry of January 31st asks the opinion of this office as to whether, under the provisions of Section 2907—a R. S., the ditch, pike paving and sidewalk assessments shall be taken into consideration as a part of the taxes referred to by that section, which the auditor has a right to reduce in accordance with its provisions. It seems to me that cannot be a mooted question as there should be no serious difficulty in arriving at the conclusion that this section means just what it says, that the taxes levied upon the lands shall be reduced. Assessments are a very different charge from that of taxes. Assessments are made upon lands because of improvements upon them equal, at least, to the value of the assessment. The person making the improvement may own the assessment levied upon the land, or the municipality making the assessment may have paid the expense of making the improvement, and thus become the creditor itself. It is entirely clear that if the statute were construed to include assessments, it would be unconstitutional; because it would be impairing the obligation of contracts: e. g., suppose a sidewalk is to be ordered constructed in front of a lot; the work of constructing the sidewalk is sold by the council, and the person constructing the walk is the owner of the claim therefor assessed against the lot; would it be contended for a moment that the owner of that claim must be compelled to accept as payment in full a per cent. of the amount due him? And the same principle applies if a municipality owns a claim which is assessed against the property for the improvement made upon it. It would be impairing the obligation of contracts to compel it to accept from the debtor a per cent. of the amount due it.

With the taxes levied against real estate it is different. That claim is a claim due the state and the state may forgive part of the claim due it if it wants to do so.

Very truly,

J. M. SHEETS,
Attorney General.

PER DIEM AND EXPENSES OF COUNTY COMMISSIONERS.

COLUMBUS, OHIO, February 4, 1901.

H. W. Kuntz, Prosecuting Attorney, Caldwell, Ohio:

DEAR SIR: — Yours at hand inquiring whether the following is a proper bill, and whether it should be certified to by the Prosecuting Attorney:

"John Jones, County Commissioner of Noble County, Ohio, in account with said County.

January 1, 1901, one day's work selling bridge in Jackson Township	$3 00
January 1, 1901, mileage to Jackson Township (30)	1 50
January 1, 1901, livery bill, Jackson Township	2 00
January 1, 1901, hotel bill, Jackson Township	1 00
Total amount due him for said day's work and expenses	$7 50"

The answer to this involves a construction of Section 897 R. S. The provisions of this Section, in so far as the bear upon the question at issue, are as follows:

> Each county commissioner shall be allowed three dollars for each day that he is employed in his official duties, and five cents per mile for his necessary travel, for each regular or called session, not exceeding one session each month, or twelve in any one year, and five cents per mile when traveling within their respective counties on official business, to be paid out of the county treasury on the warrant of the county auditor —. * * * * Each commissioner * * * * for his services, 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 hereinbefore provided, any other reasonable and necessary expenses actually paid in the discharge of his official duty" * * * *

Under the provisions of the first paragraph above quoted, the commissioners have a right to charge and receive the following:

1st. Three dollars per day for each day employed in his official duties.

2d. Five cents per mile traveling expenses while traveling within the county on official business.

Upon an inspection of the above bill it would seem that the commissioner presenting it was required by the board of county commissioners to travel thirty miles to let a bridge contract. Hence, the $3.00 per diem and .1.50 mileage would be proper under the provisions of the paragraph first above quoted.

The last two items, livery bill and hotel bill, are improper unless they are authorized by the last paragraph of Section 897, above quoted. This provision is somewhat ambiguous, but in my opinion, the clause "and when necessary to travel on official business out of his county" limits the right of commissioners to be paid expenses to those instances where they are incurred while on official business outside of the county. Any other construction would have the effect of eliminating this clause from the Statute; for, with this clause left out this provision of the Statute would be sweeping in its character, and would give the commissioners the right to charge up and receive from the county

all expenses incurred by them when attending to official business, whether within or without the county, and whether incurred while attending a regular or special session of the board. It is needless for me to cite authorities to the effect that a statute must be so construed as to give effect to every clause of it. This construction is strengthened by reference to the original act, which became, upon revision, Section 897 (72 O. L., page 169, Section 1). The part of the Section now under consideration then read, —

> "Each commissioner for his services, when necessarily engaged in attending to the business of the county, pertaining to his office under the direction of the board, other than in attending regular or called sessions of the board of commissioners shall be allowed the same per diem as is provided by this act for attendance upon sessions of the board, and when necessary to travel on official business out of his county, shall be allowed in addition thereto his reasonable and necessary expenses actually paid in the discharge of his official duty."

It is clear that by this provision the county commissioners are entitled to be paid expenses only when traveling on official business outside of the county.

That the "mere change" of phraseology in a revised or amended statute does not change the form of construction further than it appears evidently intended, is an elementary rule applied to the construction of statutes, and needs no citation of authorities to support it.

I do not regard the question submitted by you as to the second two items longer open to controversy, for it was settled adversely to the claim of your commissioner by the Supreme Court of Ohio in Higgins against Commissioners, 62 O. S., 621. In that case the commissioner had charged mileage to each session of the board which he attended over and above the 12 sessions per year, and had also charged his expenses incurred while attending upon these sessions. The Court held that he was not entitled to these expenses. If the construction contended for by your commissioner is to prevail, the Supreme Court then was wrong in holding that the expenses of a commissioner while attending upon his official duties within the county should not be paid.

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

RIGHT TO INSPECT RAILWAY SHOPS.

COLUMBUS, OHIO, February 4, 1901.

Hon. J. W. Knaub, Chief Inspector of Workshops and Factories, Columbus, Ohio.

DEAR SIR: — Yours making inquiry as to whether shops used by railway companies in which their rolling stock is manufactured and repaired, come within the provisions of the law requiring inspection by the inspectors of workshops and factories, and requiring those in charge on such shops, to report all serious accidents happening therein, to the chief inspector of workshops and factories, is at hand.

Section 2573-a among other things provides that the inspectors of workshops and factories, "shall visit all shops and factories within their respective districts as often as possible, to see that all the provisions and requirements of this act are strictly observed and carried out."

Upon reading the provisions of the statutes with reference to the inspection of workshops and factories, it will be observed that the purpose of their enactment, was to improve the sanitary condition and the safety of operation of such plants. It was to protect the health, life and limb of the person employed therein. Why then, should railroad shops be exempt? In these shops are large numbers of men at work; they are filled with belting and shafting; and powerful machinery is constantly in operation. There is no reason why such shops should be exempted from the operation of the statute, and in my opinion, they are not exempted.

Section 2573-1 provides that every manufacturer within the state shall forward by mail to the chief inspector of workshops and factories, a detailed report of every serious accident occurring at the establishment, giving details of the circumstances. Section 2573-2 defines the word "manufacturer" as used in the preceding section to mean "any person, who, as owner, manager, lessee, assignee, receiver, contractor, or who, as agent of any incorporated company, makes or causes to be made, or who deals in any kind of goods of merchandise, or who owns, controls or operates any street railway or laundry establishment or is engaged in the construction of buildings, bridges or structures, or in loading or unloading vessels, or cars, or moving heavy materials, or operating dangerous machinery, or in the manufacture or use of explosives." This definition clearly brings railway shops within the provisions of the law. Hence, it is the duty of the inspectors to inspect railway shops, and it is the duty of the proprietors of such shops to report all serious accidents to the chief inspector of workshops and factories.

Very truly,

J. M. SHEETS,

Attorney General.

RIGHT TO INSPECT RAILWAY GRAIN ELEVATORS.

COLUMBUS, OHIO, February 4, 1901.

J. W. Knaub, Chief Inspector of Workshops and Factories, Columbus, Ohio.

DEAR SIR: — Your inquiry as to whether railroad grain elevators come within the provisions of Sections 2573-c and 2573-d, R. S., so as to authorize an inspector of workshops and factories to inspect them and to compel the owners to improve them, both as to sanitation and safety, is at hand.

I am inclined to the opinion that grain elevators do not come within the provisions of these sections. Section 2573-d defines the term "shops and factories" as used in Section 2573-c to include "manufacturing, mechanical, electrical, mercantile, art and laundry establishments, etc." If a railway elevator comes within the definition, it must be as a mercantile establishment. The building in question is used merely to store large quantities of grain, and contains the necessary machinery to elevate it; a very limited number of persons are employed; the business of selling the grain, is seldom, if ever transacted at the elevator. Hence, a railway grain elevator could hardly be termed "a mercantile establishment; it is rather a store house.

Very truly,

J. M. SHEETS,

Attorney General.

FEES ALLOWED COUNSEL FOR DEFENDING INDIGENT PRISONERS.

COLUMBUS, OHIO, February 6, 1901.

A. E. Jacobs, Prosecuting Attorney, Jackson, Ohio:

DEAR SIR:—Your letter of February 5th at hand and contents noted. Prior to the amendment of Section 7246 in 91 Ohio Law, 62, this Section contained a limitation as to the amount that could be allowed to attorneys appointed by the court to defend a person accused of a felony. By the amendment above referred to the crimes of murder in the first or second degree was taken out of the limitation as to the amount that could be allowed for services of an attorney and a new limitation was placed upon the amount to be allowed for such crimes, viz., such amount as the court would approve. It is a familiar principle in the construction of amended statutes that the legislature is not to be presumed to have intended to change the existing law any farther than the clear provisions of the amendment will warrant. It seems to me that a careful reading of Section 7246 as it now stands, does not disclose any legislative intent to make any farther change in the existing law than above indicated, viz.: To remove the crime of murder in the first or second degree from the operation of the general rule and to fix a limitation as to the amount which counsel may receive in such cases by submitting the same to the approval of the court. The amount which the court thus allows is merely the maximum amount which may be paid for such services, just as in the former statute the amount prescribed in the statute was the maximum amount, and just as the amount still prescribed for other felonies inferior to murder in the first and second degree is the maximum amount that may be allowed for such services. In all cases, whether the maximum amount is fixed by the allowance of the court or by the terms of the statute, the bill must be presented to and allowed by the county commissioners. The county commissioners are under no greater obligations to allow the maximum amount approved by the court in cases of murder in the first and second degree than they are under obligations to, in all cases, allow the maximum amount prescribed by the statute in felonies inferior to murder in the first and second degree. In other words, the power of the commissioners to fix the amount to be paid for such services is not affected by the amendment to the statute, except that in cases of murder in the first and second degree they may allow a greater amount than was formerly prescribed by the statute, in case the court first approves such greater amount. The commissioners are limited to the amount so approved by the court, and can not go beyond that, but may, in their discretion, reduce the amount of the allowance.

I do not understand that the allowance or approval of the court is required in any other cases except those of murder in the first or second degree, but the commissioners have authority to fix the compensation for such inferior felonies, within the limits prescribed by the statute.

As to the effect of the decision of the commissioners, in my opinion, it is final. The reasoning of the Supreme Court in the case of the Commissioners of Geauga County vs. Ranney, et al., in 13, O. S., page 388 would be as applicable to the statute as it now stands as it was to the former statute. The reasoning of that case is followed, also, in the State ex rel. John Gerke vs. Board of Commissioners of Hamilton County, 26 O. S. 364.

In the former case the court say "From the action of the board of county commissioners under an act to regulate the fees of attorneys and counsellors at law, passed March 4, 1844, allowing the claim of counsel assigned to defend

an indigent prisoner, counsel who are not satisfied with the amount allowed have no right to appeal to the court of common pleas."

I believe the foregoing covers all questions submitted in your letter. I am,

Yours very truly,

J. E. TODD,

Assistant Attorney General.

AS TO LEGALITY OF ACTION OF BOARD OF MEDICAL REGISTRATION AND EXAMINATION ON APPLICATION OF DR. F. W. JUDSON TO PRACTICE MEDICINE.

COLUMBUS, OHIO, February 6, 1901.

Hon. Geo. K. Nash, Governor of Ohio, Columbus, Ohio:

DEAR SIR:—Your letter of the 4th inst., enclosing letter of Dr. F. W. Judson and letter of Dr. Frank Winders, at hand. The act of February 27, 1896, provided that a graduate in medicine or surgery, from a medical institute in good standing, might file his diploma, together with his affidavit that he is the person named in such diploma and is the lawful possessor of the same, with the State Board of Medical Registration and Examination, together with a fee of $5.00, and be entitled to receive from said Board a certificate as a legal practitioner of medicine in the State of Ohio. The provisions of this act, relating to the requirements for the practice of medicine within the State of Ohio, were repealed by the act of April 14, 1900, which act contains the following provision:

> "No person shall practice medicine, surgery, or midwifery in any of its branches in the State of Ohio, without first complying with the requirements of this act. All persons authorized and entitled prior to July 1st, 1900, to practice medicine, surgery, or midwifery in the State of Ohio, under and by virtue of the provisions of an act entitled 'An act to regulate the practice of medicine in the State of Ohio,' passed April 27, 1896, to which this act is amendatory, may engage in such practice and shall be subject to the law regulating the same; all other persons desiring to engage in such practice in this State shall apply to the State Board of Medical Registration and Examination for a certificate and submit to the examination hereinafter provided * * * * The fee for an examination shall be $25,00, which shall not be returned in case of the failure to pass such examination, but the applicant may, within a year after such failure, present himself and be examined again without the payment of an additional fee."

It was further provided that said act should take effect and be in force from and after July 1, 1900. It does not appear, from the letter of Dr. Judson that he ever qualified under the provisions of the act of February 27, 1896; and, this act now being repealed, it is too late for him to obtain the benefits of its provisions. So far as his case is concerned it is the same as though the act had never had an existence. He is now subject to the provisions of the act of April 14, 1900. It seems that the language used in this act is clear and unambiguous, to-wit:

> "All other persons desiring to engage in such practice in this State shall apply to the State Board of Medical Registration and Examination for a certificate, and submit to the examination hereinafter provided."

I am unable to see that Dr. Winders has misconstrued the law in any particular. And, I am unable to find that there are any exceptions in the application of this rule, except as to students matriculated in a medical college in Ohio prior to January 1, 1900, but who shall have graduated subsequent to January 1, 1900. Such students are to be licensed under the provisions of the act of February 27, 1896. And except further that "the Board may, in its discretion, dispense with an examination in the case of a physician or surgeon duly authorized to practice medicine or surgery in any other state, who may desire to change his residence to Ohio and who makes application in a form to be prescribed by the Board, accompanied by a fee of $50.00, and presents a certificate or license issued after an examination by the medical board of such state." Such privilege, however, can only be accorded to applicants from states whose laws demand qualifications of equal grades of those required in Ohio, and when equal rights and privileges are accorded by such state to physicians and surgeons of Ohio who may desire to remove to and practice in such state.

I am not advised as to the requirements of the State of Michigan in relation to the practice of medicine, and am unable to say whether or not Mr. Judson is entitled to the benefits of the exception above noted.

Yours very truly,

J. E. TODD,

Assistant Attorney General.

CONSTRUCTION OF ACT CREATING SPECIAL ROAD DISTRICT, 94, O. L., p. 96, ALSO page 404.

COLUMBUS, OHIO, February 8, 1901.

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

DEAR SIR:—I have your communication of the 1st inst., proposing two questions; one with regard to the construction of House Bill No. 379, found in 94, O. L., p. 96, as to who are resident owners of real estate.

Resident owners of real estate under the wording of the act mentioned, refers to real estate lying and being within one mile of any public road, etc., which distance shall be computed from the sides of the road, and not from the termini thereof. If it had been designed to extend the tax limits so as to include territory beyond the end of the road proposed to be improved, the legislature, it is presumed, would have made it manifest by appropriate language. It did not fail to do so in the act commonly known as "The two mile road improvement law," which provides in amended section 4, 71, O. L., p. 94, that no land should be assessed which did not lie within two miles of the proposed improvement, and that such distance of two miles, might "be computed in any direction from either side, end or terminus of said road."

The reasonableness of such a construction of the statute as will confine the assessment to property on each side of the proposed improvement, is made manifest when you would consider the inequalities and inconsistencies occurring under any other construction. I am therefore of the opinion that the case cited of Lear vs. Holstead, 41, O. S., 566, is the proper rule to follow in the construction of the act in question.

Second: You next inquire if in Senate Bill No. 126, 94, O. L., p 404, Section 4 thereof, "Does the clause providing that not more than one such improvement shall be made in any county in any period of two years," refer

to the improvements of such roads mentioned in Section 7 thereof? That is, where the same may be located upon, or adjacent to any county line.

A careful reading of that act will lead you to the conclusion that the first six sections thereof provide for one class of improved roads, and Section 7 thereof provides for another class. Therefore, the language used in Section 4 that not more than one *such* improvement shall be made in any county in any period of two years, refers to the improvement contemplated in Section 4 and the preceding sections. Section 7 treats of a different class of improvements, and hence, I am of the opinion that the clause quoted does not forbid an improvement being made under Section 7 during the same years with an improvement under the preceding sections of the act.

Without having the inquiry made to me, I would suggest it to be a very serious questions as to whether Senate Bill No. 126 is not unconstitutional.

Very truly,

J. M. SHEETS,

Attorney General.

INDEXES TO BE KEPT BY COUNTY RECORDER.

COLUMBUS, OHIO, February 12, 1901.

J. E. Powell, Prosecuting Attorney, New Lexington, Ohio:

DEAR SIR: — I have your esteemed favor of the 9th inst., proposing a question as to what compensation should be allowed to the county recorder for the maintaining of an index such as is described in your letter of that date. Your communication necessitates a review of the statutes governing a county recorder. The first inquiry would be to observe what records are required to be kept by the county recorder. By Section 1143, Revised Statutes, it would be observed that the following records are required to be kept:

1. Record of deeds.
2. Record of mortgages.
3. Record of plats.
4. Record of leases.

In connection with that section I would cite you the case of Greene vs. Garrington, 16 O. S., 550, wherein it is held that the index is no part of the record; that the record is complete without it, but it will be found, by examination of the statutes, that certain indexes are authorized to be made, certain ones of which must be made whether directed by the county commissioners or not, and certain other indexes when directed by the county commissioners, and such indexes may be enumerated as follows:

1. A daily alphabetical index. See Sec. 1153.
2. "Proper indexes." Sec. 1153.
3. Alphabetical index of powers of attorney. Sec. 4132-1, R. S.
4. General index of sub-divisions. Sec.1154.

There is no question in my mind but that the words "proper indexes," as used in Section 1153, would authorize a recorder to maintain general indexes of all the records he is required to keep, to-wit: Of deeds, mortgages, plats, and leases.

The index provided by Section 1154 is one that must be directed when found to be necessary, by the county commissioners, and such index shall be in addition to the alphabetical indexes and has been designated "A general

index of sub-divisions," and such, you say, was ordered and directed by the county commissioners to be made, but the index prepared under that order is not in compliance with that section. If it was made to comply with Section 1154, or could not be such an index as is required under Section 4132-1 or under Section 1153, the question would arise, what sort of an index is it, and under what section of the statute is it authorized if not by the section under which it was assumed to be made and directed? This question your letter does not assume to answer, but you say that the recorder assumes that if the index does not comply with Section 1154 then it is under the description required in Section 1155, to-wit: "Other indexes authorized by the county commissioners."

It seems to be elementary that the indexes to be kept by a county recorder must be such as are authorized by some express statutory authority. If he would assume to keep an index, or the county commissioners direct an index to be made which does not comply with any index described in Chapter 6, of Title 8, entitled "County Recorder," then such indexes, not being authorized by any statute, would be of no effect as a record of such office, nor as evidence of any court of justice, nor could the officer keeping the same recover any compensation for keeping and maintaining the same. To make a plain case—If the recorder would assume to keep an index of judgments recorded in the court of common pleas, it would be independent of statutory authority, and he could recover nothing for keeping the same.

If the index in question would comply with any of the above mentioned indexes, the county recorded could recover the amounts prescribed for his services, but as this is a question which could only be determined by an examination of the index itself, it is patent that it is one that can not be determined by this office. I remain,

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

PURCHASE OF CHARTS BY BOARD OF EDUCATION.

COLUMBUS, OHIO, February 12, 1901.

Hon. Fred. E. Guthery, Prosecuting Attorney, Marion, Ohio:

DEAR SIR:—I have your esteemed favor of the 9th inst., relative to the action of the township board of education of one of the townships of your county, in the purchase of a set of charts, which they seek to pay for out of the contingent fund raised pursuant to Section 3958, Revised Statutes, wherein you present the question as to whether, when the board has credited the tuition fund with $1,500, and given the contingent fund credit for $400 only, and the price of the charts virtually exhaust the contingent fund, is the board authorized to make such a purchase?

The question is one of the proper administration of the duties of their office rather than one of lack of power. The division of the fund raised pursuant to Section 3958 into tuition and contingent fund is arbitrary and independent of any statutory authority or direction. The only limitation to be considered in this connection would be the securing of the primary object of the levy which is to supplement that wherein the amount received from the State is not sufficient. The purchases made by the board could not be made so as to interfere with the tuition necessary for the school year, and if this

purchase is made as contemplated, I know of no law that is violated thereby, as the matter is purely within the power of the board provided that the charts are of such kind as are necessary in school work.

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

POWERS OF STATE BOARD OF DENTAL EXAMINERS.

COLUMBUS, OHIO, February 13, 1901.

A. F. Emminger, D. D. S., Secretary State Board of Dental Examiners, Columbus, Ohio:

DEAR SIR: — In your communication of February 12, 1901, you submit to this office for answer certain questions concerning the powers and duties of the State Board of Dental Examiners. It appears from your communication that one Wm. Theobald and one Ferdinand Seiler, have each made application to your said board for registration and license to practice dentistry in the State of Ohio: said applications are accompanied by the affidavits of free-holders to the effect that said applicants have been regularly engaged in the practice of dentistry in the State of Ohio since the fourth day of July, 1889. The question presented on this state of facts is, is the board required under the law to issue to such persons certificates of registration and license; or in other words, may the board in the exercise of sound discretion refuse to issue such certificates?

The act of April 8, 1892 (89 O. L., 237), now contained in Section 4404 of the Revised Statutes, after providing for the appointment of a board of dental examiners and for the examination of such persons as desired to practice dentistry in the State of Ohio, contains the following provisions:

> "Every person who may legally hold a diploma from any reputable dental college in the United States or any foreign country, or who has been regularly since July 4, 1889, engaged in the practice of dentistry in this state, shall, upon application and payment of a fee of two dollars to the secretary of said board of dental examiners, and producing satisfactory and reasonable proof of the fact that he holds such diploma, or has been so engaged in the practice of dentistry in this state since July 4, 1889, receive a certificate of registration and license to practice dentistry in this state. Every applicant for license to practice dentistry under the provisions of this section shall, in person, by mail or otherwise, produce for the inspection of the board of dental examiners his diploma, or the affidavits of himself and two free-holders, (stating) that he has been regularly engaged in the practice of dentistry in this state, and at what place or places since July 4, 1889; and if the board of dental examiners shall, upon inspection thereof, find that the applicant is legally qualified under the provisions of this act to practice dentistry in this state, the secretary shall, without unnecessary delay, deliver to the applicant a certificate of registration and license to practice dentistry in this state."

The language of this statute clearly implies discretion on the part of the board. The proof produced must be "satisfactory and reasonable." The board

of examiners must "find upon inspection thereof that the applicant is legally qualified." Such provisions are inconsistent with any other view than that the board are required to determine in a *quasi judicial* capacity the sufficiency of the proofs produced to entitle the applicant to a certificate. The provision that the applicant shall file his diploma or affidavits of himself and two free-holders stating that he has been engaged in the practice of dentistry since July 4, 1889, is not a limitation on the power of the board in this particular. It does not prescribe the amount of evidence the board may require, but simply prescribes the minimum amount of evidence the board shall be obliged to consider. The power given the board in other provisions of the act to make rules, etc., and to administer oaths and to hear testimony in all matters relating to the duties imposed upon it by law, tends to confirm the view that the board is not bound to issue a license upon every application that may be presented accompanied with the required number of affidavits.

You are advised therefore that in the opinion of this office, your board is clothed with discretion to refuse to issue a certificate or license except the board first finds that the applicant is legally entitled to the same.

You also submit two letters written by one Z. D. Patterson who alleges that one H. H. Buck was licensed in 1897 by the board of dental examiners, but who, it is claimed by said Patterson, was not entitled to registration for the reason that he has not practiced dentistry regularly in this state since July 4, 1889, but that a part of said time he was in the State of New York. Mr. Patterson does not seem to be troubled with any doubt as to the power of the board but serenely requests that the certificate issued to Mr. Buck be revoked. I have carefully examined the statutes prescribing the powers and duties of your board and fail to find any authority granted to revoke a certificate once issued. Being created by the statute, the board of dental examiners can have no other or greater powers than those expressly conferred, and such incidental or inplied powers as are necessary to accomplish the purpose for which the board was created. The power to revoke certificates or licenses is neither expressly given or necessarily implied. If the applicant has satisfied the board that he is entitled to a certificate and one has been issued to him, upon what principle is the board at a subsequent time to say that this certificate was improperly granted. To do so would be like opening the judgment of a court and trying over again the issues in the case. If the power of revocation was to be given at all, it should only be for acts occurring subsequently to the issuing of the certificate. No board ought to be empowered to reconsider the action of the board taken at a former time and revoke a certificate because in its judgment, the board had not sufficient evidence before it upon which to grant such certificate. So that in the case presented, I am of the opinion that the power is not granted to your board to revoke the certificate of Mr. Buck, and neither is it desirable that such power should be granted. If the certificate was obtained by fraud or misrepresentation, I would suggest that possibly it wauld not be sufficient to protect the holder in the event of a criminal prosecution. The certificate would only be prima facie evidence of his right to practice dentistry, and the entire question might be tried in a criminal proceeding under the statute to determine whether or not he has complied with the statutes, and thereby secured the right to practice dentistry in this state. I suggest this question without giving a final opinion upon it.

Very truly,

J. E. TODD,

Assistant Attorney General.

AS TO WHAT BEQUESTS SHALL BE LIABLE FOR THE COLLATERAL INHERITANCE TAX.

COLUMBUS, OHIO, February 16, 1901.

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

DEAR SIR: — I am in receipt of your communication of the 15th inst., requesting a written opinion from me upon the following state of facts:

> "A widow recently died in this county leaving an estate worth about $60,000.00. She gave by will about $30,000.00 to her nephews and nieces. About $25,000.00 to the nephews and nieces of her deceased husband, about $4,000.00 to a sister of her deceased husband, and $1,000.00 to the First Pres. Church of Newark, Ohio.
>
> Which of these bequests, if any, are liable for the collateral inheritance tax?"

This necessitates a construction of Section (2731-1) Bates' Annotated Ohio Statutes, being the first section of The Collateral Inheritance Tax.

The decedent leaving a will removes from consideration the question whether or not, the estate devised is ancestral.

It will be noted that the act not only exempts from the tax the property received by *lineal descendants* of the testatrix, but also all her *collateral branches*, and the lineal descendants thereof.

The sister, and the nephews and nieces of the testatrix deceased husband, are plainly no relation to the testatrix, within the contemplation of the statute.

It would therefore follow that the legacies given to the sister, nephews and nieces of the testatrix husband and to the First Presbyterian Church are all subject to the tax above the sum of $200.00. While those given to her own nieces and nephews are not subject to the tax.

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

AS TO WHETHER THE BUSINESS OF A SAVINGS AND LOAN ASSOCIATION AND A SAFETY DEPOSIT AND TRUST COMPANY MAY BE CONDUCTED BY A SINGLE CORPORATION.

COLUMBUS, OHIO, February 18, 1901.

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

DEAR SIR: — This department has received from you a request for a written opinion on the question, whether or not under the laws of this state, the business of a savings and loan association and of a safe deposit and trust company, may be conducted by a single corporation?

I cheerfully comply with your request, not alone because it is the duty of this department to advise the various state officers when requested so to do in all matters relating to their official duties, but also because the articles of incorporation of all savings and loan associations are required by statute to be submitted to the Attorney General for approval before the same are filed, and your inquiry furnishes us an opportunity to express to you fully our views concerning the nature of the business which savings and loan associations and safe deposit and trust companies are authorized to transact, without the necessity of refusing to approve the articles of some proposed corporation.

It is to be remarked in the first place that the name "savings and loan association" as applied to the corporations authorized by the act of February 20, 1873 (70 O. L., 40), and the various acts amendatory and supplemental thereto, is apt to mislead. The fundamental idea of a savings association or a savings bank is an institution conducted solely for the *benefit of the depositors.* The money deposited in such an institution remains the property of the depositor and the increase thereon is his. The associations authorized by the savings and loan associations statutes (Sections 3797 to 3821 R. S., inclusive), are in reality banking corporations, organized with capital stock and for profit, and with all the functions and powers of an ordinary commercial bank, particularly with the powers of discount and deposit. The following are some of the provisions of the statute in relation to the powers of savings and loan associations:

(a) May acquire, hold and convey such real estate as is necessary for the transaction of its business, or as it may find necessary to purchase to secure debts due it.

(b) May receive on deposit for safe keeping or investment, all sums of money that may be offered for that purpose, or that may be ordered to be deposited by any court in this state having custody of money, and may make investments thereof, and may receive and pay such rates of interest thereon as may be agreed upon.

(c) May purchase and sell promissory notes, drafts and bills of exchange.

(d) May invest their funds in the purchase of stocks, bonds, or other evidences of indebtedness, etc., to such an amount as may be deemed proper.

(e) May invest their funds in bonds or notes secured by mortgages on unencumbered real estate to an amount equal to 75% of the amount of the paid up capital and deposits.

(f) May discount notes and bills of exrhange; may take, receive, reserve and charge upon any loan or discount made upon any note, bill of exchange or other evidence of debt, interest at the rate allowed by law.

(g) Interest may be reserved or taken in advance at the time of making the loan or discount.

In addition to these powers certain limitations are placed upon the officers and stockholders; such as requiring one-half of the subscribed capital stock to be fully paid up, and requiring the officers to give bond to the corporation, and forbidding any officer or director to borrow or use the funds of the corporation to an amount greater than one-half of the amount of stock by him owned or held, and forbidding any officer or director to be surety, or in any manner an obligor for any loan made by the corporation, and limiting the amount of liability of any person, company, corporation or firm either as principal debtor or as security or indorser for others, to one-fifth of the capital stock of such association actually paid in, etc.

Money deposited with such a corporation becomes the property of the corporation, and the ordinary relation of debtor and creditor results,' and the entire business thus authorized to be conducted by such associations, is, as above intimated, the ordinary business of discount and deposit exercised by commercial banks.

Coming now to consider the functions and powers of safe deposit companies as provided by the act of April 17, 1882 (79 O. L., 101), it will be found that said companies may

(a) Receive on deposit for safe keeping, government securities, stocks, bonds, coins, jewelry, plate, valuable books, papers and documents, and other property of every kind.

(b) Act as agent or trustee for the purpose of registering, countersigning or transferring certificates of stock, bonds, or other evidences of indebtedness upon such terms as may be agreed upon.

(c) Receive moneys or property ordered deposited by any court in this state upon such terms and subject to such instructions as may be by such court designated.

(d) Receive and hold moneys and property in trust or on deposit from executors, administrators, assignees, guardians, trustees, corporations or individuals, upon such terms and conditions as may be agreed upon between the parties.

(e) Invest moneys or properties received in trust, together with the capital of such company, in authorized loans of the United States or of the State of Ohio, etc.

(f) No loan shall be made either directly or indirectly to any officer, employee or trustee of such company, and not more than ten percentum of its capital shall be invested in any one security or loan.

(g) Such company may be trustee under any will or instrument creating a trust for the care and management of property, under the same circumstances, in the same manner and subject to the same control by the court having jurisdiction of the same, as in the case of a legally qualified person.

(h) No such company shall accept any trust until the capital stock of said company shall amount to $200,000 fully paid up, and until such company shall have deposited with the treasurer of state $100,000 in cash or securities.

The business thus provided for is entirely separate and distinct from banking business. While the deposit of money in a bank creates the relation of debtor and creditor, the deposit of money or property with a safe deposit and trust company creates the relation of trustee and *cestui que trust.*

It is settled law that a corporation has only such powers as are granted to it, or such incidental powers as are necessary to carry out those expressly granted.

The business of safe deposit and trust companies being entirely dissimilar from the business of savings and loan associations, such business cannot be conducted by the same corporation without express authority of statute. I take it, that in Ohio at least, corporations can be formed but for a single purpose. In the case of the State ex rel. vs. Taylor, 55 C. S., p. 61, in construing Section 3235 of the Revised Statutes, which provides that "corporations may be formed in the manner provided in this chapter for any purpose for which individuals may lawfully associate themselves except for the purpose of carrying on professional business" Judge Spear speaking for the Court say:

"It will be noted that the word is 'purpose', not 'purposes.' Its use implies a limitation. This limitation must have

> been by design. It is a most wise and reasonable one. We cannct assume that the general assembly would intentionally clothe corporations with capacity to unite all classes of business under one organization, as this would tend strongly to monopoly. Construing this section wholly by itself it will not justify the contention that a corporation organized for one purpose can be changed by amendment into a company having authority to pursue a number of differing and unrelated purposes. Indeed the only rational deduction is the exact opposite. But the section does not stand alone. Following, under the same title, there are provisions for the incorporation of no less than fifteen different kinds of corporations, including street railway companies, and, by later enactments, the formation of electric companies for conducting electricity for light and power purposes, and to contract with municipalities for lighting streets is authorized. If it had been the design of the general assembly, by section 3235, to give the unlimited power contended for, why the subsequent provisions referred to? These enactments taken together, we think, support the conclusion that a corporation may, except where distinct provision is made, be organized for one main purpose, not for a half-dozen. Nor is this unreasonable. It would seem to be a sufficient extension of the words of any grant to corporations to hold that they may possess such incidental powers as are necessary to carry into effect the powers expressly conferred."

I am unable to find any "distinct provision" that savings and loan associations may also do a safe deposit and trust business. On the contrary, I find many things aside from the dissimilar character of the business above discussed, to lead to the conclusion that the legislature in enacting the statutes in relation to safe deposit and trust business, did not intend that such business should be conducted by savings and loan associations. Thus, the original act in relation to safe deposit and trust companies, found in 70 O. L., p 101, has the following title:

> "An act supplementary to Chapter 16, Title 2, Part 2d, of the Revised Statutes of Ohio, and to provide for the creation and regulation of safe deposit and trust companies."

This title would clearly indicate that the legislature was providing for the organization and regulation of a distinct class of corporations, and the mere fact that the act is supplemental to the chapter containing the provisions in relation to savings and loan associations, is not sufficient to justify the conclusion that the powers provided for in said act were to be exercised by savings and loan associations. The same may be said of the title to the various acts supplemental and amendatory to the original act and found in 88 O. L., 407; 89 O. L., 370; 91 O. L., 225; 92 O. L., 62; 93 O. L., 337, in all of which reference is made to safe deposit and trust companies, and not to savings and loan associations.

Again, the 74th General Assembly by an act passed April 16, 1900, provided that savings and loan associations in certain cities, to-wit, Toledo and Columbus, might also do a safe deposit and trust business, thus giving legislative recognition to the proposition, that under existing laws, savings and loan associations are not authorized to transact safe deposit and trust business. It may be remarked in this connection that in so far as the act above

referred to seeks to confer such power upon savings and loan associations in the two cities named, it is probably void as being in conflict with the state constitution.

Having thus seen that the functions and powers of the two corporations are entirely dissimilar, and that no express provision of statute exists whereby either corporation may transact the business or exercise the powers conferred by law upon the other, but that the legislative intent as expressed in the title of the acts authorizing safe deposit and trust companies, is to the effect that the business therein provided for is to be conducted by a distinct corporation organized for such purpose, I am of the opinion that no company should be chartered to exercise the functions and powers both of a savings and loan association and a safe deposit and trust company.

I am aware that a different construction has heretofore obtained under former administrations of the offices of secretary of state and attorney general, and that corporations have been formed with charters sufficiently liberal to authorize the transaction of both kinds of business. I am unable to understand however, how that fact could justify a continued disregard of the provisions of law in relation to the creation of corporations.

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

I have carefully examined the above opinion and the same is hereby approved.

J. M. SHEETS,
Attorney General.

MEANING OF PHRASE "TABULAR OR RULE WORK" — "COMPACT FORM."

COLUMBUS, OHIO, February 19, 1901.

H. C. Claypool, Prosecuting Attorney, Chillicothe, Ohio:

DEAR SIR: — Yours enclosing publication of the commissioners' report of your county for the year 1900, is at hand. The questions submitted for solution are:

First: Is the report as published "tabular or rule work", for which the publisher would be entitled to receive fifty per cent. extra per square?

Second: Does the publication of this report comply with the provisions of Section 917 R. S., which requires that it shall be published in "compact form"?

The report as prepared by the commissioners and as published, contains a detailed statement of the financial transaction of the commissioners "itemized as to amount, to whom paid, and for what purposes;" and the report as published is substantially in the following form:

"Edward Long, chair for Commissioners' office..... $8 00
The Unsere Zeit, notice to tax payers..... 1 50"

The question is whether work set up in this form is tabular or rule work within the meaning of the provisions of Section 4366 R. S. Tabular or rule work is defined in the Century Dictionary to be the same as table-work, and is as follows: "In printing, the setting of tables; specifically, work done in such narrow columns, usually with figures, as to call for extra compensation under an established scale." If that definition is to be a guide, it is clear to my mind that the work in question is not tabular or rule work, and it is

not work done in narrow columns. This work could have been set solid without lead lines, and then certainly nobody would have claimed it was tabular or rule work. I enclose a sample (page 39 Superintendent of Insurance Report for the year 1898) which comes within the above definition, and is tabular or rule work as I understand the meaning of this phrase.

Hence, it is my opinion that the report as published is not tabular or rule work.

Second: Does the publication in question comply with Section 917 R. S., which requires that it shall be made in compact form?

The Supreme Court of Ohio in the case of State ex rel. vs. Commissioners, 56 O. S., 631, decided what the words "compact form" meant prior to the amendment of the statute by the 74th General Assembly, and this amendment was evidently made with a view to compelling a more detailed report to be published. The section as it now reads requires that the commissioners shall annually make a detailed statement of their financial transactions, itemized as to amount, to whom paid, and for what purpose, and file the same with the Court of Common Pleas. The latter part of this same section provides that the financial statement of the commissioners, together with the report of the examiners, shall be published in compact form. Now, just what this phrase "compact form" means, may be a little difficult to determine, but giving it the most liberal construction in favor of the publishers of newspapers, the phrase "compact form," would at least mean that there should be no "padding" of the publication as is commonly understood. There should be no lead lines where not absolutely necessary; there should be no leading and no double spacing. It would also require that every abbreviation possible should be used where the sense would not be destroyed. All of these abbreviations should be made, and if they are not made, the report is not published in compact form. As I have already said, this is a most liberal construction in favor of the publisher, and it is somewhat questionable in my mind, whether a much narrower construction may not justly be put upon this provision.

Taking this construction however, as a guide, upon an inspection of the report which you submit, it will be observed that it consists quite largely in lead lines and double spacing, and in no instance has there been any abbreviation, that I was able to discover. Had double spacing been left out and abbreviations made, the report, as published, could have been much condensed. You will observe by an inspection of this publication, that, had not double spacing been frequently used, a great many items could have been contained in one line which now occupy two. Also, had well recognized abbreviated forms been used, many items could have been condensed into a single line which now occupy two. I have made a lead pencil cross at a very few of the items in which double, if not treble spacing, has been used, and where abbreviations might have been made, and thus condensed the report.

Whether or not this report should have been set up solid without lead lines, and without placing the cash items at the right of the column, in order to comply with the provisions of Section 917, I am not fully prepared to say.

I am inclined however to the opinion that if this detailed report is to be published on the theory that all the people of the county might want to examine and read it, it would be more convenient for them to examine, if the cash items were placed at the right of the column as they appear in this report and should be published in that form.

Very truly,

J. M. SHEETS,

Attorney General.

RIGHT OF CANAL COMMISSION TO LEASE PROPERTY HERETOFORE LEASED.

COLUMBUS, OHIO, February 27, 1901.

Ohio Canal Commission, Columbus, Ohio:

GENTLEMEN: — I have your communication of the 26th inst., requesting an opinion of this department upon the right the State of Ohio has to control and lease the canal property heretofore leased to The Columbus Hocking Valley and Athens Railroad Company by virtue of the act of May 18, 1894, found in 91 O. L., 327.

This act was amended April 23, 1898, 93 O. L., 216, and again amended April 16, 1900, 94 O. L., 236, but the effect of these amendments was only to extend the time within which the railroad company, the lessee, should have the right to comply with the conditions mentioned in the first act, and does not go to the extent of in any way enlarging the powers granted to the railroad company by the act of May 18, 1894.

It then only becomes necessary to inquire what rights were conferred upon the lessee by the act in question, and as incidental to that, the title that the State of Ohio may still have in the premises so occupied by such railroad company.

The title of the State of Ohio to the lands embraced within that portion of the canal system of the State, known as The Hocking Canal, has been derived from two sources, concerning which it will be unnecessary to mention, except as it pertains to the particular tract which has been let and leased unto The Columbus Hocking Valley and Athens Railroad Company.

The title to a portion of said canal property, viz.: that portion extending between Lancaster and Carroll, being all in Fairfield County, was acquired under authority granted by the legislature of Ohio, on the 8th day of February, 1826, found in Vol. 24, O. L., p. 71. To the premises embraced within those termini, the State acquired but a qualified title; for that portion of the canal was built, and the lands acquired for its use by a private corporation, and the law under which it was done, above cited, authorized it to acquire lands for its use by donation, grant or appropriation without expressing the interest of estate to be acquired thereby. Under the ruling of the Supreme Court of Ohio in the case of Vought vs. The Columbus Hocking Valley and Athens Railroad Company, the lands embraced within that portion of the canal, revert to the owner from whom they were acquired on the abandonment of the canal, or to his successor in title.

See Vought vs. C. H. V. & A. R. R. Co., 58 O. S., 123 to 166.
See also, 176 U. S., 469.

The lands embraced within the canal beyond Lancaster were acquired by virtue of certain acts of the Congress of the United States, and by the General Assembly of the State of Ohio, under and by virtue of certain agreements entered into by and between the United States and the State of Ohio; and further, by virtue of certain acts passed by the Legislature of Ohio accepting the grant from the United States, and further providing for the acquiring of title to the canal property of the State, found in 23 O. L., pp. 50–58 inclusive, whereby the State of Ohio obtained a fee simple title to the lands acquired in pursuance of said acts, and the condemnation and appropriation proceedings mentioned in Section 8 of said act.

All lands acquired pursuant to said act vested in the State of Ohio a fee simple title.

53 O. S., 189.
53 O. S., 521.
34 O. S., 541.
28 O. S., 643.

The premises embraced within the act of May 18, 1894, as I understand, lie within that portion of the canal system to which the State of Ohio acquired a fee simple title, and at the time of the passage of that act, the State was in possession of the premises and was the owner thereof in fee simple.

The grant of such railroad company was not a fee simple, but was merely a lease, and was denominated in Section 2 of the act as "A right franchise and privilege of constructing, maintaining and operating over, upon and along the Hocking Canal and property of the State of Ohio adjacent thereto, a railroad, etc."

The first section of that act provides for an abandonment of the premises for canal purposes, and that the same should not be used for canal purposes during the pendency of the lease.

Section 4 of the act provides that the railroad company, its successors and assigns, "shall have the exclusive right during the term aforesaid, to use and occupy the property, or so much thereof as may be necessary for the purpose of constructing, maintaining and operating a railroad thereon;" and further provides that when said railroad company, its successors and assigns, cease to use said canal for railroad purposes, it shall revert to the state for canal purposes.

This constitutes a grant for railroad purposes alone. The rights of the lessee in the premises are limited and defined by the grant, and cannot be extended to use the premises for any other purpose, or divert the same for any other purpose, than that set forth in the act, or necessarily incident thereto.

Giesey vs. C. W. & Z. R. R. Co., 4 O. S., 309.
McComb vs. Stewart, 40 O. S., 647.
Cooley's Constitutional Limitations, 559.

The title acquired by this grant to the C. H. V. & A. R. R. Co., is just such a title as is conferred by appropriation proceedings under the statutes, and no greater: *A grant for railroad purposes.*

Sections 3281 and 3282, Revised Statutes.

As it was held by the Court of Common Pleas of Franklin County in the case of The Hocking Valley and Lake Erie Railroad Company vs. A. T. Wickoff et al., decided October 3, 1898, that the railway company, which is the successor of the C. H. V. & A. R. R. Co., had no right in the premises in question for gas or oil which might be therein, in opposition to the demands of the State of Ohio; and that the interest of said company in and to said premises, was merely to occupy and use the same for railroad purposes, it follows therefrom that the State did not part with, nor did the company acquire any right to use the premises in question for any other than railroad purposes, or that which is necessarily incident thereto, as defined in Giesey vs. R. R. Company, 4 O. S., 309.

The state thus being the owner of said premises subject to the use aforesaid by said railroad company, has it the power to control and lease the same for any purpose?

All subsequent grants, leases or interests conveyed by the State of Ohio in and to these premises, must be necessarily subject to the rights acquired therein by the railroad company, but it is clear to me that, although this be true, the state has still power to lease the same for purposes that are not inconsistent with the grant made to the railroad company, and which would not be destructive of, nor in any way impair the use of the railroad company for railroad purposes. This was held in the case of Little Miami Railroad Company vs. Dayton, 23 O. S., 510.

Giesey vs. R. R. Co., 4 O. S., 324.
B P. W. Co. vs. R. R. Co., 23 Pick., 360.

I conclude that your power and authority to lease canal property is still existing in relation to the premises in question, and that you may let and lease the same for purposes not inconsistent with the use of the railroad company, and subject to the rights of the company, as acquired under the act of May 18, 1894, and acts amendatory and supplementary thereto.

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

RIGHT OF STARK COUNTY AGRICULTURAL SOCIETY TO RECEIVE MONEY OUT OF THE COUNTY TREASURY.

COLUMBUS, OHIO, March 1, 1901.

Robert H. Day, Prosecuting Attorney, Canton, Ohio:

DEAR SIR: — Yours of February 27th at hand, and contents noted. Your inquiry goes to the question as to what sum, if any, the agricultural society of Stark County is entitled to receive, out of the county treasury, under and pursuant to the provisions of Section 3697 R. S.

It appears, from the statement of facts, that this company received, last year, $300, as membership fees; $263.62, live stock entries; $300 from speed class entries. Also, that the contention of the Fair Association is, that, under the provisions of the section above referred to, it is entitled to receive, from the county treasury, the sum of $800.

This section provides, in effect, that where the society pays to its treasurer voluntary subscriptions, or fees are imposed upon its members, to the extent that money is thus raised, the county shall pay to the association a like sum, not less, hower, than $50, nor more than $800, in any one year.

Article 4 of the constitution of the Stark County Agricultural Society reads as follows:

> "Members of the society must be residents of the county, and pay annually to the association the sum of one dollar, prior to the last day of the preceding fair."

Rule 1, of the rules and regulations, provides that, —

> "On the payment of one dollar, a card of membership and four single admission tickets shall be issued, but no one shall be permitted to purchase membership tickets in blocks."

It is entirely clear that the fees received for live stock entries, and speed ring entries are not fees imposed upon its members within the provisions of Section 3697. These fees are exacted for the privilege of exhibiting stock,

or entering the speed ring, with the hope of getting a premium in return. Hence, there is a consideration for the exaction of these fees. The fees referred to in Section 3697 are in the nature of voluntary contributions, or fees exacted simply for the privilege of being members of the Association.

It is very questionable whether or not the membership fee of one dollar is a fee imposed upon the members of the society, within the meaning of this section; for by the provisions of rule one above quoted a person may become a member by paying one dollar to the Association, and, in turn, gets four single admission tickets. Four single admission tickets would, evidently, cost him a dollar, even though he did not get the membership ticket; hence, the member has sacrificed nothing in order to become such.

From your letter, I should judge that you are not seriously controverting the right to receive $300. I have not given that question as careful consideration as I otherwise would have done.

Yours very truly,

J. M. SHEETS,
Attorney General.

MEANING OF TERMS, "RESIDENT OWNERS, AND WITHIN ONE MILE OF ANY PUBLIC ROAD.

COLUMBUS, OHIO, March 1, 1901.

Benjamin Meck, Prosecuting Attorney, Upper Sandusky, Ohio:

DEAR SIR: — In your letter of February 25th, you submit to this office some questions concerning the proper construction of the act of April 4, 1900 (94 O. L., 96). The first section of this act so far as pertinent to the inquiries you suggest, reads as follows:

> "That when a majority of the resident owners of any real estate, lying and being within one mile of any public road, shall present a petition to the county commissioners of any county in the State of Ohio, asking for (the) grading and improving of any such road, etc."

The specific questions presented are, who are "resident owners," as the term is used in said act, and does the expression "within one mile of any public road," include real estate lying within one mile of the end of such road, as well as measured from the sides of such road?

As to the first question, I am clearly of the opinion that "resident owners" refer to persons residing within the county and owning real estate within the limits affected by the improvement. It is not necessary that such owners should reside upon the real estate within the limits of the improvement, but may reside in any part of the county. The terms "resident owner" and "non-resident owner," are frequently used in connection with the statutes relating to public roads, ditches, etc., not only in regard to petitions for such public improvements, but also in respect to notice, given to the owners of real estate affected by such improvements; and in every instance, which I have examined, the term "resident owner," applies to persons residing within the county, while the term "non-resident owner," applies to persons who own real estate within the county, but reside elsewhere. This is particularly evident, when the statutes in relation to service of notice upon owners of real estate are considered. This act being in *pari materia* with the statutes above referred

to, the term should receive the same construction in this act as in the other provisions of the statute.

As to the one mile limit prescribed in said act, the question is more difficult. The language used in its ordinary signification is capable of a construction which would include territory lying within one mile of the end of the improvement, as well as territory lying within one mile as measured from the sides of the improvement, and not extending beyond the end of the same. However, I am of the opinion that such a construction was not within the intent of the legislature, for the following reasons:

First: Such construction, in my judgment, would lead to some absurd consequences; for example: If a new improvement should commence at a point where a former improvement terminated, then the land lying within one mile both ways from the junction of the two improvements, would be liable for the special taxation provided for by said act, for both improvements, while lands lying beyond the one mile limit, would only be taxed for the one improvement. Other absurd consequences will readily occur to you if such a construction be adopted.

Second: An examination of other acts of the General Assembly in relation to roads, will disclose that when the legislature has contemplated that the taxing district for a road improvement should extend beyond the end of such improvement, it has expressed this intention with clear and unmistakeable language. In the case of Lear vs. Halstead (41 O. S., 566), the Court had under consideration the act of March 28, 1876, which provides,

> "That for the purpose of constructing free turnpike roads authorized by this act, extra taxes, when levied as hereinbefore provided, shall be on all real and personal property within one mile on each side of said free turnpike road, etc."

The court held that this provision "does not include land within one mile as measured from the end of the road, but only as measured from either side of the road and between the termini of the same." The following language was used by Dickman, Judge, in deciding the case:

> "If it had been designed to extend the tax limits so as to include territory and personal property beyond the end of the turnpike, the legislature, it is presumed, would have made it manifest by appropriate language. It did not fail to do so in the act commonly known as the 'two mile road improvement law,' which provided in amended Section 4 (71 O. L., 94), that no lands should be assessed which did not lie within two miles of the proposed improvement, and that such distance of two miles might 'be computed in any direction from either side, end or terminus of said road.'"

While the language in the act under consideration is not entirely similar to the language of the act construed by the Court in the case above cited, yet, I am of the opinion that the same construction should be given.

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

CONSTRUCTION OF ROAD IMPROVEMENT LAWS — SUFFICIENCY OF INDICTMENT FOR PERJURY.

COLUMBUS, OHIO, March 4, 1901.

Fred E. Guthery, Prosecuting Attorney, Marion, Ohio:

DEAR SIR: — In your letter of February 21, you submit to this office certain questions in relation to the acts of the 74th General Assembly, in relation to the improvement of roads by the county commissioners. These acts are published in 94 O. L., pp. 96 and 364.

Your first inquiry presents the question whether these acts are mandatory upon the county commissioners, or merely permissive.

The act of April 4, 1900 (94 O. L., 96), requires the county commissioners, when a proper petition is presented, to go upon the line of the road prescribed in the petition, but this is as far as the mandatory provisions of this act extend. They are not required to do anything further, unless it is their opinion that the public utility requires such road to be improved.

In the act of April 16, 1900 (94 O. L., 364), the entire proceeding authorized by such act is merely permissive. The county commissioners are authorized to make a levy for the creation of a fund, to be known as "the county road improvement fund," and the commissioners of such counties as shall make such levy, are further authorized to improve any state and county road, etc., when petitioned so to do by a majority of the owners of the foot frontage of the land abutting on said road. The entire matter therefore, of making the levy as well as selecting the roads to be improved, is vested in the discretion of the county commissioners.

You further suggest the question as to the constitutionality of these acts. I do not feel that it is the province of the attorneys for the state to declare acts unconstitutional, unless they are so clearly repugnant to the provisions of the constitution, that no presumption can arise that the legislation is valid. The acts in question are not so clearly repugnant. Indeed, from the examination I have given them, I see nothing in them conflicting with the provisions of the constitution. The power to tax lands benefited by such road improvements, is merely the power to make assessments, which power has been sustained by the courts of Ohio for many years. Without examining carefully into the constitutionality of these acts, I am of the opinion that in so far as the office of Attorney General or Prosecuting Attorney is concerned, their constitutionality should be presumed.

You further inquire whether an indictment for perjury will lie, where the defendant was sworn by a deputy clerk of court in open court, and in the presence of the judge, where said deputy clerk so administering the oath, was only verbally appointed by the clerk for a second term and no certificate of his appointment given him, nor any approval of his appointment given by the court.

Section 1244, R. S., provides that the clerk may appoint one or more deputies to be approved by the court of common pleas, etc., and that the appointment shall be by certificate signed by the clerk, which, with the approval of the court or judge, shall be entered on the journal. From your statement, it is evident that no deputy clerk was appointed, as, under the provisions of the statute above quoted, the appointment could not lawfully be made until all the requirements of the statute, down to entering the certificate of appointment of the journal, were fulfilled. The deputy was nothing

more than a *de facto* officer. To constitute the crime of perjury under the statute of Ohio, it is necessary that the oath on which the charge is based, should be "lawfully administered." (Section 6897 R. S.) The authorities are uniform, that an oath administered by one who is a *de facto* officer merely, is not sufficient to sustain an indictment for perjury. (See Staight vs. State, 39 O. S., 496, and authorities there cited.)

It was held however, in the case of Oakes vs. Rogers, 48 Cal., 197, that, "Where the statute requires an oath to be administered by the court or judge, and it is administered by the clerk in open court, under the direction of the court and tested by the clerk, it is administered by the court in the sense of the statute." Also, in the United States Circuit Court of Michigan in the case of U. S. vs. Babcock (4 McLean, 113), McLean, Judge, speaking for the court said: "There can be no doubt that the clerk in the presence of the court, or any other person acting under the sanction of the court, is authorized to administer oaths. It is the act of the court in such a case, and not an act done by the authority of the individual who administered the oath." These citations tend to support the proposition that in the case suggested in your letter where the oath was administered by the acting deputy clerk, in the presence of the court, it was in effect administered by the court, and an indictment for perjury would lie. Such a case has never been fairly presented to the Supreme Court of Ohio, and I think the authorities above cited, and others that might be found, would justify you in insisting upon the validity of your indictment, and if necessary, bring the matter to the attention of the Supreme Court.

I am, Very truly yours,

J. E. TODD,
Assistant Attorney General.

USE OF GASOLINE FOR ILLUMINATING PURPOSES.

COLUMBUS, OHIO, March 4, 1901.

Hon. John R. Malloy and Hon. Frank P. Baird, Oil Inspectors of Ohio:

GENTLEMEN: — Your communication of recent date is at hand, and contents noted. The question presented for solution, is, whether those who use gasoline for illuminating purposes are guilty of an infraction of the laws relating to the inspection of illuminating oils refined from petroleum, where they use an apparatus which has been invented since the enactment of the law, whereby gasoline may be used as an illuminant with entire safety

On April 11, 1884, an act was passed by the legislature of Ohio, providing for the inspection of illuminating oils refined from petroleum, and providing that any such oils that would flash at a temperature below one hundred and twenty degrees Fahrenheit, should not receive the approval of the Inspector, and should not be sold or used for illuminating purposes; also providing certain penalties for an infraction of the provisions of this act.

Revised Statutes, Sections 394 to 402, inclusive.

At the time this act was passed a great deal of low grade oil was sold and consumed, and many serious accidents were happening, especially because of the use of gasoline in lamps, the mechanism of which was wholly unsuited to the purpose. Hence, the purpose of the enactment of this law was as a police regulation to remedy these evils. Since that date the gasoline stove has come into almost universal use, and a number of different styles of lamps have been invented, whereby gas is generated from gasoline, is mixed with air, and, when

ignited, and coming in contact with a mantle, produces a steady, white light. It is claimed, and I believe conceded, that this style of apparatus is perfectly safe, and the light thus produced is most satisfactory and inexpensive to the consumer. Hence, it seems that the evils which led to the enactment of the statute in question no longer exist.

Quite a number of companies have been organized in Ohio, and are now engaged in the manufacture and sale of this style of gasoline lamp. Here, then, is a lamp that is safe and cheap, the manufacturers desire to sell it, and the public desire to purchase and use it. Are the provisions of the law above referred to in the way?

Under the police power of the State the Legislature may regulate, and, sometimes, even prohibit, the use of a dangerous agency where life, or limb, or health is put in jeopardy. But the Legislature cannot, under the guise of police regulations, arbitrarily enact any legislation it may choose, if its purpose in no manner concerns the well being of the people. It cannot prohibit the sale and consumption of useful articles of commerce, and thus take from the producer the value of his property, by prohibiting its sale, and take from the consumer some of the comforts of life, where the thing prohibited has no reference to the comfort, safety, or welfare of society.

Cooley's Constitutional Limitations, 6th Edition, 710.

Section 306, R. S., prohibits the use of any oils for illuminating purposes in mines of this State, except a certain limited class, that will pass the test imposed by the statute. This act was passed for the benefit of the miner, and is entirely proper as a police regulation; yet, if this provision were extended to apply to dwellings, mercantile establishments, etc., it would hardly receive the sanction of the courts. Nor would legislative prohibition of the use of tallow candles, or electric lights in dwellings be upheld; and, if the Legislature now, for the first time, were to enact a law prohibiting the use of gasoline as an illuminant, regardless of its safety, it is very questionable whether the court's would uphold the act. Hence, the question arises whether this law, enacted many years ago, prohibiting the use of gasoline as an illuminant, because of the dangers attending its use, should now be held to apply to the use of this fluid for illuminating purposes, when used in an apparatus invented long after the enactment of the Statute, and which, by its improved mechanism, has removed every element of danger.

Gasoline is in almost universal use for heating purposes, and its use is entirely legal. The same flame which produces the heat may, by placing a mantle over it, be utilized to produce light, and, without in the least increasing the danger. It would seem absurd to hold that the flame without the use of the mantle would be an infraction of the law, but with the mantle it would be.

> "Statutes passed in the exercise of the police power of the State, restricting and regulating property rights, or the pursuit of useful occupations and callings, are to be strictly construed."

23 Am. & Eng. Law, 385-6.

The law is a progressive science and keeps pace with progress in business, inventions, commerce and with the changed conditions of society. The spirit of the law, rather than the letter, is to be enforced, especially when nothing but mischief could arise from the enforcement of the latter.

It is clear to my mind that the Statute in question was not aimed at the present gasoline lamp, which has been so improved in mechanism as to re-

move the element of danger, but at the lamp which was in existence at the time of the enactment of the Statute.

In view of these considerations, I incline to the opinion that this Statute cannot fairly be construed to extend beyond the mischief at which it was aimed. Hence, I am of the opinion that persons using gasoline as an illuminant in the lately invented lamp, if free from danger, is not guilty of an infraction of this act.

Very truly,

J. M. SHEETS,

Attorney General.

RIGHT TO LEASE WALLS OF THE CANALS OF THE STATE.

COLUMBUS, OHIO, March 6th, 1901.

Hon. Charles E. Perkins, Chief Engineer Board of Public Works, Columbus, Ohio:

DEAR SIR:—You refer to this office for an opinion a certain contract of lease entered into between the Canal Commission, Board of Public Works and Chief Engineer of the Public Works, party of the first part, and one John C. Clause, party of the second part, by which said party of the first part undertakes to grant to the party of the second part, "the privilege of erecting bill boards against the wall of the canal at the crossing of certain streets at an annual rental of $12.00 per year"; but it is not stated in the lease where these streets are, whether in Cincinnati, Toledo or some other city, but I assume from the names of them they are in the City of Cincinnati. You require from this office an opinion as to the validity of such lease. I find no authority in the statute for making such a lease. Certain sections of the statute authorize the leasing of lands not necessary for actual use in the operation of the canals of the State. If I understand the lease in question, it attempts to grant an interest in the wall of the canal itself. It is not stipulated in the lease that the Board of Public Works, Canal Commission, etc., found that the premises leased were not necessary for actual use in the operation of the canal, and, indeed, I do not understand how such a finding could be made. Certainly, the canal cannot be operated without walls or banks, and an attempt to lease any portion of the wall of the canal, or grant any rights or privileges in connection with said wall, is an attempt to lease away the very body of the canal itself, for which no authority exists in the statute.

I am of the opinion therefore that this lease should be treated as absolutely null and void, because of the want of power in the lessors to make such a lease in the first instance.

Very truly,

J. E. TODD,

Assistant Attorney General.

POWER TO EQUALIZE COAL LANDS SEPARATE AND DISTINCT FROM OTHER LANDS.

COLUMBUS, OHIO, March 6th, 1901.

To the Decennial State Board of Equalization:

GENTLEMEN:—Your inquiry of this date is at hand. The question propounded is whether your board, as a board of equalization, can take the coal lands of the State of Ohio and equalize their value separate and distinct from the other lands of the State. In my opinion, this cannot be done. Under the provisions of the law by which the State Board of Equalization equalizes the taxable values of the lands of the State, it must deal with each county or town as a unit. It cannot take particular tracts of land in any town and increase or diminish the value as

placed upon them by the local board of equalization. You may raise the aggregate taxable value of the real estate of a town, or reduce it, as, in your judgment, the circumstances warrant. To that extent, the coal lands of that particular town or township would be affected. But to not other or greater extent can you affect the value of the coal lands.

I understand the statement is made that the coal lands in some of the counties have been valued excessively high by the local boards. If that is the case, the only remedy that the owners have will be to apply to the Board of Revision for a reduction of the values of such lands. Where the coal is owned by one person and the fee of the soil by another the coal and the fee are appraised separately. The provisions of Section 2792, in my opinion, would warrant the Board of Revision in treating the number of acres of coal in place that have been appraised and returned by the assessors as so much land subject to be increased or decreased in value according as evidence might warrant, and to these local Boards of Revision, owners of coal lands who feel aggrieved must look for redress.

Very truly,

J. M. SHEETS,

Attorney General.

AS TO WHETHER A ROAD TAX MAY BE DISCHARGED BY LABOR ON THE PUBLIC HIGHWAYS.

COLUMBUS, OHIO, March 7th, 1901.

Henry Bannon, Prosecuting Attorney, Portsmouth, Ohio:

DEAR SIR: — Yours of March 5, making inquiry as to whether the road tax levied pursuant to the provisions of Section 2827, R. S., by the Township Trustees of a township, may be discharged by labor on the public roads, as provided in Section 2830, R. S., is at hand.

Section 2827 authorizes the Township Trustees to levy a tax for all township purposes. This, of course,, includes the right to levy a tax for road purposes. Section 2829 authorizes an additional levy for road purposes when the Trustees deem such levy necessary; but they are limited to a three-mills levy, "which may be discharged in labor as hereinafter provided; and in addition thereto, not exceeding one mill on the dollar for the same purpose to be collected in money." Section 2830 provides that "any person charged with a road tax, may discharge the same by labor on the public highways."

These three sections under consideration were originally enacted in 1877, and appear in 74, Ohio Laws, page 92, as Sections 5, 7 and 8. The only material change in either of these three sections, since their original enactment that could have any bearing upon the question at issue, is the insertion in Secton 2829 (Secton 7) of the clause, "which may be discharged in labor as hereinafter provided; and in addition thereto, not exceeding one mill on the dollar for the same purpose, to be collected in money."

As the Act stood when originally passed, Sections 5 and 7 (Revised Statutes, Sections 2827 and 2829), authorized the levy of a road tax; Section 8 (Revised Statutes, Section 2830), provided that "any person charged with a road tax may discharge the same by labor on the public highways within the time designated in this act.'

So it is apparent that as the act then stood, a road tax, whether levied by virtue of the provisions of Sections 5 or 7, could be discharged by labor on the public highway. Does the amendment of Section 7, above referred to, require a change in the cnstruction of these provisions? I think not. This amendment provides that a

certain portion of the additional tax authorized to be levied, may be paid in work, and a certain portion must be paid in money. There is no manifest purpose to change the meaning of these statutes, except to the extent of requiring one mill of the extra levy to be paid in money; otherwise, the original construction of the act, in my opinion, obtains. Hence, I am inclined to the view that whether the tax is levied by virtue of the provisions of Section 2827 or Section 2829 (except as to the one mill levy provided for in Section 2829, which is to be paid in money), may be discharged in labor on the public highway.

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

RELIEF OF NON-RESIDENT PAUPERS.

COLUMBUS, OHIO, March 7th, 1901.

Charles B. Dechant, Prosecuting Attorney, Lebanon, Ohio:

DEAR SIR: — Yours of March 6th at hand and contents noted. You ask what are the respective duties of the Infirmary Directors and Trustees of a township of the county in which a non-resident pauper is found, and also as to what are the duties of the Infirmary Directors of the county in which a pauper has a legal residence, with reference to paying for the relief of such pauper, furnished by the county in which he may be found?

Section 1496, it seems to me, is unambiguous. It makes it clear as to what the duties of the Trustees are. They shall notify the Infirmary Directors of the county in which the pauper may be located. There their duties end. The Infirmary Directors, in turn, should remove the pauper to the county in which he has a legal residence, if his health will permit, and the latter county is required to pay the expenses of his removal. If at the time a person is found to be a pauper he is not known to be a resident of another county, and relief is furnished, it is the duty of the Infirmary Directors to serve notice, if such relief is furnished, within twenty days from the time they discover his residence, and, in that event, the county in which he has a legal residence must pay for the relief so furnished. Provided, however, they cannot collect relief for a time to exceed the period of ninety days.

I apprehend that until the residence of a pauper is discovered, the method of affording relief is the same as that of affording relief to any other pauper within the county.

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

PER DIEM AND MILEAGE OF DEPUTY STATE SUPERVISORS OF ELECTION — ALLOWANCE OF.

COLUMBUS, OHIO, March 8th, 1901.

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

DEAR SIR: — Your inquiry requires an answer to the question as to whether the per diem and mileage of Deputy State Supervisors of Election, and the necessary expenses incurred in the performance of their duties are, claims against the county, which the Commissioners must allow before the Auditor is authorized to issue his warrant for the same.

The answer to this question depends upon the construction to be placed upon the following provisions of the Statutes:

Section 4 of the act creating the office of State Supervisor of Elections, and prescribing the duties of the Deputy Supervisors, provides, among other things:

> "For attending all meetings the Deputy Supervisors shall receive as compensation the sum of two dollars per day, not to exceed thirty days in any one year, and mileage at the rate of five cents a mile going to and returning from the county seat, if the distance be more than one mile. The compensation above provided for, and 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."

Section 894, 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, 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."

Section 1024, Revised Statutes, provides that:

> "The Auditor shall issue warrants on the County Treasurer for all moneys payable out of the treasury * * * * But he shall not issue a warrant for the payment of any claim against the county, unless the same is allowed by the County Commissioners, except in cases where the amount due is fiexd by law, or is allowed by some other officer or tribunal, authorized by law to allow the same."

That the per diem and mileage of these officers, and expenses incurred, are claims against the county, there can be no question. Hence, the questions remaining for solution are:

1st. Are the amounts due on these claims fixed by law? Or

2nd. Is some other tribunal authorized to pass upon and allow these claims?

As to the first question, it is clear to my mind that the amounts due are not fixed by law, not even the amount due for the per diem and mileage of the Deputy Supervisors. While the per diem and mileage are fixed, yet these furnish only the basis for computing the amount due when the number of days employed, and the number of miles traveled have been ascertained. That is, the amount due depends entirely upon the number of days the Dputy Supervisors are employed, and the number of miles each lives from the place of meeting. When the amount due is fixed by law, the person to whom it is due cannot increase or decrease the amount by any act of his own, for it would not be fixed by law if he could increase of decrease the amount by his own act. E. g. the amount of salary due the County Auditor, based on the quadrennial enumeration is an instance of a claim fixed by law. He gets this sum each and every year, regardless of the services rendered by him. But the amount a County Commissioner is entitled to receive for the year is not fixed by law, although his per

diem and mileage are fixed, for the amount he is to receive depends entirely upon the services rendered.

2nd. Is some other tribunal authorized to pass upon, and allow these claims?

No other tribunal has a right to pass upon and allow these claims, unless it be the Board of Deputy State Supervisors. Has it been given this power? In an opinion rendered by my predecessor to your predecessor, he arrived at the conclusion that this Board has such power; and, as a basis for his conclusion,, relied on the following provision of Section 14 of the act in question:

> "All expenses arising for printing ballots, cards of explanation to officers of the election and voters, blanks, and all other proper and necessary expenses of any general or specal election, including compensation of precinct election officers, shall be paid out of the county treasury as other county exjenses; * * * * the amount of all such expenses shall be ascertained and apportioned by the Deputy State Supervisors to the several political divisions and certified to the County Auditor."

Will this provision warrant such a construction? I should not feel like reviewing an opinion of my predecessor, and arriving at a different conclusion, except after a thorough examination, and being fully satisfied that he was in error.

In his opinion the word "ascertained" was construed to be synonymous in meaning with the word "allowed," hence, his conclusion that the provision of Section 14, just above quoted, authorized the Deputy Supervisors to pass upon and allow these claims. In this I am constrained to hold that he was in error. Especially in view of a recent decision by the Circuit Court of Cuyahoga County in the case of the State ex rel. against Craig, Weekly Law Bulletin, Volume 45, February 4th, page 180.

The meaning of the provisions of the section above quoted, can more easily be comprehended when the whole section is read together. This section provides:

> "All expenses arising for printing and distributing ballots, cards of explanation to officers of the election and voters, blanks, and all other proper and necessary expenses of any general or special election, including compensation of precinct election officers, shall be paid out of the county treasury as other county expenses; but, except in the case of November elections, shall be a charge against the township, city, village or political division in which such election was held, and the amount so paid by the county as above provided, shall be retained by the County Auditor from the funds due to such township, city, village or political division, at the time of making the semi-annual distribution of taxes; the County Commissioners, Township Trustees, Councils, Boards of Education or other authorities authorized to levy taxes shall make the necessary levy to meet such expenses, which levy may be in addition to other levies authorized or required by law; the amount of all such expenses shall be ascertained and apportioned by the Deputy State Supervisors to the several political divisions and certified to the County Auditor."

It is thus seen that the expenses to be ascertained are not the expenses incident to the November election, nor the per diem and mileage of the Deputy Supervisors, but the expenses incident to township and municipal electons; and these expenses are ascertained, not for the purpose of allowing and authorizing

their payment, but to apportion them back to the municipality or political subdivision causing the expense, in order that the county may be reimbursed for the outlay. When these expenses are allowed, it then becomes the duty of the Deputy Supervisors to ascertain the amount of such allowance and apportion it.

A witness may have ascertained the amount of a claim, and may testify to its correctness, but he cannot allow it. The Court must allow the claim. In this instance the Commissioners constitute the Court. Indeed the Commissioners in allowing a claim, must, if they perform their duty, *ascertain*, by evidence or otherwise, the amount justly due before they allow it; and must allow only such sum as they *ascertain* to be justly due. *Ascertain* means to find out or learn to a certainty while *allow* means to approve, and to allow a claim means to authorize its payment.

The policy of the law has always been against permitting an officer to pass upon and allow his own claims, and there is nothing in the Statute that leads me to believe that the Legislature, in this instance, abandoned this policy; and especially am I supported in this conclusion by the decision of the Circuit Court in the case of the State ex rel. against Craig, above referred to.

The syllabus in that case reads:

> "Under Section 2969-4, R. S., the compensation for a necessary assistant to the Board of Deputy Supervisors of Election may be allowed and paid as necessary expenses, but the County Auditor cannot issue his warrant on the Treasurer to pay for such services unless the amount has first been allowed by the County Commissioners."

This decision is conclusive of the question in this case, and requires me to hold that the per diem and mileage and the necessary expenses incurred by the Deputy Supervisors of election, are claims against the County which must be allowed by the County Commissioners before the Auditor is authorized to issue his warrant for the same.

Very truly,

J. M. SHEETS,

Attorney General.

AS TO WHETHER THE COUNTY COMMISSIONERS SHALL ISSUE BONDS TO PAY THE COST OF ROAD IMPROVEMENTS.

COLUMBUS, OHIO, March 9th, 1901.

C. R. Hornbeck, Prosecuting Attorney, London, Ohio:

DEAR SIR: — In your letter of March 7th, you request of this office an opinion as to the proper construction of Senate Bill No. 126, 94, O. L., 403. This act relates to the improvement of certain roads in counties having improved graveled free roads. The particular question presented relates to the construction of Section 6 of said act, which reads as follows:

> "Said Commissioners may issue and sell at not less than par the bonds of said county in sums of one hundred dollars, or multiples thereof, bearing interest not exceeding five per cent per annum and having not exceeding three years to run, payable principal and interest at the treasury of said county or at such point in the City of New York as may be designated therein, for the amount necessary to cover the cost of such improvement, which shall not exceed two thousand dollars per mile, and shall provide

> for the payment of such bonds by the necessary levies upon the grand duplicate of said county. Provided such bonds may be paid out of the bridge fund or general road improvement fund, or both, and the levy for either or both of said funds may be increased above that now provided by law to the amount necessary to meet such expense."

This section is permissive merely. The first part of the section authorizes the Commissioners to issue and sell bonds of the county for the purpose of providing funds necessary to pay the cost of such road improvements, while the latter part of the section provides for the levying of taxes with which to pay the bonds after the same have been issued. For this purpose, the Commissioners are authorized to increase the levy for the bridge fund, or general road improvement fund, or both, by such amount as may be necessary to meet the expenses of taking up the bonds as they mature. As above stated, however, this section is permissive merely, and not mandatory, and if a sufficient amount of money is present in the bridge fund or road improvement fund, or both, and not needed for the use of such funds, there can be no valid reason why the cost of such improvement should not be paid out of such fund, without the necessity of issuing bonds.

You are advised, therefore, that it is unnecessary for the County Commissioners to issue bonds to pay the cost of such road improvement, when there is a sufficient amount of money in the county bridge or general road improvement fund, or both, to cover the cost of such improvement and not needed for the ordinary purposes of such funds.

Very truly,

J. E. TODD,

Assistant Attorney General.

INSURANCE THROUGH A RESIDENT AGENT.

COLUMBUS, OHIO, March 13th, 1901.

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

DEAR SIR: — In your letter of March 9th, you submit the following question:

> "Must insurance under paragraph one of Section 3641 of the Revised Statutes of Ohio, against damage in transportation on goods transported from a point out of the State to a point in the State, in so far as it covers insurance on such goods in course of transportation in Ohio, be issued through a resident agent, as provided in Section 2745-a, as amended April 16, 1900?"

The first paragraph of Section 3641 authorizes a company organized under the laws of Ohio, "to make all kinds of insurance on goods, merchandise and other property in the course of transportation, whether on land or water, or on any vessel or boat, wherever the same may be." It is also provided by Section 2745a, that:

> "It shall be unlawful for any insurance company or agent legally authorized to transact insurance business in the State of Ohio to write, place or cause to be written or placed, any policy or renewal on policy contract for insurance upon property situated or located in the State of Ohio, except through a legally authorized agent in the State of Ohio."

The business of insuring against damage or loss in the transportation of goods might be conducted in two ways: First, A wholesaler or jobber might insure against loss upon all shipments of goods made by him during the life of the policy, or, Second, He might insure against loss or damage on a single specific shipment. But, whichever plan be adopted, the result would be the same so far as a policy of insurance covers shipments of goods into Ohio.

It is to be observed in relation to such contracts of insurance as are referred to in your question, that the policy of insurance is issued to a non-resident of the State of Ohio, and on property, which, at the time the contract of insurance is entered into, is entirely without the State. If these premises are correct, it follows necessarily that the laws of Ohio cannot be given such extra territorial effect as to make such a contract unlawful, although one of the contracting parties should be an insurance company doing business in Ohio. The only escape from these conclusions, is to say that in contemplation of law, goods in the course of transportation to a point within the State of Ohio, have a situs in such State. In the case of Carrier vs. Gordon, 21 O. S., 605, Welch, Judge, in construing the statute in relation to the taxation of personal property, says:

> "It is true that in order to constitute it 'property within the State,' within the meaning of the law, it must have a situs in the State. If it is at the time the tax attaches *in transitu*, either through the State, or from a point in the State to a point outside the State, it is not to be regarded as property in the State, wihin the meaning of the statute, but as property belonging to the place of its destination."

This dictum, however, only relates to property actually *in transitu*. The Court held in this case, however, that property within the State which, had not in fact, started on its transit, had its *situs* in this state, so far as to make it subject to taxation. I apprehend that the insurance referred to in your question is taken before the goods are in fact in transit, and hence, the rule stated by the Supreme Court in Carrier vs. Gordon, does not apply. It is further to be remembered that the insurance is entered into for the benefit of the shipper, who is the owner of the goods insured at the time the insurance is affected. Even though the goods be sold to the consignee, the consignor still retains an interest in them. They are shipped at his risk, and he must make good any loss or damage in transportation. He may exercise the right of stoppage *in transitu*, and have the goods returned to him. His interest in the goods is not extinguished until the goods are actually delivered to the consignee, and it is this interest that is insured, and when this interest is at an end, the insurance also terminates.

Other considerations might be urged, but we deem the above sufficient to justify the conclusion that insurance against damage or loss in transportation of goods transported from a point out of the State to a point in the State, need not be written or placed through an agent in the State of Ohio.

Very truly,

J. E. Todd,
Assistant Attorney General.

RIGHT OF STATE TO PUBLISH "OHIO STATESMEN AND HUNDRED-YEAR BOOK."

COLUMBUS, OHIO, March 20th, 1901.

Hon. E. Howard Gilkey, Editor Hundred-Year Book, Columbus Ohio:

DEAR SIR: — In your letter of March 19th you ask from this office an opinion as to your powers and duties in the revision of the book known as the "Ohio Statesmen and Hundred-Year Book," as provided by the act of April 16th, 1900, (94 O. L., 303.)

It appears that one, William A. Taylor, in the year 1892, procured a copyright on a book known as "Ohio Statesmen and Hundred-Year Book," of which book he was the author and publisher. That on March 3rd, 1898, (93 O. L., 29), an act was passed by the General Assembly of Ohio, directing the Supervisor of Public Printing to print 9,500 copies of said book, and further providing that:

> "The author, as a compensation for furnishing the matter for said publication and supervising the proof reading and printing of the same, under the direction of the Supervisor of Public Printing, to be allowed the sum of forty cents per copy for the number of copies so published."

Section 2 of this act required the author to add the roster of the 73rd General Assembly to the work as authorized to be published by joint resolution No. 48, of the 72nd General Assembly.

Section 3 of said act made appropriation of money out of the general Revenue fund to pay the compensation to the author, and provided that such cmpensatin should be paid:

> "On the presentation of the receipt of the Supervisor of Public Printing for the manuscript of said publication, and the receipt of the Secretary of State for the deed of assignment by the author for the use and benefit of the State of Ohio, of the copyright, whereby the State aforesaid shall have the exclusive right to make future publication of said work, for its use and benefit, without
>
> future payment of royalty or other compensation therefor."

On the day the last named act was passed, to-wit, March 3rd, 1898, W. A. Taplor executed a written assignment on the back of the original letters of copyright issued by the Librarian of Congress on the 20th day of April, 1892, for the book, entitled "Ohio Statesmen and Hundred-Year Book," which assignment is in words as follows:

> "I hereby deed and assign the within copyright of the publication known as 'Ohio Statesmen and Hundred-Year Book,' to the Secretary of State of Ohio for the use and benefit of the State of Ohio, aforesaid, for the purposes set forth in Section three of an act entitled, 'An act authorizing the printing of 9,500 copies of 'Ohio Statesmen and Hundred-Year Book,' and for the distribution of the same.'
>
> W. A. TAYLOR,
> Columbus, O., March 3rd, 1898."
>
> "Witness: H. D. MANNINGTON.

This assignment was duly recorded in the office of the Librarian of Congress within a few days after the date of its execution.

It appears that subsequently, and after the publication of the revised edition of the "Ohio Statesmen and Hundred-Year Book," as authorized by the act of March 3rd, 1898, said W. A. Taylor sought to procure a copyright on said revised edition.

Section 4955 of the Revised Statutes of the United States provides as follows:

> "Copyrights shall be assignable in law by any instrument of writing, and such assignment shall be recorded in the office of the Librarian of Congress within sixty days after its execution."

While the State of Ohio probably could not take out a copyright on publications issued by the State, for the reason that the entire subject of copyrights is controlled by the federal statutes, and such statute only extends the privilege of copyright to "any citizen of the United States, or resident therein who shall be the author, etc., of any book," etc. The State could not be comprehended in this designation of "citizen." Yet I have no doubt that the State might receive and hold an assignment of a copyright to its use and benefit, after the same had been procured by the author and proprietor of any book, or other document subject to the copyright laws.

This being true, it would seem that the assignment of W. A. Taylor of March 3rd, 1898, transferred to the State of Ohio all the rights and interest of said Taylor in the copyright of the publication known as the "Ohio Statesmen and Hundred-Year Book." This is especially apparent when the assignment is read in connection with the act of the General Assembly authorizing the publication of said book, and the payment to the author for the same.

If then, the State owns the original copyright of the work, the edition published in 1898 was published under the supervision of the State and was merely a revision of a work which the State already owned the copyright of, and it is impossible that said Taylor could acquire any rights or interest in the revised edition, adverse to the rights and interests of the State.

The State being the owner of the original copyright of this work, has, undoubtedly, the right to publish revisions and new editions of the work, making such changes in the original matter, and adding such new and additional matter as may be deemed advisable. This right to change, alter, and revise extends even to the title of the work. The entire property in the copyright is within the State, and the State may certainly do as it likes with its own.

Very truly,

J. E. TODD,

Assistant Attorney General.

AS TO HOW THE PROPERTY ON UNION DEPOT COMPANIES SHOULD BE RETURNED FOR TAXATION.

COLUMBUS, OHIO, March 22nd, 1901.

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

DEAR SIR: — Your inquiry as to whether the real estate of union depot companies necessary for the daily operations of the company, should be appraised under the provisions of law for the decennial appraisement of real estate, or whether it should be returned annually by the company, under the provisions of Section 2744 of the Revised Statutes, is at hand.

Sections 3446 to 3453, R. S., inclusive, provide for the incorporation and organization of union depot companies, and confer on such companies when

organized, all the powers necessary and proper to carry into effect the purposes of the organization. Sections 3346 and 3347, provide that the presidents of two or more railway companies desiring to occupy the same depot in a city or village, may, when authorized so to do by the respective boards of directors of the companies, sign and file with the Secretary of State, articles of incorporation giving the name of the union depot company, names of the companies, and city or village where such depot is to be located, and the amount of capital stock of such union depot company. The company thereupon becomes a body corporate, clothed with all the powers necessary and proper to carry out the purposes of its organization. It has power to sue and be sued, to contract and be contracted with, to acquire by appropriation or otherwise, all necessary real estate upon which to construct and maintain its depot and connecting tracks, and issue its bonds, when, in the opinion of the directors of the company, the same is necessary.

The railway companies engaged in the organization of a union depot, are required to contribute to the capital stock in equal proportions. While this is so, yet the union depot company is a separate and distinct corporation, and being such, its property should be listed the same as that of other corporations of like character.

Hence, it is very clear to my mind that the real estate necessary for the daily operations of the union depot company, should not be appraised under the provisions of law for the decennial appraisement of real estate; nor do I think that the property of union depot companies can be appraised as a part of the property of the respective railways owning its capital stock, any more than any other corporation may be appraised as a part of the property of the respective stockholders of that company, but should be appraised annually, as provided by Section 2744, R. S.

This section requires:

> "The President, Secretary and principal Accounting Officer of every canal or slackwater navigation company, turnpike company, plank-road company, bridge company, insurance company, telegraph company, or other joint stock company, except banking or other corporations whose taxation is specifically provided for, for whatever purpose they may have been created, whether incorporated by any law of this State or not, 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."

This section also requires that the listing shall be annual, and the return of the property so listed shall be made to the County Auditor; and if he is of the opinion that the property is listed at less than its true value, he is required to proceed and list it at its true value.

This section provides for the listing of the property of corporations in general, and includes all corporations where no other specific provision is made for the listing of their property for taxation; and there being no specific provision for the listing of the property of union depot companies for taxation, Section 2744 applies, and the property of these companies, including such real estate as is necessary for their daily operations, should be returned by them to the County Auditor annually for taxation.

Very truly,

J. M. SHEETS,

Attorney General.

RIGHT TO CONFER DEGREES UNDER JOINT NAME.

COLUMBUS, OHIO, March 28, 1901.

The Board of Medical Registration and Examination of the State of Ohio, Columbus, Ohio:

GENTLEMEN: — I have a communication submitted to you by The Medical Department of the University of Cincinnati, bearing upon the question of their authority to issue diplomas and confer degrees under the joint name of "The Medical School of the University of the City of Cincinnati and The President and Trustees of the Medical College of Ohio." Accompanying the inquiry are circulars and a copy of the statutes and ordinances under which The University of Cincinnati is operating, from which, and from the statutes of the State, I obtain the following:

By the act of January 19, 1819, there was incorporated "The Medical College of Ohio," which college by its faculty had the power to confer the degree of Doctor of Medicine, and grant diplomas for the same under the seal of the corporation.

By an amendment to this act, under date of December 13, 1822, all the powers of the above college enumerated in the original act and exercised by the faculty, subject to certain exceptions, were vested in a Board of Trustees of thirteen members. The new act did not change the name adopted by the act of January 19, 1819.

On April 27, 1896, "The Medical College of Ohio" conveyed to the City of Cincinnati all of the "Property named and good will of such college, in trust for the uses and purposes of the medical department of The University of Cincinnati"; the city obligating itself in such conveyance to observe and execute among other things the following agreements:

(1.) The Medical College of Ohio to secure amendments to its organic law as will make the Board of Directors of the University of Cincinnati, the successors in perpetuity of the Board of Trustees of The Medical College of Ohio.

(2.) The new school shall be designated by the joint title, "The Medical Department of the University of Cincinnati and The Medical College of Ohio."

These stipulations were, as I have said, incorporated in the conveyance made by The Medical College of Ohio to The University of Cincinnati, and were, with other provisions, inserted therein, adopted by The University of Cincinnati by a resolution duly passed April 28, 1896.

Further, certain by-laws set out in the conveyance by the government of the new school, were adopted, and constitute the by-laws of The Medical Department of the University by act of the Board of Directors, under date of May 11, 1896.

In furtherance of the foregoing, it having been conceived that further legislative power was necessary in order to accomplish the purposes mentioned in the conveyance, an act was passed by the General Assembly of Ohio, dated April 26, 1896, title, "To provide for the Board of Trustees for the Medical College of Ohio", (92, O. L., pp. 751, 752.)

This act recited in the preamble therein that "The Trustees and faculty of the Medical College of Ohio and the Directors of the University of Cincinnati have unanimously agreed that the interests of both institutions will thereby be promoted."

Section 1 thereof is as follows:

> "That the affairs of the Medical College of Ohio shall hereafter be under the management of the Directors, for the time being, of the University of Cincinnati, which Directors shall be, and they are hereby constituted the Board of Trustees of the Medical College of Ohio, and they are hereby authorized to exercise all the powers granted by law to the Board of Trustees of the Medical College of Ohio."

It will thus be seen that by the above act no change of name was made, although the Medical College of Ohio has been transferred corporeally to the University of Cincinnati. The powers of the University of Cincinnati to thus acquire this medical department, are contained in Section 4099, et seq., of the Revised Statutes of Ohio.

Ever since May 11, 1896, diplomas have been issued to persons graduating in medicine from the University of Cincinnati in the form which your Board has submitted, but which it is unnecessary to here copy, and which have been so worded as having been conferred in the name of "The Medical School of the University of the City of Cincinnati; the President and Trustees of the Medical College of Ohio."

It will thus be observed that the names employed in the diplomas do not correspond with the names of the grantor and grantee in the original conveyance, nor are they the joint names provided by the agreement inserted in the conveyance, nor the same as that mentioned in the act of January 19, 1819, hereinbefore cited.

Are such diplomas authorized?

No limitation upon the power to act as a corporation was imposed by the General Assembly in not assuming any of the names proposed. By the act passed April 27th, 1896, in pursuance of the provisions of the parties to the conveyance, "the affairs of the Medical College of Ohio shall hereafter be under the management of the Directors, for the time being, of the University of Cincinnati, which Directors, are by the act, constituted the Board of Trustees of the Medical College of Ohio, and they are authorized to exercise all the powers granted by law to the Board of Trustees of the Medical College of Ohio." Among those powers as hereinbefore seen, was that of granting degrees of Doctor of Medicine, and issuing diplomas. By Section 4102, R. S., the power was conferred upon the Directors of the University of Cincinnati, to "Confer such degrees and honors as are customary in universities or colleges in the United States, and such others as with reference to the other studies and attainments of the graduates in Special Departments, they may deem proper."

The Legislature not having specifically adopted any name by which the new school should be known, the fact that the school or department assumes the name used in the diplomas, does not make void the diplomas.

"A corporation may act by the name assumed if it is sufficient by which to identify it." "The identity of a corporation is no more affected by a change of name than the identity of an individual." It has been held by the Supreme Court of Ohio that where a party is known as well by one name as by another, either may be used. If necessary to thoroughly identify a corporation with the act, other evidence may be introduced in order to establish what company was intended. "So a statute or legal proceeding relating to a corporation is not inoperative by reason of a slight variation in the company's name, if the identity of the company is clearly indicated."

Morawetz on Corporations, Section 354, and cases cited.

There is no question here but that this school or department of the University may be easily identified as the Medical Department of the University of Cincinnati, as the names assumed in the diplomas differ but slightly from that provided in the conveyance.

Further, it has been held by the Supreme Court of Ohio that your Board is to determine whether a medical institution issuing a diploma is, or is not a medical institution in good standing.

State ex rel. vs. Hygeia Medical College, 60, O. S., 122.

This you have already done, and have thus identified this college in connection with these diplomas, which diplomas you have accepted as evidence of fitness of the applicant for a certificate, and have thereby passed upon the fitness of the college issuing the same.

It therefore seems plain to me that the acts performed by you in this regard are proper, and that the diplomas issued by "The Board of Directors of the University of Cincinnati," which are constituted "The Board of Trustees of the Medical College of Ohio," even though issued in the name that has been used, are fully authorized.

I herewith return to you the papers left with me.

Very truly,
SMITH W. BENNETT
Special Counsel.

The above opinion examined and approved by me.

J. M. SHEETS,
Attorney General.

ELECTRIC RAILROADS SUBJECT TO CERTAIN PROVISIONS OF THE REVISED STATUTES.

COLUMBUS, OHIO, April 1st, 1901.

Hon. J. C. Morris, Commissioner of Railroads and Telegraphs, Columbus, Ohio:

DEAR SIR: — The question submitted by your department, upon which an opinion is requested of me, is as follows:

> "Are electric railroads, which seek to cross other electric roads, subject to the provisions of the act of April 27, 1896, (92, O. L., 315-316), and the act amendatory thereof passed April 25, 1898 (93, O. L., 334), known in the Revised Statutes as Sections 247d, 247e and 247f thereof"?

The answer to this question necessarily requires an examination of the Legislative Acts enumerating the duties devolving upon your office, in connection with such roads.

In other words, what railroads are contemplated? For purposes of general classification, we have roads operated by steam as a motive power, and those operated by power other than steam.

It was the original intent of the Legislature to give to your office control, in the manner specified, of steam roads alone; subsequently this jurisdiction was enlarged, until we find it embracing roads of other descriptions, but always under certain conditions; and, when those conditions *do not* exist, your jurisdiction does not attach.

We find that when the word "railroad" is used without any qualifying word, a steam road only is meant; and to make it apply to any other road, the word

"electric," "cable," etc., is supplied in connection therewith. In Green vs. St. R. R. Co., 62, O. S., 67, the word "railroad" is held not to include street railways. This goes to prove that steam railroads alone were in the mind of the Legislature, when the jurisdiction of the Railroad Commissioner was originally established.

In what respect has that jurisdiction been enlarged?

In Section 247d, the following words are used:

> "When in case *two or more railroads* or a *railroad* and an *electric* crossing each other at a common grade," etc.

Also in Section 247e of the Revised Statutes, the following words are used:

> "In case when the tracks of two or more railroads, or the tracks of a railroad and an electric railroad cross each other at a common grade," etc.

Also in Section 247f of the Revised Statutes, the following words are used:

> "In case, however, one railroad company or an electric railroad company shall hereafter seek to cross at grade with its track or tracks," etc.

In all of these statutes, which are the ones providing how railroads of those classes may cross each other at grade without stopping, the distinction is made between railroads and electric railroads, and in no part of it, by any rule of construction, can it be said to contemplate the control of one electric railroad crossing another of the same kind. In such cases, no system of interlocking is provided for by statute, and the control of such crossing is not vested in your department.

Very truly,

J. M. SHEETS,

Attorney General.

FEES OF SHERIFF FOR SUMMONING JURORS.

COLUMBUS, OHIO, April 2nd, 1901.

Hunter S. Armstrong, Prosecuting Attorney, St. Clairsville, Ohio:

DEAR SIR: — Yours of April 1st at hand and contents noted. The question presented in your letter for solution is what fees the Sheriff of your county is entitled to receive.

First. For summoning regular grand juries.

Second. For summoning regular petit juries.

Third. Special venire to fill the panel of the petit jury where it has become exhausted from any cause.

Fourth. Venire for juries in capital case, and

Fifth. For a special venire for additional jurors as provided in Sections 7267 and 7268 of the Revised Statutes.

Your county having a population of more than twenty-two thousand and five hundred, the Sheriff is entitled to the fees prescribed by Section 1230b, R. S. This section provides that the Sheriff shall have the following fees with reference to summoning juries:

> "Serving and returning regular venire for petit or grand juries, or serving special venire for petit juries to fill the panel

to be paid by the county ($4.00) four dollars, and traveling fees going and returning. * * * * Summoning a special jury including traveling fees, four dollars ($4.00)."

From the reading of this provision, it seems to me the fees which the Sheriff is entitled to charge in each instance suggested by you in your letter, is four dollars ($4.00) and traveling fees. You will observe that Section 1230b reads quite differently than Section 1230, when it comes to the question of the fees of a Sheriff for summoning petit or grand juries.

As to whether the Sheriff is entitled to the amount he claims due for the services named, of course, I am unable to state as I know nothing about the number of miles it was necessary for him to travel in order to summon the juries named. Of course, he would not be entitled to charge mileage from the county seat to each juror's residence and return, for this section also provides that "where more than one person is named in such writ (this, of course, includes a venire for juries), mileage shall be charged for the shortest distance necessary to be traveled." This means that he shall take his venire and serve all the persons named in the writ, traveling the shortest distance he can in order to accomplish the purpose.

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

POWER OF BOARD OF PUBLIC WORKS TO SELL OR OTHERWISE USE THE STONE AND MATERIAL USED IN THE CONSTRUCTION OF THE HOCKING CANAL.

COLUMBUS, OHIO, April 9th, 1901.

To the Board of Public Works of the State of Ohio, Columbus, Ohio:

GENTLEMEN:—In your communication of March 1st, you request of this office an opinion as to the power of the Board of Public Works to sell or otherwise use the stone and material used in the construction of locks on that part of the Hocking Canal heretofore leased by the authority of the General Assembly to The Columbus, Hocking Valley and Athens Railroad Company.

Replying to the same, permit me to say that I know of no authority vested in the Board of Public Works to sell such material Under the terms of the original act leasing this canal to the Railroad Company, it is especially provided, "That when said railroad, its successors or assigns, cease to use said canal for railroad purposes, said canal property shall revert to the State for Canal purposes." (Section 4 of the act of May 18, 1894, 91, O. L., 327.)

These locks being a part of the canal, and the Legislature having especially provided for the reversion of this property for canal purposes, it would be impossible to conceive of the locks as being unnecessary for the use or operation of the canal. Hence, I am clearly of the opinion that there is no authority vested in the Board of Public Works to make a sale of this property.

This view, however, in no sense interferes with the power of the Board of Public Works to make such use of such stone and material on said canal as they may find to be expedient and necessary.

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

POWERS OF STATE BOARD OF EQUALIZATION AND COUNTY AND CITY BOARDS OF REVISION.

COLUMBUS, OHIO, April 9th, 1901.

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

DEAR SIR: — In your communication of March 28th you request of this office a written pinion on two questions, viz:

1. Should the State Board of Equalization continue its sessions beyond the date fixed by statute for the adjournment of said Board, would the acts performed by said Board after said date be legal?

2. What are the powers of decennial County and City Boards of Revision?

Section 2818 R. S., as amended April 16, 1900 (94, O. L., 337), contains the following provision relative to the date of adjournment of the State Board of Equalization:

> "The said Board shall meet at Columbus on the first Tuesday of December, nineteen hundred, and every tenth year thereafter, and shall close its sessions on or before the first Monday in May then next following."

The language of this statute is mandatory. The date on which the Board shall meet, as well as the latest date on which it shall finally adjourn, is stated in plain and unmistakable terms. I am aware that statutes prescribing the time within which an act shall be done are usually construed as directory merely. The Supreme Court of Wisconsin states the rule concerning such statutes as follows:

> "That when 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 Legisture 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. But when any of these reasons intervene, then the limit is established."
>
> State vs. Lean, 9 Wis., 279.

This rule is quoted with approval by Judge Cooley in his work on Constitutional Limitations at p. 92, and this author then proceeds to re-state the rule as follows:

> "Those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly and prompt conduct of the business, and by a failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory; and if the act is performed, but not in the time or in the precise mode indicated, it may still be sufficient, if that which is done accomplishes the substantial purpose of the statute. But this rule presupposes that no negative words are employed in the statute which expressly or by necessary implication forbid the doing of the act at any other time or in any other manner than as directed. Even as thus laid

> down and restricted, the doctrine is one to be applied with much circumspection; for it is not to be denied that the courts have sometimes, in their anxiety to sustain the proceedings of careless or incompetent officers, gone very far in substituting a judicial view of what was essential for that declared by the Legislature."

These citations might be extended indefinitely, but it is believed that the above is a fair statement of the rule of construction adopted by the courts in relation to such statutes. It is to be remembered, however, that this is only a *rule of construction*, and cannot have the effect to override the intent of the Legislature. If, in the act in question, it plainly appears that the Legislature intended that the acts of the Board of Equalization should be performed within the time limited in the statute or not at all, then there is no occasion for the application of any other rule of construction than the well-known rule that the intent of the General Assembly must prevail. In order to discover whether such was the intent of the Legislature, we may consider the phraseology of the act, its nature and design, kindred statutes and the consequences that will follow from construing it one way or the other.

As above stated, the language is mandatory. Not only so, but the expression "on or before," would seem to indicate that the Legislature considered that the time given was not only ample, but probably more than would be needed. It has frequently been held by the courts that the use of negative words in a statute, suffice to make a statute mandatory, which otherwise would be directory only Thus, if a statute required an act to be done on a certain day "and not otherwise," no court would feel at liberty to say that the act provided for might be done on any other day than the day specified. The Legislature, by the use of such negative terms, clearly expresses the intent that it should be done on that day. It seems to us that the use of the expression "on or before" in the statute under consideration, has something of the same effect in rendering clear the intent of the Legislature that the Board of Equalization should adjourn not later than the day fixed in the statute.

The work to be done by the State Board of Equalization is a part of a connected series of acts necessary to be performed to secure equality in the burdens of taxation. It has its appropriate place in the system of taxation, both in point of time and scope of duty. Its work cannot be done until after the completion of the work of the County and City Boards of Equalization, and the results of such work certified to the Auditor of State. Neither can the work of revision by the County and City Boards properly proceed until the work of the State Board is certified back to the County Auditors. The County Boards of Revision are authorized to begin their sessions on the very day fixed by statute for the adjournment of the State Board. Here again, seems to be evidenced the Legislative intent that the State Board should adjourn not later than the first Monday of May.

The end towards which the entire scheme of decennial appraisement of real property tends is, that each separate parcel of property may be entered upon the tax duplicate of its appropriate county, at its true value in money. This work of entering the separate tracts of real estate within the county upon the tax duplicates of the county, devolves upon the County Auditor. Such officer cannot proceed with the work of making up the tax duplicates for the use of the Treasurer in the collection of taxes levied for the year 1901 until he has the results of the work of the State Board of Equalization. These duplicates must be in the hands of the County Treasurer by the first of October, and it is a matter of common knowledge that it requires several months' time for their preparation. In making up the duplicates for this year in all coun-

ties where the State Board has changed the valuation, the work of the County Auditor in making up the duplicates will be materially increased by reason of the fact that he must make a separate computation as to every piece of real estate within his county in order to make the additions or deductions required by the State Board. If the State Board can continue its sessions a single day over the time limit in the statute then all restrictions are removed, and it may continue a month or a year, as the caprice of the members may determine. The result of such action could not but result injuriously to every interest of the State. The fact that it is necessary that the State Board should complete its labors before other officers and taxing agents can perform the duties devolved upon them, lends additional force to the conclusion that the Legislature intended the act prescribing the time when the State Board should adjourn, to be mandatory. The Legislature must be deemed to have had in mind all these important interests of the State which must necessarily suffer if the sessions of the State Board of Equalization should be continued indefinitely, and have provided against such injurious consequences by definitely fixing the time when the labors of the State Board must be concluded.

It seems to me that the case falls fairly within the rules stated by the Supreme Court of Wisconsin, as above cited. That is, there seems to be substantial reasons why the work of the State Board may not be done as well after the time prescribed as before. That there is a presumption that by allowing it to be done after the time, it will work an injury. That other acts relating to the subject of taxation indicate that the legislature did not intend that the work of the State Board should be extended beyond the time fixed for its adjournment.

In view of the important character of the work to be performed by this Board and the grave consequences that would follow should its acts be held invalid, as well as the almost certainty that an act performed by it after the time fixed for its adjournment will be attacked in the courts, it would seem that the voice of prudence would indicate that the Board ought to adjourn on the day fixed. It is not safe to attempt to be wiser than the law. Every consideration of public interest and official duty unite in admonishing the Board and the individual members thereof to keep strictly within the limits of their prescribed powers to the end that their work may successfully withstand attack and accomplish what the Legislature designed in the creation of said Board, viz: Uniformity in taxation.

Your second question relating to the powers of decennial County and City Boards of Revision may be answered more briefly. Under the provision of the act of April 16, 1900 (94, O. L., 246), the decennial County and City Boards of Equalization sit as Boards of Revision when notified by the Auditor of the county to meet for that purpose. The Auditor is required to issue this notification to meet as a Board of Revision if any complaint has been filed with him against any valuation, on or before April 15th, if a County Board, or May 15th, if a City Board; or the Auditor may, if he deems it advisable, convene said boards on his own motion, and without any complaints being filed with him for that purpose. Touching the duties and powers of such boards, the act provides:

> "The Board of Revision shall investigate all such complaints and all complaints against any valuation filed with it as a Board, or made by the County Auditor, and may increase or decrease any valuation complained of and no others."

It is manifest, therefore, that to give the Board of Revision jurisdiction over the valuation of any property, it is necessary either that complaints should be filed against such valuation by some person interested in having such valua-

tion either increased or diminished, or that complaint should be made as to such valuation by the County Auditor. There seems to be no limitation upon the power of the County Auditor to make such complaints, hence, I see no reason why he cannot complain of the valuation of each and every piece of property in a township or other taxing district, thereby giving the Board of Revision jurisdiction to make a horizontal increase or reduction in the valuation of such district. However, the further provision of the statute would necessarily have to be complied with in such a case, viz:

> "No valuation, as fixed by the Board of Equalization, shall be increased by the Board of Revision, in any case, except upon reasonable notice as prescribed by this chapter, to all persons directly interested."

The powers of such boards sitting as Boards of Revision, are not greater, however, than their powers as Boards of Equalization. It is specially provided by Section 2814a (94, O. L., 247):

> "Said Board shall, in all respects, be governed by the laws in force governing the valuing of real property, and shall make no change in any valuation complained of except in accordance with such laws, and subject to the laws regulating and restricting the limit of equalization."

One of the important provisions regulating and restricting the limit of equalization by County and City Boards is that said boards

> "Shall not reduce the aggregate value of the real property of the county below the aggregate value thereof, as returned by the assessors, with the additions made thereto by the Auditor."

This power, being denied the board as a Board of Equalization, cannot be exercised by such board when sitting as a Board of Revision.

You further inquire whether this office still adheres to the opinion formerly rendered you to the effect that the State Board of Equalization should maintain the aggregate valuation of the real property of the State as returned by the various County Auditors. We have not changed our views in respect to this proposition in the least. We stated then, and we reaffirm it now, that there is no power in the State Board, either to increase of decrease the grand aggregate. Of course, we expected a reasonable construction to be placed upon this language. The principle thus announced probably could not be literally enforced. The variation of a few dollars either way would not be destructive of the principle, but a substantial compliance with this requirement can be, and ought to be secured. At least, the variation from the grand aggregate, as returned by the County Auditors, ought not to be so marked as to evince a deliberate purpose on the part of the State Board to totally disregard such grand aggregate, and to fix a new valuation upon the property of the State..

I need not now repeat what was said in the former opinion, but perhaps a few additional suggestions may not be out of place.

An examination into the history of the statute creating the State Board of Equalization will disclose that the power of that board to change the grand aggregate of the valuations of the State, particularly in the matter of reduc-

ing the grand aggregate, has always been carefully guarded. In the original act of April 5th, 1859 (56 O. L., 195), is contained this provision:

> "They shall not reduce the aggregate value of all the real property of the State as returned by the County Auditors, more than ten millions of dollars."

In the amendment of this act of May, 1868 (65 O. L., 170), the same provision is found, while in the amendment of this section of April 11, 1889 (86 O. L., 236), the following provision is found in relation to the power of the State Board to change the grand aggregate:

> "If, in their judgment, the aggregate value of all the real property of the State, as returned by the County Auditors, is above or below its true value in money, they may increase or reduce it, but such increase or reduction shall not exceed twelve and one-half per centum of said aggregate; provided, that if any increase or reduction shall be made in the valuation of the grand aggregate, it shall only be made after the equalization of all the counties of the State; and when such increase or reduction is made, it shall be the same per cent of the equalized valuation in every county of the State."

It therefore appears that the State Board of Equalization has never been clothed with the absolute power to make such change in the grand aggregate valuation of the State as it might desire. By the former statutes above quoted, it was authorized to make a reduction not exceeding ten millions of dollars, while by the latter act, above quoted, it was authorized to make either an increase or reduction within the limits of twelve and one-half per centum of the grand aggregate. But, in this act it was specifically provided:

> *"That, if any increase or reduction shall be made in the valuation of the grand aggregate, it shall only be made after the equalization of all the counties of the State."*

Stronger language could not be used to show the legislative intent that the process of equalization should be complete before any change could be made in the grand aggregate. This power to change the grand aggregate having been eliminated from the statute, no power remains in the board, except the power to equalize. To equalize does not imply to create a new valuation. The exercise of such a power would change the board from a Board of Equalization to a Board of Real Estate Appraisers.

The act of April 11, 1889, above quoted, authorizing an increase or reduction in the grand aggregate within the limits of twelve and one-half per centum, must be considered as a grant of power to the Board of Equalization, and not as a limitation upon the power already possessed by said Board. The repeal of this provision by the last Legislature takes from the Board the power thus conferred.

The State Board is thus confronted with two important questions, viz:

The date upon which said Board shall adjourn; and,

The maintenance of the grand aggregate.

The validity of the work of the Board will, in our judgment, depend largely upon the manner in which the Board meets these two questions. The people of the State have a right to expect that the work of the State Board will inure to their benefit. One course is open to the Board that is free from

all doubt or danger: That course is to comply strictly with the provisions of the statute; another course will be attended with uncertainty.

In view of the importance of the issues involved, no man could be regarded as a safe counsellor who would advise any other course than the one that is secure from all uncertainty or danger.

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

The above opinion was submitted to me during its course of preparation, and the same is hereby approved.

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

EXPENSES OF DEPUTY SUPERVISORS OF ELECTIONS.

COLUMBUS, OHIO, April 12, 1901.

Oliver N. Sams, Prosecuting Attorney, Hillsboro, Ohio:

DEAR SIR: — Yours of April 9th at hand and contents noted. The question involved in your inquiry is whether the following bill is a proper charge, and should be paid by the county:

HILLSBORO, OHIO, April 8, 1901.

HIGHLAND COUNTY, OHIO.....DR.

To E. V. Barrere for expenses in looking after and securing voting places and providing for holding Spring Election, 1901, in the eight township and corporation precincts, to-wit:

Bushcreek Twp. South, Liberty S. W., Hillsboro N. Corp., New Market Twp., Dodson Twp., Paint N., Fairfield E., and New Lexington Corporation.

Mileage, 132 miles 5c per mi.....	$6 60
R. R. Fare.....	60
Livery	10 50
Hotel Bills	1 75
	$19 45

Approved,
J. B. WORLEY, Chief Deputy,
F. L. LEMON, Clerk.

Before a public servant can claim compensation out of the county treasury for services rendered, two things must occur: First, The services rendered must have been enjoined upon him by law. Second, The law must provide compensation for such services.

The services for which the deputy supervisor of elections in question claims compensation and expenses are stated in the bill rendered as being "for expenses in looking after and securing voting places and providing for holding Spring Election, 1901," in eight townships and precincts in the county.

Does the law enjoin such duties upon the deputy supervisors of elections? If it does, I have been unable to find the provisions. Section 1443 R. S. (election laws, p. 12), provides:

> "The trustees shall fix the place of holding elections within their township, or of any election precinct thereof, and they may purchase or lease for this purpose a house and suitable grounds, or by permanent lease or otherwise, a site, and erect thereon a house."

Section 2923 R. S. (election laws, p. 28), provides:

> "Each township, exclusive of the territory embraced within the limits of a municipal corporation which is divided into wards, shall compose an election precinct, unless such township alone, or with other territory, is divided, according to law, into precincts; and each ward of any such municipal corporation shall also compose one election precinct, unless such ward is divided, according to law, into precincts; and elections shall be held for every township precinct at such place within the township as the trustees thereof shall determine to be the most convenient of access for the voters of such precinct; and for each ward precinct, at such place as the council of the corporation shall designate."

The statute also requires the trustees to post notice of township elections, and the municipal authorities to issue proclamation and post notice of municipal elections, but nowhere provides for the performance of any of these duties by the board of deputy supervisors. While the deputy state supervisors of elections are required to provide booths, guard rails, ballot boxes, etc., yet, after they are provided, their custody and care pass to the clerk of the township or corporation in which the precinct is situated. Section 2966.33 (election laws, p. 94), provides:

> "After each election the judges of elections shall see that the booths, guard-rails and other equipments are returned to the clerk of the township or corporation in which the precinct is situated, for safe keeping, and it shall be the duty of such clerk to have such booths and equipments on hand and in place at the polling place in each precinct before the time for opening the polls on election day, and for this service the deputy state supervisors may allow the necessary expense incurred; provided, that where a board of elections is established by law, this duty shall devolve on such board."

From the above observations it will hardly be necessary to add that the deputy supervisor in question performed services not enjoined upon him by law, hence, is not entitled to any compensation therefor, even mileage or expenses.

This view disposes of the question adverse to the claimant without passing on the second question.

But suppose I am wrong in this view; suppose the deputy may perform these duties; does the law provide for the payment of such expenses? Section 2966-4 (election laws, p. 77), provides:

> "For attending all meetings the deputy supervisors shall receive as compensation the sum of two dollars per day, not to exceed thirty days in any one year, and mileage at the rate of five cents per mile going to and returning from the county seat, if the distance be more than one mile. The compensation above

provided for, and 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."

The mileage here provided for is only when attending the meetings of the board, and then not to exceed thirty in any one year. The law makes no provision for charging mileage except when attending the meetings of the board of supervisors. Hence, even if the trip were within the scope of the duties of the deputy supervisor, the law makes no provision for pay.

> "A citizen who takes upon himself the burden of an office, can recover no fees except such as are prescribed by law or ordinance, and there are no implied obligations at common law to pay."
>
> Richardson vs. State, 19 C. C., 191, 5.
>
> "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."
>
> Debolt vs. Trustees, 7 O. S., 239.

I am also of the opinion that the provision for the payment of "all proper necessary expenses in the performance of the duties of such deputy supervisors," does not include the personal expenses of the deputy supervisors, such as hotel bills, and transportation expenses. The mileage allowed is presumed to be allowed for the payment of traveling expenses.

> "The term 'mileage' has a well defined legal meaning. It usually signifies compensation allowed by law to officers for their trouble and expenses in traveling on public business."
>
> Richardson vs. State, 19 C. C., 191, 4.
>
> 2. Bouviers L. D., 179 (14 Edition).

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."

"A statute must be strictly construed, and unless an item of expense or compensation to the officer is especially provided for, it cannot be allowed to him by implication."

Richardson vs. State, 19 C. C., 191, 5.

If I view the law aright, there is no hardship in this holding, for there are no duties enjoined upon the board of supervisors requiring them to go over the county to look after voting places, proclaiming the time of holding elections, or caring for the election booths, ballot boxes, etc., between elections. They are only required to meet at the county seat and perform the duties expressly enjoined upon them by statute.

While the construction given to the provisions of the statute with reference to compensation and expenses due deputy supervisors of elections has not been uniform, yet, in part of the counties at least, they do not charge up their personal expenses against the county, and are not reimbursed out of the county treasury for their personal expenses in attending the meetings of the board.

Very truly,

J. M. SHEETS,

Attorney General.

RIGHT OF A PRISONER IN THE O. S. R. TO BE PAROLED.—MEANING OF WORDS "PAROLE" AND "RELEASE."—BEFORE WHOM INSANE PRISONERS SHALL BE ADJUDGED INSANE. WHAT SHALL BE DONE WITH INSANE PRISONERS.

COLUMBUS, OHIO, April 15, 1901.

Hon. C. H. Workman, Secy. Board of Managers Ohio State Reformatory, Mansfield, Ohio:

DEAR SIR:—I have your esteemed favor requesting an answer of this department to the following inquiries:

1. Can a prisoner in the Ohio State Reformatory be paroled before he has served his minimum sentence?

2. What, if any difference is there between the meaning of the words "parole" and "release," as used in the chapter governing the Ohio State Reformatory?

3. What shall be done with insane prisoners confined in the Reformatory? Before whom are they to be adjudged insane?

Answer One. Every sentence to the Ohio State Reformatory must be indeterminate in extent, but it shall not exceed the maximum nor be less than the minimum term provided by law for the crime for which the person was convicted.

Section 7388-27 R. S.

The minimum sentence thus fixed by statute can be reduced or diminished by good behavior, amounting to five days from each of the twelve months of the time of the minimum sentence. During all this time, the prisoner may be subject to be paroled as provided for in Section 7388-29.

Section 7388-33 R. S.

There are certain limitations upon the right of the Board of Managers to parole prisoners imprisoned in the Ohio State Reformatory.

1. No application for parole shall be considered by the managers unless the prisoner shall be recommended as worthy of such consideration by the superintendent and chaplain of the Reformatory.

2. Notice of the recommendation shall be published for three weeks as required by statute.

3. The Board of Managers must be of the opinion, that the prisoner will not, if given his liberty, violate the law, and that his release is not incompatible with the welfare of society.

But in all of the qualifications upon the right to parole, there is nothing akin to the language used in Sections 7388-6 and 7388-9 in the chapter governing the Board of Managers of the Ohio Penitentiary. In those sections, the Board of Managers of that institution are forbidden to parole a prisoner of the Ohio Penitentiary unless such prisoner has served at least the minimum sentence. It seemed to have been the intention of the legislature to have provided a different procedure for the managers of the two institutions, and when they conferred upon the Board of Managers of the Ohio State Reformatory the right to parole prisoners as it is conferred by statute and only qualified it in the certain respects mentioned, it follows that a prisoner may be paroled without having served the minimum sentence provided by law.

Answer two. In the act governing the Ohio State Reformatory, the phrase "released either conditionally or absolutely" — is frequently used. I am of the opinion, the words "conditional release" mean nothing more than "a parole." And the words "absolute release" is the termination of imprisonment, either actually or constructively. Such a release can be granted by the Board of Managers as provided in Section 7388-33 R. S., but does not restore the criminal to citizenship, which is an executive act to be performed by the governor. I view the distinction between conditional and an absolute release to consist in this: "conditional release" admits the prisoner to parole, liable at any time to be re-taken, and during which time he is constructively imprisoned. An absolute release discharges the prisoner from the Reformatory, and he is no longer amenable to the control of the Board of Managers.

Answer Three. If an individual becomes insane while a prisoner at the Ohio State Reformatory, the duties of the Board of Managers in relation to such person have not been fixed by the chapter covering the duties of such managers. So that we are compelled to look elsewhere in the statutes for their authority in the premises.

Other sections of the Revised Statutes govern the inmates of other institutions, and I gather from this that the absence of any legislation granting special authority to the Board of Managers of this institution, is a mere oversight of the legislature.

Inmates of the Ohio Penitentiary becoming insane during their terms of imprisonment are governed by Sections 7428 and 7429 R. S., that institution having what is known as an "insane department."

An inmate of the Soldiers' and Sailors' Home becoming insane, is governed by Sections 674-8-9 and 10 R. S. In that case special authority was found necessary by the legislature to be granted to the probate judge of the county in which that Home is located to hear and determine the sanity of such inmate.

By the act found in 93 O. L., p. 276, it is provided that after June, 1900, it is unlawful to keep any insane person in an infirmary of any county in this state.

Prisoners confined in county jails who become insane before indictment are governed by Section 7166, R. S.

Those confined in county jails who become insane between the time of their indictment and their sentence, are governed by Sections 7240 and 7241, R. S.

It will thus be observed by an analysis of these various acts, that provision seems to have been made for insane prisoners confined in county jails and in the Ohio Penitentiary, as well as in certain other state institutions, but that no provision is made *especially* authorizing the Board of Managers of the Reformatory in the premises.

It is therefore my opinion that such insane prisoners should be taken by the proper officer of your institution before the probate judge of the county where such prisoner had a residence at the time of his commitment to the Reformatory, and such proceedings should be had before such probate judge as are authorized by Chapter Nine of Title Five of the Revised Statutes. By so doing, it will distribute the quota and expenses to the various counties thus represented, and not centralize the same against Richland County.

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

RIGHT OF A SURETY ON THE BOND OF A NOTARY PUBLIC TO BE RELEASED.

COLUMBUS, OHIO, April 16, 1901.

Hon. F. N. Sinks, Private Secretary, Columbus, Ohio:

MY DEAR MR. SINKS: — Yours containing inquiry of C. W. Brainerd, is at hand. This inquiry requires an answer to the question whether a surety on the bond of a notary public has a right to be released therefrom?

The statutes, in so far as they bear upon the question at issue, may be summarized as follows:

Section 110, R. S., provides for the appointment of notaries public.

Section 112 provides that he shall hold office for three years unless sooner removed, and also provides that before entering upon the discharge of his duties, he must give a bond to the State of Ohio in the sum of $1,500, with sureties to the approval of the governor, conditioned for the faithful performance of his duties.

Upon the question of removal, Section 123 provides that if he charges excessive fees, or dishonestly or unfaithfully discharges any of the duties of his office, he shall, on complaint filed and substantiated in the court of common pleas, be removed from office, and the fact of such removal certified to the governor. This is the only provision for the removal of a notary public from office. If the sureties can be released from his bond, he, of necessity, would have to be removed from office, unless he could give a new bond.

However, I might suggest that it is a proposition of universal application, that a surety on an official bond, cannot be released therefrom except by virtue of some statutory provision. The bond executed by a notary public and his sureties is a contract between the obligors and the State of Ohio to the effect that they will stand responsible to the Stae for the use of persons injured on account

of the official misconduct of the notary public during his term of office. No more can a surety be released from his obligation on an official bond except by virtue of a statutory provision, than can a surety on a promissory note be released. He has made the contract, and he must abide by his terms.

Sections 844, 5837–5844, provide the method by which sureties on the bonds of township, municipal and county officers may be released, but nowhere is there any provision for the release of a surety on the bond of a notary public. This being the case, it is my opinion that he must remain liable on the bond until the end of the term, unless the notary is removed from office pursuant to the provisions of Section 123, R.S.

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

SUPPORT OF PERSONS CONVICTED OF MISDEMEANORS AND SENTENCED TO A WORKHOUSE IN ANOTHER COUNTY.

COLUMBUS, OHIO, April 18, 1901.

J. E. Powell, Prosecuting Attorney, New Lexington, Ohio:

DEAR SIR: — The question involved in your inquiry of April 17th, is whether when a mayor of a municipality sentences a person for a misdemeanor to confinement in a workhouse located in another county, pursuant to a contract made by the county commissioners with the authorities of the workhouse in which the person is confined, the cost of keeping such prisoner shall be borne by the county, or the municipality whose mayor heard the case and rendered the judgment.

In my opinion the expense must be borne by the county. Sections 2107q and 6801a provide, in effect, that municipalities and counties not having a workhouse may contract with the directors of a workhouse in another county for the admission of persons convicted of misdemeanors or violations of ordinances. Misdemeanors are violations of the laws of the State, and the respective counties are responsible for the costs incident to the prosecution and punishment of the offenders; while violations of ordinances are only quasi criminal, and the respective municipalities whose ordinances have been violated are responsible for the costs incident to the prosecution and punishment of the offenders.

By a fair interpretation of the terms of Sections 2107q and 6801a, above referred to, the commissioners may make contracts for the admission of persons convicted of misdemeanors within their respective counties; while the council of a municipality can only contract for the admission of persons convicted of violating ordinances of their respective municipalities. A municipality would not have power to contract for the admission of persons convicted of misdemeanors in the event the mayor happened to hear and determine the case. A municipality, as such, has nothing to do with the prosecution of crimes. The mere fact that a mayor of a municipality happens to be the tribunal finding a person guilty of a misdemeanor does not throw the cost of the trial, and the burden of the support of the person found guilty, on the municipality any more than the finding of a person guilty of a misdemeanor by a justice of the peace would throw the cost of the trial and support upon the township in which the justice happened to reside.

Hence, it is my conclusion that a person convicted of a misdemeanor and sent to a workhouse in another county, pursuant to a contract between the

commissioners and the workhouse authorities, the county must pay the expense, and it matters not whether the tribunal was the common pleas court, a justice of the peace, or the mayor of a municipality.

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

RIGHT OF WOMAN TO BE APPOINTED "COMMISSIONER OF THE STATE OF OHIO."

COLUMBUS, OHIO, April 24, 1901.

Hon. Frederick N. Sinks, Private Secretary, Columbus, Ohio:

MY DEAR SIR:—Your letter of April 22d, making inquiry as to whether a woman residing in another state is eligible to the appointment of "Commissioner of the State of Ohio," pursuant to the provisions of Section 134, R. S., is at hand. This section provides that the governor may "appoint and commission as commissioners of the State of Ohio, persons residing in any other state, or in any other territory of the United States, or in any foreign state, on furnishing such evidence of qualification as he thinks proper to require, who shall continue in office for the term of three years." This section further designates the powers and duties of the commissioners thus appointed, and also prescribes the requirements to be complied with before entering upon their official duties. There is no other provision in this section bearing upon the qualification of the persons to be appointed, and from the above quotation, it will be observed that the only qualification exacted of the persons to be appointed, is that they shall furnish evidence of qualification as the governor thinks proper to require. Hence, a woman is eligible for that position unless some other provision of the statute or constitution disqualifies her. There are no other provisions in the Statutes of Ohio bearing on the appointment of commissioners of the State of Ohio, except Sections 124 to 126 inclusive, and no where in these provisions, is a woman made ineligible for this appointment.

Does the constitution make her ineligible? That part of the constitution prescribing the qualifications of officers, reads as follows:

> "No person shall be elected or appointed to any office in this state, unless he possesses the qualifications of an elector."
>
> (Section 4, Article 15).

That the position of commissioner of the State of Ohio, is an office, is clear to my mind. It was held in the case of State ex rel. vs. Adamd, 58 O. S., 612, that a notary public was an officer within the provision of this section. It was also held in State vs. Wilson, 29 O. S., 347, that a medical superintendent of a hospital for the insane was an officer within the meaning of this section. In fact, it comes clearly within the definition of "office" as defined by all the leading text writers and eminent judges.

Does this section of the constitution apply to this office? I am of the opinion that it does not. For if it did, Sections 124 to 126 of the Revised Statutes, would become a dead letter, for it goes without saying that no person residing in another state, "possesses the qualifications of an elector." If the governor would have to wait until he found a person residing in another state possessing the qualifications of an elector before he appointed a commissioner of the State of Ohio, of course he would never do so. But, it will be observed that

this section of the constitution merely provides that no person shall be elected or appointed to any office *in this state*, unless he possesses the qualifications of an elector. It has no bearing upon the appointment of a commissioner of the State of Ohio residing in another state.

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

LIABILITY OF STATE FOR JURY FEES IN FELONIES.

COLUMBUS, OHIO, April 29, 1901.

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

DEAR SIR: — Your inquiry of this date contains a question proposed by the Prosecuting Attorney of Perry County, involving the costs which must be paid by the State of Ohio in cases of conviction of a felony, the particular item of cost in this case being the $6 jury fee which was included in the judgment against the defendant by virtue of Section 6799, Revised Statutes. By a consideration of this section, as well as Section 1330, it is plainly apparent that this item is part of the legitimate costs chargeable against the defendant, and for which judgment may be rendered; but, in so holding I do not find any authority for saying that the same is payable by the State when it cannot be collected from the defendant.

Section 1330 provides:

> "Judgment shall be rendered therefor against such defendant which sum when collected by the clerk of said court, or sheriff, to whom execution shall have been issued shall be paid over to the county treasurer."

Authority is here given to collect the same from the defendant, and the direction is, when collected by the clerk or sheriff, to pay the same into the county treasury; but this is not tantamount to saying that the same shall be paid by the State.

It has been the uniform practice of the office with which you are connected to refuse to pay these items. In an opinion rendered on the 18th of May, 1886, by the Hon. J. A. Kohler, then Attorney General, he held in regard to Section 1330 of the Revised Statutes providing for the jury fee of $6 to be taxed into the bill of costs and collected and paid into the treasury of the county, but in case execution against defendant is returned "no property found whereon to levy," and defendant is irresponsible, no obligation rests upon the State to pay it. This has been uniformly followed from that day to this, and I find no reason for departing from the construction given these sections by my predecessor.

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

SCHOOL BOARDS BUILDING AND MAINTAINING LINE FENCES.

COLUMBUS, OHIO, May 1, 1901.

B. W. Rowland, Prosecuting Attorney, Cadiz, Ohio:

DEAR SIR: — Your letter of April 29th, is at hand and contains noted. Your inquiry goes to the question as to what the respective duties of a board of education owning a school lot and the proprietor of the adjoining land are with

reference to building and maintaining a line fence between the school lot and the adjoining lands.

Section 3987 provides that boards of education shall build and keep in good repair all fences enclosing school premises. As I read this section, however, it does not compel boards of education to enclose school house lots with fences regardless of the question as to whether such enclosure is needed. In my opinion, this section leaves it to the discretion of the board as to whether it will or will not enclose the school grounds. If it does not see fit to do so, then it is under no obligation to build or maintain any part of a line fence between the school house grounds and the lands of the adjoining proprietors.

The statutes bearing upon the subject of line fences require adjoining proprietors to keep up jointly line fences only where the lands of both proprietors are enclosed. From your letter, it appears that the land belonging to the board of education is not enclosed, and the board does not see fit to enclose it. That being the case, the statutes relating to line fences, do not apply.

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

BOARD OF EDUCATION LIABLE FOR PAY OF TEACHER DURING TIME SCHOOL IS CLOSED BY ITS ORDER ON ACCOUNT OF SMALL POX.

COLUMBUS, OHIO, May, 1, 1901.

C. H. Graves, Prosecuting Attorney, Oak Harbor, Ohio:

DEAR SIR: — Yours of April 29th seeking an opinion from this office as to whether a teacher in the public schools is entitled to compensation during the time schools are closed by order of the board of education on account of the prevalence of small pox in the community, is at hand.

I take it for granted that the board of education ordered the school dismissed without making any agreement with the teacher that he should lose his time; also that the teacher held himself in readiness during the interval of suspension to comply with his part of the contract; and that he did not actually teach the full term for which he was originally employed. Assuming these to be the facts, I am of the opinion that the teacher is entitled to pay for the time the school was closed.

He was employed to teach between certain dates; he could not engage in other employment; he had to hold himself in readiness to perform his contract; he had set apart a particular portion of his time for the performance of the contract entered into between him and the board of education. By reason of the closing of the schools a portion of his time was lost. Hence, he is entitled to pay. In other words, the ordinary principles of law governing contracts between private individuals, under similar circumstances apply in this case.

True, Section 3986, of the Revised Statutes, permits boards of education to make and enforce such rules and regulations to prevent the spread of small pox as, in their opinion, are necessary for the protection and safety of the public. And, a board of education could, under the provisions of this section, close the schools, if it saw fit. Yet, if it wanted to protect itself against the payment of a teacher during a suspension of the schools under such circumstances, it should have made such agreement with the teacher.

The case of Drew vs. School District 43, Mich., 480, cited by you in your letter, is a well considered case, and is directly in point.

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

ITEMIZING BILLS OF ONE TRANSACTION.

COLUMBUS, OHIO, May 6, 1901.

Hon. F. M. Webster, Chief Inspector Ohio Agricultural Experiment Station, Wooster, Ohio.

DEAR SIR: — Your letter of April 18th, came duly to hand. It was placed on my desk for answer, but before I had time to answer it, I was called out of the city and have been absent ever since, so that to-day is the first opportunity I have had of investigating the questions presented in said letter. You ask in this letter whether, under the provisions of the Act of April 14, 1900 (94 O. L., 221), entitled "An act to prevent the introduction and spread of San Jose scale, etc," it is necessary to itemize a bill for one half the cost of treating orchards affected with the San Jose scale, and other dangerous, contagious diseases as provided in Section three of said act.

Section three of this act providing for notice to the owners or persons in charge of orchards found to be infected with such diseases, contains the following provision:

> "If the person so notified shall refuse or neglect to treat and disinfect said premises or property in the manner and within the time prescribed, it shall be the duty of the Board to cause such premises or property to be so treated, and they shall certify to the owner or person in charge of such premises one half of the cost of the treatment. If said sum is not paid to them within sixty days thereafter, the same may be recovered, together with the cost of action, before any court in the State having competent jurisdiction."

You further state that the cost of treatment includes such items as labor and material, board of men while employed, fuel with which to prepare the mixture for application, and also for running the steam spraying machine, the expense of getting the men and machinery to a locality, the wear and tear of machinery, and also the salary and board of the assistant who has chief supervision of the work, etc. Manifestly, some of these items cannot be stated with exactness, but if included in the bill, could only be estimated. The first question to be determined is, should such items be considered in computing the amount of the bill. The bill to be certified to the owner or person having charge of the premises treated, is for "one half of the cost of treatment." Certainly all the items above enumerated are elements that go to make up the entire cost of treatment. Machinery must be purchased, fuel and other material used, labor is required, hands must be boarded, etc., and all these things go to swell the total expense of the cost of treating the infected premises. Hence, I am clearly of the opinion that all these things should be considered and included in the bill. It by no means follows, howerer, that all these items must be separately set out in the bill with the amount estimated for each item. The bill to be rendered consists of a single item, viz: "the cost of treating the infected premises." It comprises but a single transaction. All of the other items above mentioned are simply elements which go to the for-

mation of the one transaction, and there can no purpose be subserved by separating the transaction into its constituent elements, and setting out the price or cost of each of such elemets.

The statement, such as contained in the bill you enclose, that the amount charged is "for one half of the expense of treatment of premises for San Jose scale," etc., is sufficient to apprise the owner of the premises of the nature of the account which he is required to pay, and certainly there could be no justification for the owner refusing payment on the ground that the bill was not made out with sufficient particularity. Where a bill consists of items relating to different and unrelated transactions, doubtless the rule is that each item, or at least each transaction must be particularly set out. But in the case under consideration, the items all relate to a single transaction, and if this is set out with the total charge for the entire transaction, it is in my judgment, sufficient. An instructive case of this proposition may be found in 7, O. C. C. Reports, p. 158, where the court says:

> "The petition alleged that there was due to the plaintiffs from the defendant, the sum of $285.00 for professional services, rendered by them as attorneys at law to him, at his request, between January 1, 1891, and January 17, 1891" in examining records and the law, giving an opinion, and furnishing an abstract of the defects in a certain tax title and tax deed claimed and held by one Hohaus to the real estate of the defendant, and counselling and advising him in relation thereto." And in substantially a similar manner it alleges services rendered in a different case pending in court. The motion was that the plaintiffs be required to make their petition more definite and certain by itemizing the services alleged to have been performed, and by setting forth the charge made by each item thereof.
>
> We think the court was not bound to grant this motion as made. The defendant was fully and sufficiently advised of the character and nature of the services alleged to have been performed. They were itemized therein. We do not think that the plaintiffs, in a case like this, are bound to make a statement of each particular item of services rendered, where they refer to one particular transaction, and state the charge for each item separately. We find no authority for such particularity. If the charges are for services in two or more wholly different matters, there would be propriety in requiring the value of services rendered in each to be stated separately, but not the value of each particular item of each transaction."

The above quotation from the opinion of the court, sufficiently explains the case and the conclusions of the court thereon. The same reasoning would apply to an account such as the one submitted with your letter. Of course such an account would be subject to the defense that the amount charged was in excess of the actual cost of such treatment. This, of course, is a question of fact, and not of law, and would arise in each individual case.

Very truly yours,

J. E. TODD,

Assistant Attorney General.

Approved by J. M. Sheets, Attorney General.

AUTHORITY OF COMMISSIONERS TO FURNISH CRIMINAL DOCKETS FOR POLICE JUDGES.

COLUMBUS, OHIO, May 13, 1901.

H. E. Starkey, Prosecuting Attorney, Jefferson, Ohio:

DEAR SIR: — Yours of May 10th at hand and contents noted. You inquire whether the county commissioners are authorized to furnish the police judge of the city of Ashtabula with a criminal docket and blanks, to be used exclusively in state cases. In my opinion they may do so.

A police judge has the same jurisdiction as an examining magistrate as a justice of the peace. (R. S., Section 1787.) He also has final jurisdiction of misdemeanors. (R. S., Section 1788.) A part of his salary is payable out of the county treasury. (R. S., Section 1797b.) Jury and witness fees in misdemeanors are payable out of the county treasury. (R. S., Section 1798.)

From the above provisions it will be seen that the legislature contemplated that the police judge would materially aid in the enforcement of the criminal laws of the State; and to the extent that he does so, the legislature has apparently undertaken to cast the burden of the expense incident to these duties, upon the county. This is but just. The expense of enforcing the criminal laws of the State is a burden cast by law upon the county, and it is only following out the spirit of express statutory enactment to hold that the additional expense of furnishing the criminal docket and criminal blanks for the police judge shall also be borne by the county.

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

ALLOWING EXPENSES OF SUPERINTENDENT WHILE ATTENDING NATIONAL CONVENTIONS.

COLUMBUS, OHIO, May 18, 1901.

Trustees of Dayton State Hospital, Dayton, Ohio:

GENTLEMEN: — Your inquiry requires an answer to the question, whether the expenses of the Superintendent of the Dayton State Hospital incurred while attending the national convention of superintendents of insane asylums to be held in the city of Milwaukee, Wisconsin, are proper items to be allowed and paid out of the appropriation for current expenses of the institution.

Section three of the bill making this appropriation, provides that no "expense for officers attending state, interstate, or national associations of the benevolent institutions shall be paid out of the appropriation for current expenses of said institutions." In view of this provision, there can be but one answer to this question, and that is in the negative.

Even without this provision, it would be difficult to arrive at any other conclusion that the payment of such expenses out of this fund would be without authority of law. If these conventions are held for the purpose of improving the efficiency of the superintendents in the management of such institutions, the purpose is a laudable and proper one. But no more could the superintendent claim that these expenses should be allowed him, than the physician of the institution could demand and receive his expenses incurred while attending a course of lectures, or a teacher in a public school demand and receive his expenses incurred while

attending a summer normal school for the purpose of preparing himself to give his patrons better service. Superintendents of these institutions are selected because of their special fitness for the services required of them, and because they are supposed to be sufficiently interested in their duties to take advantage of every reasonable opportunity to make themselves more efficient.

Wherever courts have had an opportunity, they have refused all such claims as proper items of expense to be paid out of public funds. County commissioners in some of the counties have been in the habit of charging up their expenses to the county while attending the state association of county commissioners. The ostensible purpose of this association is to make the county commissioners more efficient in the performance of their duties; but the courts have held that that is a duty they owe to the public to become as efficient as possible, but the public should not pay the expense of their education.

I am informed that it had been the custom of some of the institutions of the state to pay the expenses of their superintendents in attending these conventions, and that it was the purpose of the legislature to stop it effectually.

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

TRANSFER OF TERRITORY FROM ONE SCHOOL DISTRICT TO ANOTHER, AND DIVISION OF INDEBTEDNESS OF SAME.

COLUMBUS, OHIO, May 27th, 1901.

Hon. Lewis D. Bonebrake, State School Commissioner, Columbus, Ohio:

DEAR SIR: — Yours of May 24th at hand and contents noted. Your inquiry requires an answer to the following question:

> "Where a special school district has incurred an indebtedness for the erection of school buildings and a part of its territory has been subsequently detached and annexed to a township school district, is the detached territory freed from the burden of the bonded indebtedness; and, if not, has the Board of County Commissioners authority to apportion the indebtedness between the special school district and the township district?"

Unless otherwise provided by statute, where territory has been detached from a political subdivision of the State and added to another, the detached territory is freed from such debts — the original political subdivision retains the property and remains liable for the debts.

> Cooley on Taxation, page 176.
> First Destey on Taxation, page 95.

The question for solution then is: Has the Legislature made provision for the apportionment of the debts in such contingency, as suggested in your letter?

Section 3893 provides that territory may be transferred from one district to that of another by the mutual consent of the Boards of Education having control of the territory.

Sections 3846 to 48, R. S., provide for the filing of a petition with the Boards of Education for the transfer of territory. Also provides for an appeal to the Probate Court, by any person interested.

Section 3893 also provides:

> "That when a village or a portion of a village, township or special school district has been attached to and become a part of an adjoining city or village by annexation, the portion of such village, township or special school district thus annexed to such city or village shall be deemed to be thereby transferred from such village school district, township or special school district into such city or village school district, and the amount of the existing school indebtedness of such village school district, township school district or special school district, shall be ascertained and apportioned by the County Commissioners in the same manner as provided in section sixteen hundred and fifteen."

That the Commissioners have power to apportion the indebtedness where a part of a district is transferred to a city, or village district, is entirely clear, by the provisions of the section just quoted. But it is not clear whether the power of the Commissioners stop there. I am of the opinion that it does not. There is no reason why the indebtedness should not be apportioned, under the circumstances named in your letter, as well as where territory is transferred to a city or village district. And the statute in question does not bear out that limited construction, unless the punctuation is taken as controlling. If the provision authorizing the Commissioners to apportion the indebtedness read:

> "And the amount of the existing indebtedness of such village school district, township school district, or special school district, shall be ascertained and apportioned by the Commissioners between such districts, and the city or village district to which the territory is attached, in the same manner as provided in Section sixteen hundred and fifteen,"

then it would be clear that the power of the Commissioners was limited to cases where territory is attached to a city or village district. Such is not the reading of the statute. And, as already suggested, there is nothing to warrant that limited construction, except the punctuation. If the clause, "And the amount of the existing school indebtedness," etc., were preceded by a period, the language used inthe statute is broad enough to warrant the Commissioners in apportioning the indebtedness under the circumstances named in your letter.

It is an old and familiar rule of the construction of statutes that courts will not be bound by punctuation, in construing statutes, but will look to the whole body of the law upon the subject, the reason for the enactment of the particular provision, and the evils to be remedied, and from these things determine the Legislative intent.

> "If, therefore, the words of the act, taken in themselves alone, or compared with the context and read in the light of the spirit and reason of the whole act, convey a precise and single meaning, they are not to be affected by the want of proper punctuation or by the insertion of incorrect or misplaced marks. In that event, the court will disregard the existing punctuation, supply such stops as may be missing, transpose those which are erroneously placed, eliminate those which are superfluous, reform such as are incorrectly used, and read the act as if correctly punctuated."
>
> Black on Interpretation of Laws, page 186.

Taking this principle as a guide, let us inquire the purpose of the enactment of this provision. The Legislature was well aware that the transfer of territory from one school district to another would, quite frequently operate to embarrass very seriously the school district whose territory had been detached, when it came to paying its debts. Hence, I am constrained to believe that it did not choose to pick out particular instances and relieve those cases from the embarrassment, and leave others unprovided for.

It has long been the Legislative policy of this State, from its earliest history to the present time, to provide that when territory has been transferred from one political subdivision of the State to another, to require an apportionment of the indebtedness of the subdivision losing the territory, between it and the one acquiring the territory. This policy has extended to counties, municipalities and school districts. Why make an exception where territory is transferred from a special school district to that of a township district? If this particular instance is an exception to the general rule, there is nothing to hinder the continued chopping off of the territory of the special district in question until its territory will be gone, and nothing be left to pay its indebtedness. The Legislature intended to provide against just such contingencies. Hence, I am of the opinion that the Commissioners, by the provisions of Section 3893, R. S., are authorized to apportion the indebtedness between the township and special school district, in the case named by you.

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

APPOINTMENT OF JUSTICES OF THE PEACE TO A NEWLY CREATED OFFICE.

COLUMBUS, OHIO, June 6th, 1901.

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

DEAR SIR: — In your communication of May 8th, you submit to this office the certificate of T. Robert Barclay, Clerk of Steubenville Township, Jefferson County, Ohio, certifying that the Probate Court of Jefferson County, on the 3rd day of May, 1901, in a proceeding pending before said court for that purpose, increased the number of the justices of the peace for Steubenville Township from two to three, and at a meeting of the Trustees of said township, held on said day, one Charles W. Dean was duly appointed by said Trustees to fill the vacancy made by the creation of said office until the next regular election for township officers. And you inquire whether you are authorized to issue a commission upon said certificate to Mr. Dean as Justice of the Peace of Steubenville Township for the term caused by the creation of said office until the next regular election for township officers.

First. A certificate of election of a Justice of the Peace, or the appointment of a justice to fill a vacancy, is required by the statutes of Ohio, to be furnished the Secretary of State by the Clerk of the Court of the county in which such election or appointment is made. I know of no authority for Township Clerks to present such certificate.

Second. Section 568, Revised Statutes of Ohio, provides that

> "When it is made to appear to the satisfaction of a Probate Judge of the proper county that there is not a sufficient number of Justices of the Peace in any township thereof * * * *

> the court is authorized to add one or more Justices to such township as seems just and proper, and the Trustees shall give notice to the electors of such township to elect such Justices or Justice so added *agreeably to the provisions of Sections* 567."

At the time of the enactment of this statute, Section 567, provided for filling vacancies in the office of Justice of the Peace, arising either by death, removal, absence at any time for the space of six months, resignation, refusal to serve or otherwise, by an election. By a subsequent amendment to Section 567, vacancies arising in the office of Justice of the Peace, shall be filled by appointment by the Trustees of the township until the next regular election for Justices of the Peace, which regular election, it is provided by Section 521, shall be held at the regular spring election for township officers. Referring now to Section 568 as above quoted, the part underscored, to-wit, "agreeably to the provisions of Section 567," can now have no meaning or application, for the reason that Section 567 does not now specifically provide for the election of Justices of the Peace to fill vacancies. This fact, however, cannot have the effect to render nugatory the remaining provisions of Section 568, above quoted, which require that where a Justice of the Peace has been added in any township, all such Justices shall be elected. The Legislature, in amending Section 567 to provide for the appointment of Justices to fill vacancies occurring by death, removal, absence, resignation, refusal to serve or otherwise, evidently did not contemplate that a Justice should be appointed to fill a vacancy caused by the creation of a new office in any township. This is farther evidenced by a consideration of the last clause of Section 567, as amended, which provides:

> "And in case the election of an additional Justice of the Peace in any township is authorized by the proper authority, the Clerk of the Court, in certifying his election to the Secretary of State, shall state in his certificate that he is such additional Justice of the Peace, so authorized and elected."

My conclusion, therefore, is, that the statute does not authorize the appointment of a Justice of the Peace to fill the newly created office in Steubenville Township.

Third. The above conclusions are reached without considering the question, whether a vacancy can be said to exist in an elective office which has never been filled by an election. On this question, authorities do not agree. Probably the weight of authority is in support of the proposition that a new office not yet filled by election may be vacant as well as an old office. The Supreme Court of Ohio, however, while this question has never been fairly presented as to whether a new office can be said to be vacant, in several decisions, appear to hold to the proposition that vacancy in office, as used in the Constitution and Statutes of Ohio, relate to vacancies occurring fortuitously, and hence could not apply to a newly created office. As above intimated, however, this question is not discussed here, for the reason that it is unnecessary to determine the question as to the right of Mr. Dean to receive a commission.

Very truly,

J. E. Todd,
Assistant Attorney General.

TRUSTEES OF OHIO STATE UNIVERSITY NOT EMPOWERED TO LEASE PART OF UNIVERSITY GROUNDS.

COLUMBUS, OHIO, June 13th, 1901.

Dr. W. O. Thompson, President O. S. U., Columbus, Ohio:

DEAR SIR: — Your letter of June 10th, at hand and contents noted. The question for solution is, whether the Board of Trustees of the Ohio State University is authorized to permit the erection and maintenance of a chapter house by a college fraternity on the University grounds? In my opinion, the Board of Trustees is without authority to make such a grant. The grounds, buildings and other property of the Ohio State University belong to the State of Ohio; both the legal and equitable title to this property is in the State (Section 4105-16 R. S.), and the Trustees have no power with reference to the management or disposition of the same, except such as is given them by statute. Section 4105-13, R. S., provides that:

> "The Board of Trustees shall have the general supervision of all lands, buildings, and other property belonging to said College, and the control of all expenses therefor."

This is the only section that I am able to find that defines the powers and duties of the Board of Trustees with reference to the lands of the University. And it will hardly be contended that this provision is sufficient to authorize the Trustees to make the grant in question. If the Trustees may lease a part of the grounds of the University, they may lease all of them; and if they may lease to a college fraternity, they may likewise lease to a Masonic Order, Odd Fellows or any fraternal organization.

The fact that, as now constituted nobody, but a student attending the Ohio State University, can join this fraternity, makes no difference in principle. This is a fraternity which is not a part of the University. The Board of Trustees has not control over it, and it may change its rules with reference to the admission of members without consulting the Board of Trustees of the University. Not only could it do that, but it could sell its building and the lease for the same, to any person it saw fit.

It is thus easily seen that the principle contended for by the College fraternity in question might result in the use of the grounds of the University for purposes wholly foreign to those for which they were acquired.

Very truly yours

J. M. SHEETS,

Attorney General.

AS TO WHAT PER CENT OF UNDERSIZED FISH SHOULD BE RETURNED TO THE WATER.

COLUMBUS, OHIO, June 18th, 1901.

Hon. L. H. Reutinger, Chief Warden Fish and Game Commission, Athens, Ohio:

DEAR SIR: — Yours of June 17th at hand and contents noted. The question involved in your inquiry is whether the provisions of Section 6968-3, R. S., which requires the release alive and return to the waters, all undersized fish at the time the net is raised, and makes it a penal offense for the catcher to retain in his possession over three per cent of his catch in undersized fish,

permits the catcher to retain more than three per cent. of any particular variety so long as the undersized fish do not exceed three per cent of the entire catch. Section 6968-3 provides:

> "And all fish caught of a length less than herein prescribed for the respective species or kind shall be released alive immediately while the nets are being lifted or taken up, in such a manner as not to injure the fish so released.
>
> "Provided, however, that the releasing of such undersized fish shall apply only to the varieties of fish herein mentioned, and having in possession or failing to return to the water alive as herein provided by the catcher, a quantity of such undersized fish not exceeding in weight three per cent, of each boat load, or part of a boat load, lot, catch or haul, brought into port, of each variety of fish, the length of which is herein prescribed, shall not be deemed a violation of this act."

There can be no doubt as to the meaning of these provisions. A catcher cannot retain over three per cent of each variety. The purpose of this act was to preserve the food fishes from destruction, and it was clearly the intention of the Legislature to preserve all varieties alike. If a catcher were permitted to return to the water all the undersized fish of one variety, and keep in his possession more than three per cent. of another variety, so long as he did not retain over three per cent. of undersized fish of the entire catch, the poorer species would always be returned to the water and the most valuable retained. And by that means the best food fishes would be practically exterminated.

The language of the provisions above quoted is unambiguous and clearly requires the catcher to return to the water all but three per cent of each variety.

Very truly

J. M. SHEETS,

Attorney General.

P. S. I notice inquiry is also made as to what part of the tail the words "center fork" refer to in speaking of the measurement of fishes. There is no difficulty in that. It means that point where the tail begins to branch. e. g. the fork of a tree is the crotch.

AS TO WHETHER A COUNTY IS REQUIRED TO PAY FOR A TRANSCRIPT OF THE EVIDENCE TO BE INCORPORATED INTO A BILL OF EXCEPTIONS IN A CRIMINAL CASE, AND WHETHER THE STATE WILL REFUND THE AMOUNT SO PAID.

COLUMBUS, OHIO, June 21st, 1901.

Benjamin Meck, Prosecuting Attorney, Upper Sandusky, Ohio:

DEAR SIR: — Yours of June 19th at hand and contents noted. You inquire whether under the provisions of the act of April 25th, 1891 (88 O. L., 403), the county is required to pay for a transcript of the evidence in a criminal case where ordered by the defendant, to be incorporated into a bill of exceptions for the purpose of prosecuting error, and if the county is obliged to pay the bill, whether the State will refund the amount so paid, to the county.

Waiving the question of the constitutionality of the act, in my opinion, the county is not required to pay such bill. Section three of the act provides that the transcripts of evidence ordered:

> "Shall be filed with the Clerks of the Courts, where such cases are pending, for the use of the court or parties."

This provision clearly indicates that it was contemplated by the Legislature that the evidence to be transcribed is to be used in the trial court either by the court or parties to the action. It will be observed that this section provides that the evidence must be filed in the court where the action is pending. That contemplates a pending action. No bill of exceptions is necessary or proper until the action in the trial court is ended — until sentence is pronounced, and judgment rendered. After the judgment is entered the case is at an end so far as the trial court is concerned. And if the defendant desires to prosecute error, he commences an entirely new action in the Appellate Court. There is no reason in my opinion, either in law or morals, why the county should have placed upon it the burden of paying for the preparation incident to carrying a case to the higher courts. A person convicted of a crime has no constitutional right to have his case heard on error, and I do not believe the Legislature intended, by the provision referred to, to cast the burden upon the county of paying for a bill of exceptions in every criminal case where the defendant desires to prosecute error. If that is the law, every criminal case in which there is a conviction, would go to the higher courts, regardless of its merits.

The second part of your question, as to whether the State would pay for the transcripts when paid for by the county, loses its importance in view of the conclusion above reached; hence, it is unnecessary to consider it,

Very truly,

J. M. SHEETS,
Attorney General.

OPERATION OF LAW REGULATING THE PRACTICE OF DENTISTRY IN THE STATE OF OHIO.

COLUMBUS, OHIO, July 1, 1901.

Dr. A. F. Emminger, President Board of Dental Examiners, 62 East Broad St., Columbus, Ohio:

MY DEAR SIR: — I have yours of this date inquiring as to the operation of the law regulating applicants for license to practice dentistry within the State of Ohio, being found in Section 4404, Revised Statutes. Your question has reference to that portion of the act constituting one of the exceptions to the law relating to the persons "as have been regularly since July 4, 1889, engaged in the practice of dentistry in this State."

The evidence before you must satisfy you that the applicant who seeks to bring himself within that exception must have been a regular practitioner since July 4, 1889, and you are not concluded in your investigations of those facts by the matters set forth in the application, and when, as in the case proposed by you, the application shows that upon that date the applicant was only fourteen years of age, his could not constitute an exception to the rule, for he could, in no sense, be considered a practitioner at that time.

A student or helper in an office could, in no sense, be considered a practitioner. One who had prior to July 4, 1889, been a practitioner and recognized

as such by the members of his profession, and according to the established rules and standards then recognized by the profession as constituting a practitioner would be considered such a practitioner under the act going into operation July 4, 1892. Prior to the adoption of this act the rules of the profession and the customs prevalent among practicing dentists would govern in determining whether an individual at the time mentioned, viz., July 4, 1889, was a practitioner or merely a student of the profession of dentistry. Upon these questions the knowledge of the members of the Board is proper evidence and can be appealed to in determining the standards formerly in vogue before the Statute in question was enacted.

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

DUTY OF COMMISSIONER OF LABOR STATISTICS AS TO ENFORCING THE LABELING OF CONVICT MADE GOODS.

COLUMBUS, OHIO, July 5, 1901.

Hon. M. D. Ratchford, Commissioner of Labor Statistics, Columbus, Ohio:

DEAR SIR: — I am in receipt of your favor of May 27th, seeking an opinion from me as to whether convict-made goods which are made and sold in Ohio come within the provisions of Section 4364-46, R. S., requiring certain convict-made goods to be labeled before sold; also stating that you are ready to perform such duties as devolve upon you with reference to the enforcement of the provisions of the act.

Section 4364-46, provides:

> "That all goods, wares, and merchandise made by convict labor in any penitentiary, prison, reformatory or other establishment in this or any other state, in which convict labor is employed, and imported, brought or introduced into the State of Ohio, shall, before being exposed for sale, be branded, labeled or marked as hereinafter provided, and shall not be exposed for sale in any place within this state without such brand, label or mark."

This section as originally enacted applied only to convict-made goods manufactured in other states and imported into Ohio. The amended statute inserted only the words "this or" and left the remainder of the act as it was before. The insertion of these two words made the meaning of the section ambiguous, and, hence, resulted in a dispute as to what the interpretation should be. It was claimed by the manufacturers that the statute did not apply to convict-made goods manufactured and sold in Ohio. That it applied only to such goods as were imported from other states having first been exported from the State of Ohio, or having been manufactured in foreign states. This question was passed on by the Circuit Court of Franklin County in the case of the State of Ohio ex rel. vs. The Brown, Hinman & Huntington Company, March, 1894, where the contention of the manufacturers was upheld — the court holding that the provisions of this section did not apply to convict-made goods manufactured and sold in Ohio. Since that time this rule has been acquiesced in, and convict-made goods manufactured in the penal and reformatory institutions of Ohio have not been required to be labeled.

There is another very important question, however, that presents itself to me with reference to the act in question, and that is in so far as it applies to convict-made goods shipped into Ohio from other states it is, in my opinion, in violation of the inter—state commerce provision of the constitution of the United States (Article 1, Section 8).

Requiring convict-made goods to be labeled before being imported and sold interferes most seriously with the sale of such goods; more so, indeed, than if a license were required of the seller before selling. In fact, it goes without saying that the purpose of the statute in question was to eliminate as far as possible from the commerce of the country, convict-made goods. This the legislature cannot do.

It was held in Arnold vs. Yonker, 56 O. S., 417, that a statute requiring a person desiring to deal in convict-made goods, before doing so to obtain a license from the Secretary of State for such purpose was in conflict with Article 1, Section 8 of the constitution of the United States.

In Leisy vs. Hardin, 135 U. S., page 100, it was held that a statutory provision prohibiting the sale of intoxicating liquors in the State of Iowa was in conflict with the constitutional provision referred to in so far as it affected the importation and sale of intoxicating liquors.

Also in Brennan vs. Titusville, 153 U. S., 289, it was held that a city ordinance requiring any person seeking to canvass for the sale of goods first to obtain a license therefor was void in so far as it applied to an agent sent by a manufacturer of goods in another state to solicit orders for the products of his factory.

The principles announced in these cases so clearly cover the case under consideration that I do not deem a more extended discussion necessary, but content myself with saying to you that it is my opinion that this statute is unconstitutional for the reasons above given, and you have no duties to perform with reference to undertaking to enforce it.

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

POWER OF BOARDS OF HEALTH TO FIX SALARY OF HEALTH OFFICER — DUTY OF CITY COUNCIL TO PROVIDE FOR THE EXPENSE THUS INCURRED.

COLUMBUS, OHIO, July 5, 1901.

Dr. C. O. Probst, Sec'y. State Board of Health, Columbus, Ohio:

DEAR SIR: — I have yours of recent date containing communication of F. Clarke Miller of Massillon, Ohio, under date of June 1st, proposing the following questions:

First: Whether the board of health or the city council of Massillon, Ohio, have the power to fix the salary of the health officer, who is also clerk of the board?

Second: As to the duty of the city council to provide for the expense thus incurred?

Answering the same, would say that under Section 2115 of the Revised Statutes of Ohio, the power is given to the Board of health to make appointments and fix salaries in the following words:

> "The board shall have exclusive control of their appointees, and define their duties and fix their salaries."

Also by Section 2140 of the Revised Statutes, it is provided:

> "When expenses are incurred by the board of health, under the provisions of this chapter, it shall be the duty of the council, upon application and certificate from the board of health, to pass the necessary appropriation ordinances to pay the expenses so incurred and certified; and the council is hereby empowered to levy, subject to the restrictions contained in the ninth division of this title, and set apart, the necessary sum to carry into effect the provisions of this chapter."

Under the section first cited, full power is given to the board of health to control their appointees, define their duties and fix their salaries. In the matter under consideration, the board fixed the compensation of the health officer at $50.00 per month from January 1, 1901. Under Section 2140 it was the duty of the board of health to certify the amount of the compensation of such officer to the city council as well as all other expenses determined by such board, so that the city council might, pursuant to its powers, pass the necessary appropriation ordinances to pay the expenses so incurred and certified. It was furthermore made the duty of the council to make a levy sufficiently large to include all such expenses. There is only one restriction upon this power of the city council, and that is the statutory limitation of the tax rate, which council may levy in a city of that size, and this is controlled by Title 12, Division 9 of the Revised Statutes.

The only question remaining to consider after this full definition of the powers of the board of health and of the city council upon this subject, is, are the provisions contained in Section 2140, directory or mandatory? I am of the opinion that the rule laid down by the Supreme Court in the case of the State ex rel. Hibbs vs. Board of County Commissioners of Franklin County, 35 O. S., 458, applies here. The rule that has been frequently upheld by our Supreme Court is, that where the statute authorizes a tax to be levied by boards or officers, the failure to levy which would defeat some department of government, such direction to levy the tax will always be considered as mandatory. I am,

Very truly yours,

J. M. SHEETS,

Attorney General.

ISSUANCE OF A REFUNDER FOR ANY PORTION OF THE DOW TAX.

COLUMBUS, OHIO, July 10, 1901.

John B. McGrew, Prosecuting Attorney, Springfield, Ohio:

DEAR SIR:—In your letter of July 8th, you state in substance that a saloon in Springfield was closed up by the board of health on the 5th day of April, because of the existence of smallpox, and was permitted to open again on the 13th day of May in the same year. And you inquire whether or not such closing of a saloon by the board of health, entitles the owner thereof to a refunder of any portion of the Dow Tax for such year?

The only authority for refunding any portion of the Dow Tax when the same has been paid or assessed against the business of trafficking in intoxicating liquors, is to be found in Section 4364-11, Revised Statutes of Ohio. This sec—

tion provides for two contingencies. First: When such business shall be commenced in any year after the fourth Monday in May, the assessment shall be proportionate in amount to the remainder of the assessment year, except that it shall be in no case less than twenty-five dollars. Second: When the full amount of the tax on such business has been paid or charged upon the duplicate, and the business is "discontinued," the county auditor upon being satisfied of that fact, shall issue a refunding order for a proportionate amount of the tax, "except that it shall be in no case less than fifty dollars."

It can hardly be said that in the case under consideration, the business was "discontinued." The ordinary signification of the word "discontinue," is "to cease from; to put an end to; to stop." It is in this sense the word is used in the statute, and not in the sense of a mere intermission or suspension. The law requires a suspension in the business of trafficking in intoxicating liquors on Sundays and on election days, but such suspension does not authorize the refunding of any portion of the tax. In the case under consideration, the business did not stop or come to an end. The owner retained his stock and his place of business, ready to resume as soon as the order of the board of health would permit. It was a mere "suspension" of the business, and not such a "discontinuance" as is provided for in the statute. Nor does the fact that the suspension of business was involuntary, or caused by the order of the board of health, change the situation in any particular. The auditor is only authorized to issue a refunding order in cases and under the circumstances provided in the statute, and no provision is there made for a refunding order in cases of any involuntary suspension of business. The loss of the tax for the period during which the saloon was closed by order of the board, stands on no higher footing than the loss of the profits and other advantages, which the owner might have derived during the same period.

There is another view to be taken of this case. If it be conceded that the business was "discontinued" on the 5th day of April, it is still doubtful whether a refunding order should issue. For the purposes of the Dow Tax, the year begins on the fourth Monday of May. If a refunding order is issued when the business is "discontinued," it should issue for the balance of the year. But it is provided in Section 4364-11, that "it shall be in no case less than fifty dollars." It is not entirely clear whether this means that the amount of the assessment retained by the state when the business is discontinued "shall be in no case less than fifty dollars," or whether it means that the amount of the refunding order "shall be in no case less than fifty dollars." If it means the latter, that a refunding order "shall be in no case less than fifty dollars," then it follows that unless the tax for the portion of the year remaining when the business is discontinued will amount to fifty dollars, no refunding order can be issued. It would be absurd to say that a refundnig order must be fifty dollars, although the tax for the remainder of the year would not amount to that sum. But the tax for the remainder of the year from April 5th to the fourth Monday of May would not amount to fifty dollars. Hence, under the most favorable construction of the statute, no refunding order can be issued.

Again, if the business was discontinued on the 5th of April, it was commenced again on the 13th day of May. This would require the payment of an assessment for the balance of the fiscal year. The statute provides however, that when such business is commenced after the fourth Monday of May, the amount of the assessment "shall be in no case less than twenty-five dollars." Hence, in the case under consideration, for carrying on the business from the 13th of May until the fourth Monday of May, would require the payment of an assessment of twenty-five dollars. This would make a material reduction in the net amount to be refunded, if a refunding order could be issued at all.

I am of the opinion however, for the reasons above stated, that the statute does not authorize a refunder of any portion of the tax under the circumstances stated in your letter.

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

COMPENSATION OF CITY BOARDS OF REVISION IN CITIES NOT OF THE FIRST OR SECOND GRADE OF THE FIRST CLASS.

COLUMBUS, OHIO, July 12, 1901.

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

DEAR SIR: — Yours of July 11th, at hand. You inquire what should be the compensation of members of the city board of revision in cities not of the first or second grade of the first class, and should the county auditor receive compensation as a member of said board acting as a board of revision?

Section 2814*a* as passed by the Legislature April 16th, 1900, provided that the decennial board of equalization shall sit as a board of revision when notified by the auditor of the county to meet for that purpose. As was said by Burket, J., in State ex rel v. Morris et al., 63, O. S., 512.

> "As the boards of revision will perform the same work in 1901 that would otherwise be performed in that year as to valuations of real estate by the boards of equalization, the latter boards will, for that year only, be superseded by the boards of revision as to equalizing the valuations of real estate in the several counties and cities, upon the principle that a later statute supersedes an earlier one, when both cover the same subject-matter."

A board of revision then, performing the same duties as a board of equalisation and being composed of the same members, would naturally be entitled to the same compensation when sitting as a board of revision as is provided for a board of equalization. This, I think, would be true if the statute made no provision for the pay of boards of revision. I am of the opinion, however, that a fair construction of Section 2813*a* as enacted April 16th, 1900, will disclose that such compensation is provided for in that section. Note the language:

> "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 a member of the board of revision, the sum of three dollars, 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 five dollars; and the members of a 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 five dollars."

This section provides, first, for the compensation of the county boards when sitting both as a board of equalization and as a board of revision, and then

provides further that the members of a city board *"shall receive for each day so necessarily employed, the sum of five dollars."*

I think it clearly appears from this language that the time "so necessarily employed" by the city board and for which compensation is fixed, is the same time as above specified for county boards, to-wit: when sitting either as a board of equalization or as a board of revision. Hence, I am of the opinion that the members of the decennial city board of revision including the county auditor in a city not of the first or second grade of the first class, are entitled to receive the sum of five dollars per day.

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

VALIDITY OF CONTRACT FOR WATER SUPPLY AT SOLDIERS' HOME AT SANDUSKY.

COLUMBUS, OHIO, July 13, 1901.

Col. J. L. Cameron, President Board of Trustees Soldiers' Home, Marysville, O.:

MY DEAR SIR: — Yours of July 8th, requesting an opinion from me as to whether there is any binding contract existing between the trustees of the water works of the city of Sandusky and the board of trustees of the Ohio Soldiers' and Sailors' Home with reference to furnishing the water supply for the Home is at hand.

From the data furnished by you it appears that on August 19th, 1886, pursuant to a proposition made by the citizens of the city of Sandusky to make certain donations and to supply water to the Ohio Soldiers' and Sailors' Home for twenty years at twenty-five dollars per annum for the first thirteen years, and at the same rate charged manufacturers for water for the remaining seven years upon the condition that the Home should be located at Sandusky, the trustees of the Ohio Soldiers' and Sailors' Home accepted the offer and located the Home at the city of Sandusky. On September 20, 1886, the council of the city of Sandusky passed an ordinance fixing the water rents to be charged for furnishing water to the Home, at the rate above named and assumed to authorize the board of trustees of the water works to execute a contract with the board of trustees of the Ohio Soldiers' and Sailors' Home, to furnish water to the Home for the period of twenty years at the prices named above. No contract, however, was ever entered into between the respective boards of trustees, but the water has been furnished from that time to the present, and paid for at the rate stipulated in the ordinance.

In view of this state of facts, I am of the opinion that there is no contract binding upon either of the boards of trustees.

The trustees of water works established in any city are authorized and required to manage, conduct, and control the works, and to furnish supplies of water, collect water rents and determine the price to be charged for water furnished (R. S., Sections 2409, 2411.) It thus appears that the only body having power to enter into a contract with the trustees of the Home for the supply of water is the trustees of the water works, and that a contract between these two boards of trustees has never been entered into.

Were it not for the statute of frauds, requiring all contracts not to be performed within a year to be in writing, and the farther fact that these trustees are acting in a public capacity, not in their private or individual capacity, it might be urged, with much show of reason, that they had adopted the terms of the ordinance as their contract. But both of these considerations make such a

claim untenable. Public officers can bind the public only in the manner pointed out by statute, and the public is not estopped by the conduct of its public officers in the same manner that private individuals are estopped by their own conduct.

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

RIGHT OF COUNTY COMMISSIONERS TO ISSUE BONDS, BORROW MONEY AND ERECT A SCHOOL HOUSE.

COLUMBUS, OHIO, July 13, 1901.

John W. Zuber, Prosecuting Attorney, Paulding, Ohio:

DEAR SIR: — Yours of July 11th at hand and contents noted. You inquire whether when the board of education of a township school district fails to provide a suitable school house for the accommodation of the pupils of any sub-district, and fails to levy the necessary tax with which to build such school house, the county commissioners, under the provisions of Section 3969, may issue bonds and borrow money and proceed to erect such school house.

Section 3969, R. S., authorizes the county commissioners, when they are satisfied that the board of education has failed to perform its duty with reference to providing schools for the pupils, either by failure to levy the necessary tax or furnish the necessary buildings or otherwise, to proceed to do and perform all things necessary and proper to supply the wants of the pupils with reference to schools, to the same extent, and in the same manner that the board of education should have done. To determine then, what the county commissioners may do it becomes necessary to examine the provisions of the statute with reference to the powers and duties of boards of education. The board of education should have made a levy sufficient to furnish funds with which to build the school house. Hence, the commissioners may do so unless the limit is already reached. In that event the commissioners must proceed under the provisions of Section 3991 and submit the question of an additional levy to a vote. If a majority of the votes should be in favor of making the levy the commissioners could then make the levy even though the limit had heretofore been reached by the levy of the board of education, and could, under the provisions of Section 3993, borrow the necessary money in anticipation of the levy. I am unable, however, to find any provision of the statute authorizing the commissioners to proceed to borrow money without first making the necessary levy with which to pay the bonds which they propose to issue.

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

ENUMERATION OF SCHOOL YOUTH.

COLUMBUS, OHIO, July 16, 1901.

Hon. L. D. Bonebrake, State School Commissioner, Columbus, Ohio:

DEAR SIR: — In your communication of July 10th, you state that there is a dispute between the adjoining school districts of Uhrichsville and Dennison of Tuscarawas County, over the control of certain territory lying between the two towns of Uhrichsville and Dennison. And that by reason of such dispute, the clerk of the board of education of each of these districts, makes an annual enumeration of the youth of school age, residing in this disputed territory thereby producing a dual enumeration of school youth in this territory.

It appears that the disputed territory formerly formed a part of Uhrichsville school district, being either a part of Uhrichsville corporation, or territory attached to said village for school purposes; that a portion of this territory was annexed to the village of Dennison in the year 1880, and another portion was so annexed to said village in the year 1885, and still another portion in the year 1894. I have not the data before me to determine whether or not the proceedings for the annexation of this territory to the village of Dennison, were in all respects in conformity with law, but assume that they were, or at least that there were colorable proceedings had in connection with the annexation of this territory to Dennison corporation. I am further informed that the school districts of Dennison and Uhrichsville are each village school districts.

Under the act for the reorganization and maintenance of common schools, passed by the General Assembly of Ohio, May 1, 1873 (70, O. L., 195), the state was divided into school districts, styled respectively, city districts of the first class, city districts of the second class, village districts, special districts and township districts, which classification of districts is still retained in the statutes of the state. Section 4 of this act, now Section 3888, R. S., provided that

> "Each incorporated village, including the territory attached to it for school purposes, and excluding the territory within its corporate limits detached for school purposes, is hereby constituted a school district to be styled a village district."

It is apparent from the above section that the territory embraced within a village school district is not necessarily co-extensive with the corporate limits of such village, but that territory outside of the corporate limits might be annexed to such village for school purposes, and territory within the corporate limits might be detached for school purposes, either being erected into a separate district or attached to some adjoining district. Section 40 of this act now Section 3893, R. S., provided a method by which territory might be transferred from one school district to another;

> "By the mutual consent of the boards of education having control of such districts."

No other provision for the transfer of territory from one district to another is found in the law until the Act of March 8, 1892, (89 O. L., 68), which act amended Section 3893, and provided that

> "When a portion of a village has been attached to, and become a part of an adjoining city by annexation, the portion of such village thus annexed to such city, shall be deemed thereby transferred from such village school district into such city school district."

This Section 3893 was again amended March 23, 1893, (90 O. L., 126), by the provision that

> "When a portion of a village, township or special school district has been attached to and become a part of an adjoining city by annexation, the portion of such village, township or special school district thus annexed to such city, shall be deemed to be thereby transferred from such village school district, township or special school district into such city school district."

A further amendment to this section was enacted May 18, 1894, (91 O. L., 307), by which the section was brought to its present form, and containing the following provision:

> "Provided, however, that when a village or a portion of a village township, or special school district has been attached to and become a part of an adjoining city or village by annexation, the portion of such village, township or special school district thus annexed to such city or village shall be deemed to be thereby transferred from such village school district, township or special school district into such city or village school district, and the amount of the existing school indebtedness of such village school district, township school district, or special school district, shall be ascertained and apportioned by the county commissioners in the same manner as provided in section sixteen hundred and fifteen; and the county auditor, in the proper apportionment of the school tax for the respective school districts, shall be governed by an accurate map of the territory so annexed as aforesaid; and the boards of education of the respective school districts shall, immediately after the passage of this act, cause to be entered upon the records of their respective boards a complete and correct description of the territory so annexed."

It thus appears that prior to the last amendment to this section in 1894, the annexation of territory to villages did not, *ipso facto*, transfer such territory to the village school district. Section 3893 being the only one which provides for the transfer of territory from one school district to another, and this section only authorizing such transfer

> "By the mutual consent of the boards of education having control of such districts,"

It follows that, unless the boards of education of Dennison and Uhrichsville school districts agreed to the transfer of this territory from Uhrichsville to Dennison, then until the year 1894, at least, this territory still belonged to and remained a part of the Uhrichsville school district.

But what effect is to be given to Section 3893 as amended in 1894? Is the provision for the transfer of territory to a city or village school district by annexation of such territory to a village or city corporation, retrospective or prospective, or both?

In our opinion it is retrospective and prospective. That is to say, that the act not only operates to procure the transfer of all such territory as may hereafter be annexed to any city or village, to such city or village school district, but also operates to secure the transfer of territory which had been so annexed prior to the passage of the act, to the city or village school districts to which such territory was annexed.

While the language of the statute is not free from ambiguity, yet it seems that no other construction would give effect to the latter clause of the section, which provides:

> "And the boards of education of the respective school districts shall, immediately after the passage of this act, cause to be entered upon the records of their respective boards a complete and correct description of the territory so annexed."

Unless the act was intended to have a retrospective effect, this clause could have no meaning.

I am of the opinion therefore, that the enactment of this amendment to Section 3893 in 1894, operated to transfer the territory which had theretofore

been annexed to Dennison corporation from the Uhrichsville school district to the Dennison village school district, and that the same effect would follow from the annexation of a portion of this territory by the Dennison corporation in the year 1894. But that prior to such year, this territory remained a part of the Uhrichsville village school district, unless the transfer was had by mutual consent of the two boards.

This brings us to a consideration of the real question submitted in your communication, viz: What are the duties of the state school commissioner in respect to the enumeration of school youth from Tuscarawas County, if both these districts persist in returning an enumeration of school youth in this disputed territory?

Section 4030, R. S., requires an annual enumeration to be taken in each district of all the unmarried youth of school age, "resident within the district." Special provisions are made by other sections to secure accuracy in this enumeration. Thus, by Section, 4031, each person required or employed under this chapter to take such enumeration, shall take an oath or affirmation to take the same "accurately and truly to the best of his skill and ability." And when making his return of the list so enumerated, such person must accompany the same with an affidavit, list so enumerated, such person must accompany the same with an affidavit, "that he has taken and returned the enumeration accurately and truly to the best of his knowledge and belief, and that such list contains the names of all the youth so enumerated and none others." It is made the duty of the clerk of each district to transmit an abstract of the enumeration of his district to the county auditor, and it is provided by Section 4073, R. S., that "in case the enumeration has not been taken as required by this chapter * * * the auditor shall employ competent persons to take such enumeration." The enumeration as "required by this chapter," is an enumeration of the school youth "resident within the district." An enumeration in any district which includes youth who are not "resident within the district," is not made as "required by this chapter," and the county auditor having knowledge of such fact, should proceed to have a new enumeration taken.

But if the district enumerators, the clerk or the county auditor all fail to secure a correct return from any district, there is still an opportunity to correct any mistake or error. The county auditor must transmit to the state school commissioner an abstract of the returns made to him and it is then provided by Section 4040:

> "When the state commissioner of common schools on examination of the enumeration returns of any district, is of the opinion that the enumeration is excessive in number, or in any other way incorrect, he may require the same to be retaken and returned, and if he think it necessary he may for this purpose appoint persons to perform the service, who shall take the same oath, perform the same duties, and receive the same compensation, out of the same funds, as the person or persons who took the enumeration in the first instance, and the school fund distributable in proportion to enumeration shall be distributed upon the corrected terms."

It is clearly the duty of the state school commissioner to see that a correct enumeration is had in these two districts. Under the conclusion reached in a former part of this opinion, this territory is a part of Dennison district and should be enumerated by that district. If this territory is included in the return of the Uhrichsville district, then the return from that district is excessive and incorrect, and should be retaken, as provided by Section 4040. It should be remembered, however, that this conclusion is based upon the proposition that

Dennison is a village school district. If it should appear that Dennison is a special school district, the situation might be different.

If all efforts to obtain a correct enumeration in these two districts fail, then the portion of the school fund distributable in proportion to the enumeration, belonging to this district, should be withheld. But this is an extreme measure—the *dernier resort* and need not now be considered.

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

COUNTY LIABLE FOR COST UNDER FISH AND GAME LAWS WHERE THE STATE FAILS TO CONVICT OR DEFENDANT PROVES INSOLVENT.

COLUMBUS, OHIO, July 17th, 1901.

Roy H. Williams, Prosecuting Attorney, Sandusky, Ohio:

MY DEAR SIR: — Yours of July 15th, making inquiry whether in prosecutions under Section 6968-3, R. S., where the State fails to convict or the defendant proves insolvent, the county must pay the costs, is at hand. You will observe that Section 6968-3 is a part of the act of April 14, 1900 (94 O. L., 210-219). Section 409d of this act, among other things, provides:

> "In all prosecutions and condemnation proceedings under the provisions of this act, no cost shall be required to be advanced, secured or paid by, or bond or undertaking required of, any person authorized under the law to prosecute such cases; and if the defendant be acquitted, or if convicted and committed in default of payment of fine and costs, or if the property seized be released, the costs in such cases shall be certified under oath to the County Auditor, who, after correcting the same, if found correct, shall issue his warrant on the County Treasurer in favor of the person or persons to whom such costs and fees are due, and for the amount due each person."

From the reading of this provision it would seem that the Legislature intended that costs incurred in prosecutions under the provisions of Section 6968-3, should be paid by the county in the event that State fails to convict, or in case of conviction and the defendant proves insolvent.

Hence, I am of the opinion that the provision above quoted, applies to all prosecutions provided for in the act of April 14, 1900, above referred to.

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

P. S. In your letter to me, you refer to Section 6963-3. As there is no such section, I took it for granted you meant Section 6968-3.

DUTY OF STATE TO FURNISH WATER TO A MILL LOCATED IN MADISON COUNTY, NEAR LONDON, OHIO.

COLUMBUS, OHIO, July 20th, 1901.

J. C. Burnett, Esq., Prosecuting Attorney, Sabina, Ohio:

DEAR SIR: — In your communication of June 10th you state that the deed from one Roberts to the State of Ohio, for certain lands in Madison county, contains the following clauses:

> "Excepting and reserving from this grant and conveyance the right to said Roberts, his heirs and assigns forever, to the use of sufficient water flowing through said mill race to run and operate the mill with the same water power now used in operating the same, and also the right to the use of any surplus water flowing from the springs supplying said mill race and not necessary and required by the grantee in the use of the land hereby conveyed which can be turned into said race without interfering with the use of the land by the grantee herein conveyed."

You further state that the land conveyed by said deed to the State is bounded on one side by a mill race, the land conveyed extending to the center of the race, and that the water flowing through the mill race and supplying the mill referred to in the deed, at the time of the execution of said deed came partly from springs located on the land conveyed, and partly from springs located upon lands adjoining the same. That the land was purchased by the State for the use of the State Fish and Game Commission, and that the water from the springs on said land is now used to supply a system of ponds or reservoirs used by said Commission in the propagation and culture of fish. And you inquire what are the respective rights of the State and owners of said mill under the above facts.

I presume the deed in question is an ordinary warranty deed with the usual covenants. The redendum clause above quoted constitutes a reservation and not an exception. The distinction is important. An exception withdraws something from the operation of a grant which otherwise would be included in it. A reservation is something arising out of the thing granted, not then in esse; or some new thing created and reserved, issuing or coming out of the thing granted, and not a part of the thing itself. In the deed under consideration the new thing created or reserved is certain rights, to-wit:

(a) The right to said Roberts, his heirs, etc., to the use of sufficient water flowing through said mill race to run and operate the mill with the same water power now used in operating the same. And

(b) The right to the use of any surplus water flowing from the springs supplying said mill race and not necessary and required by the grantee in the use of the land herein conveyed, which can be turned into said race without interfering with the use of the land by the grantee herein conveyed.

These two rights reserved to the grantor in the deed must be construed together. The reservation of these rights in the deed is in effect a grant back from the grantee to the grantor of the rights reserved. The extent of the grant is controlled by the intention of the parties to the instrument, and this intention must be determined from the language employed.

By "the right to the use of any surplus water," etc., the parties to the instrument evidently intended that nothing more than the surplus remaining

after all the water necessary and required by the State in the use and operation of the land for the purposes for which it was purchased should be reserved to the grantor. This part of the deed standing alone would not require the State to furnish any water flowing through said mill race except the surplus water remaining after supplying all necessary requirements in the use of the land conveyed. Is this right on the part of the grantor enlarged by the other right reserved, viz., the right to the use of sufficient water flowing through the mill race to operate the mill? I do not think so. Keeping in mind the fact that the land conveyed to the State extends to the center of the mill race then the water flowing over such land belongs to the State and the owner of the mill would have no right to divert this water from the mill race so as to reduce its volume to the injury and detriment of the adjoining proprietor, to-wit:, the State. The right to the use of the water flowing through the mill race is simply as stated, the right to use the water. It does not impose upon the State the obligation to supply any portion of the water flowing through said mill race. Construing the two reservations together, the effect of them is simply this, that the owner of the mill has the right to use whatever water flows through the mill race sufficient to operate his mill, while the State must permit the surplus water from the springs on the land conveyed to the State to flow into and through said mill race. That is, the state cannot prevent the use of the water flowing through the mill race, even if it requires all of the stream to run the mill, but the State is under no obligations to supply such mill with water except to the extent of the surplus water flowing from the springs on the State's land. Yours very truly,

J. E. Todd,
Assistant Attorney General.

FEES FOR COLLECTING OMITTED TAXES.

Columbus, Ohio, July 20th, 1901.

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

Dear Sir:—I am in receipt of yours of July 15th, seeking an opinion from this office as to what portion of a thirty-five-thousand-dollar item of omitted taxes collected by the Treasurer of Richland County from the estate of Hon. M. D. Harter, deceased, the State of Ohio is entitled to receive?

The facts upon which the opinion is sought may be epitomized as follows:

The inventory of the estate of Hon. M. D. Harter and other papers in the office of the Probate Court of Richland County, disclosed the fact that the deceased had failed to list his personal property for taxation. Proper proceedings were taken and the Auditor of the county placed a large amount of taxes against the estate of the deceased upon the duplicate of Richland County. Suit was commenced by the Treasurer to collect these taxes, resulting in a judgment in favor of the Treasurer in the sum of $35,000.00, it appearing in the journal entry that the court refused to assess any penalty for the reason that the deceased honestly believed that the property upon which the tax was assessed, was not subject to be returned by him for taxation.

The judgment was paid by a check made payable to the Clerk of Courts, who, in turn, indorsed it to the Treasurer of the county. The Treasurer, instead of collecting the money and placing it in the treasury, accepted two New York drafts of $17,500.00 each; one payable to himself as Treasurer, which he collected, and the other payable to counsel which represented him in the litigation. Out of this sum counsel retained $15,879.00, which they claim as

fees, and $700.00 as expenses, and paid the balance of the $17,500.00 to the Treasurer.

The tax inquisitor claims 20 per cent, or $7,000.00 for his fees; the Auditor 4 per cent or $1,400.00 for his fees, and the Treasurer 5 per cent or $1,750.00 for his fees, thus leaving the net sum of $8,271.00.

The question now arises, what, if any, of the above claims should be deducted from the $35,000.00 before distribution among the several funds entitled to share in the taxes thus collected?

The Treasurer was the proper person to collect the judgment — he had a check for the money — he had an opportunity to collect it, and in contemplation of law did collect it, and should be charged with the full sum of $35,000.00. He could neither pay counsel nor permit them to pay themselves. Their claim had not been liquidated — it had not been allowed by the County Commissioners. The statement of facts is silent as to employment of counsel in the case, but assuming that the proper authorities employed them so as to bind the county, for the payment of their fees, then they were bound by all the provisions of the law with reference to the allowance and payment of claims against the county, for under such circumstances, their claim for fees would be nothing more nor less than a claim against the county.

State ex rel. v. Commissioners, 26 O. S., 364.

A county is a mere political subdivision of the State, and has no powers except those conferred upon it by statute. It cannot be bound except in the manner pointed out by statute, and a person dealing with it must take notice of the extent of its powers and the mode of their exercise.

Cooley's Constitutional Limitations (6th Ed.,) 233.

Bridge Co. v. Campbell, 60 O. S., 406, and cases cited.

These propositions are elementary and need no elaborate citation of authorities.

Section 894, R. S., provides that:

> "No claims against the county shall be paid otherwise than upan 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."

Let me say in passing that none of the claims referred to above, are either fixed by law, or is any other tribunal except the Commissioners, authorized to pass upon and allow them. Hence, they must all secure the approval ot the County Commissioners before they come up for payment. And counsel have no authority to collect and withhold any part of the money from the treasury; the withholding of it, in my opinion, would be an act of embezzlement.

Until a claim is presented and allowed and paid out of the county treasury for services in collecting this fund, there can be no basis of a claim for deduction on account of attorney fees. Even then, I am of the opinion that the State is not required to contribute its pro rata share of attorney fees and expenses, for there is no statute making any provision to that effect.

Section 2858 provides for the employment of collectors to collect delinquent personal tax, and for charging the fees of the collector to the fund collected, but this section has no application to the employment of counsel to sue for the collection of taxes.

Section 2862 provides that when a county officer is proceeding to perform his duty with reference to the collection of the public revenues and suit is brought against him because of that fact, counsel fees and other expenses incurred in defending the action should be paid out of the county treasury, and the expenses thus incurred shall be apportioned among the funds entitled to share in the revenues about which the litigation arose.

What is now this section (2862) was originally section 58 of an act passed April 5, 1859 (56 O. L., 175). It did not, when originally enacted, nor has it been so amended as to authorize the Treasurer to proceed by civil action to collect delinquent personal tax — only provides for defense when action is brought against him. Not until the enactment of March 3, 1877 (74 O. L., 69), and carried into the Revised Statutes as Section 2854, was provision made whereby the Treasurer could proceed by civil action to collect delinquent personal taxes. But no provision is anywhere made, so far as I am able to discover, for the apportionment of the expenses incurred in collecting taxes by civil action among the several funds entitled to share in the tax collected. Hence, it may be claimed, with much show of reason, that whatever expenses may have been incurred, under the provision of Section 2859, in collecting the tax in question by suit, the State is not required to bear any portion of it. For, unless there is an express provision to the contrary, the county must collect at its own expense, the State's portion of tax.

State ex rel. vs. Cappeller, 39 O. S., 207.

Hence, I am of the opinion that whatever may be the action of the Commissioners in allowing and paying counsel fees and other expenses incurred in collecting the tax in question, the State is not required to bear any portion of the same.

Is the tax inquisitor entitled to $7,000.00 out of the fund? If he is entitled to this sum, the State must bear its pro rata share of it.

Section 1343-1 provides for the employment of a tax inquisitor to investigate and furnish the Auditor with the facts and necessary evidence to enable him to subject to taxation property improperly omitted from the tax duplicate; also provides that his fees shall not exceed 20 per cent on the amount of tax thus placed on the duplicate and collected and paid into the county treasury, and that such allowance shall be apportioned ratably among the funds entitled to share in the distribution of the tax so collected. But is he entitled to a commission on the tax in question? It appears from the statement of facts that the evidence necessary to enable the Auditor to act, was contained in the inventory and other papers of the estate of Hon. M. D. Harter, deceased, filed in the Probate Court of Richland County.

Section 6044 provides that the Probate Judge shall, at the end of each month, deliver to the Auditor of the county a statement showing the inventory of personal property filed in his office during the month, for the use of the Auditor and Board of Equalization in the performance of their respective duties in correcting false or untrue tax returns, and further provides that taxes so added to the duplicates within nine months from the date of filing the inventory of the deceased in the Probate Court, shall be a preferred debt against the estate of such decedent the same as other taxes. Sections 2781 and 2782 require the Auditor to proceed and correct tax returns and add to the duplicate, taxes

omitted, together with a penalty thereon. In making this investigation with a view to correcting any tax return, he is authorized to subpoena and enforce the attendance of witnesses and compel the production of books and papers. For these services he is entitled to receive 4 per cent of the amount of taxes added to the duplicate. He receives a liberal compensation for his services and the law contemplates that he shall be active in his duties in discovering and placing omitted taxes on the duplicate.

Upon reading Section 1343-1, it will be observed that the law contemplates that the tax inquisitor shall do something for the compensation he receives. He must furnish the Auditor the evidence of the omitted taxes in order to earn the compensation provided for in this section. The Legislature is presumed to have intended only a fair reward for the services rendered, and in view of the most liberal provisions made for tax inquisitors, it will be presumed that the Legislature contemplated that he would be stimulated to proceed in the most difficult cases, and in the most vigorous manner, to thwart the ingenuity of the tax dodger, collect the evidence, and lay it before the Auditor for his action. His position was not created as a sinecure in which he should have something for nothing.

It was held in Treasurer v. Borck, 51 O. S., 320, that, although Section 1094 provides, if taxes are not paid within the time prescribed by law, "The Treasurer shall proceed to collect the same by distress or otherwise, together with a penalty of five per centum on the amount of taxes so delinquent" (the penalty being a compensation to the Treasurer for such collection), yet where a person voluntarily paid delinquent taxes the Treasurer could not collect the five per centum penalty; he could not merely stand behind the counter and receive the delinquent tax and collect the penalty thereon; he must proceed actively by distress, suit, or otherwise to enforce the collection in order to be entitled to the five per centum penalty. This case emphasizes the proposition that a public servant shall render an equivalent for any compensation provided for him.

With these rules in view let us consider the claim of the tax inquisitor. The inventory filed with the Probate Court furnishes the data for exposing the false returns of the deceased; the Probate Judge furnishes that inventory to the Auditor (Section 6044). The Auditor must then proceed to correct the false returns and place the proper amount of tax upon the duplicate (Sections 2781, 2782). Pray, what service has the tax inquisitor rendered for the 20 per cent he seeks out of the taxes thus placed on the duplicate? By the express provision of the statute, other officers are required to furnish this evidence. Hence, it is taken out of the province of the tax inquisitor. Even if he should become officious and furnish the Auditor this data from which he proceeds to correct the tax returns, he can claim nothing for it, for the reason that the Probate Judge is required to furnish this data; the tax inquisitor cannot voluntarily assume the duties imposed by law upon another and then claim compensation out of the county treasury. This conclusion is reached without taking into consideration the latter part of Section 6044. In my opinion, however, this section clearly furnishes another reason why the tax inquisitor is not entitled to a per cent under the circumstances named by you. The provisions of Section 6044 referred to read as follows:

> "No percentage, nor any part of any increased tax on the property of any such estate, covered by any such inventory, and required by law to be listed in the name of the executor or administrator, shall be allowed or paid to any person or persons under any contract for securing for taxation, or putting

> on the tax list or duplicate, property improperly or otherwise omitted, or not listed or returned for taxation."

It will thus be seen that he is entitled to no compensation for any increase of tax on the property of the estate of a deceased person covered by the inventory, and required to be listed in the name of the executor or administrator. The proceeding to correct the tax returns of the decedent is against the executor or administrator. He is notified to appear and defend. When corrected the orderly and proper method is to place the taxes so added to the duplicate against him as such personal representative of the deceased, and a certificate of taxes so placed upon the duplicate and handed by the Auditor to the Treasurer shows the tax to be against the personal representative.

In reading Section 6044, it appears beyond cavil that the Legislature intended to cut off forever the claim that previously had been made by tax inquisitors that they were entitled to a compensation out of the taxes added to the duplicate where the evidence was furnished by the inventory of the decedent's estate; it being so manifestly unfair that he should receive compensation under such circumstances, the Legislature chose to speak upon the subject.

Is the Treasurer entitled to 5 per cent on the amount collected to be deducted from the fund before distribution? If he is, it must be by virtue of the provisions of either Section 1094, or of Sections 2855 and 2856, R. S. Section 1094 provides that when one-half of the taxes charged on the tax duplicate against any entry, are not paid by December 20th, next after they are charged, or when the remaining one-half is not paid by June 20th, following, the Treasurer shall proceed to collect the same by distress or otherwise, together with a penalty of five per cent, which penalty shall be for the use of the Treasurer as compensation for such collection." The tax in this case was not the regular annual assessment, but was omitted taxes, but when charged and certified to him, the Treasurer was required to collect it "the same as other taxes." He did not collect under this provision nor did he collect the five per cent penalty; hence, cannot claim the five per cent under the provision of this section.

Section 2855 provides:

> "Immediately after the semi-annual settlement in August, the County Auditor shall, annually, make a tax list and duplicate thereof of all the taxes on personal property remaining unpaid, as shown by the Treasurer's books, and the delinquent record as returned by him to the Auditor, which tax list and duplicate shall contain the name, valuation, and amount of personal property taxes due and unpaid, and ten per centum penalty added to the said taxes; and he shall deliver said duplicate to the Treasurer on the fifteenth day of September, annually."

Section 2856 provides:

> "The Treasurer shall forthwith proceed to collect the taxes and penalty on said duplicate by any of the means provided by law, and for his services shall be allowed five per centum on the amount collected, which shall be allowed to him out of the same on his next semi-annual settlement, when said duplicate shall be settled and the balance of the funds collected distributed in proper proportions to the appropriate funds."

When the tax in question was placed on the duplicate and a certificate of the fact given to the Treasurer, it became his duty to collect "the same as

other taxes." (Section 2781.) Hence, if not paid at the time of the semi-annual settlement in August, might be returned as delinquent and ten per cent penalty added thereto. This, however, was not done, nor was the ten per cent penalty collected (it appearing in the judgment that no penalty at all was collected). In every instance where the statute provides extra compensation to the Treasurer for collecting delinquent taxes, it also provides that a penalty shall be added and collected to the amount at least of the fees allowed the Treasurer. Indeed, the policy of the law upon the subject of the collection of delinquent taxes, has been to require the person guilty of a delinquency to pay by way of penalty, the expense of collection, and there is good reason for this. The taxing officers are required to estimate the amount of revenue needed, and make their levy accordingly. And it is important that the funds thus provided shall not be depleted in expense incurred in collecting it. And again, the penalty for delinquency should not be visited on those who pay their taxes promptly. There is still another reason that should not be overlooked, and that is, "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.

In view of these considerations, and in view of the further fact that there is no express statutory provision authorizing the payment of five per cent to the Treasurer under the circumstances named, I am of the opinion that the Treasurer is not entitled to receive five per cent out of the amount collected.

The Auditor, however, is clearly entitled to four per cent of the $35,000.00 collected. But I am unable to find any provision for the deduction of this sum before the fund is distributed. Hence, I am of the opinion that the State is entitled to its pro rata share of the sum collected without any deduction.

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

COMMENCEMENT OF TERM OF JUSTICE OF THE PEACE.

COLUMBUS, OHIO, July 26, 1901.

Hon. A. C. Lewis, Prosecuting Attorney, Steubenville, Ohio:

DEAR SIR: — In your letter of April 19th you state that one A. Humphreyville was elected a justice of the peace for Mt. Pleasant Township, and was commissioned for "the term of three years from the date of qualification;" that he "qualified as justice November 8, 1898, and filed his bond on the same or following day;" that at the April election of this year, one J. N. Richardson was elected a justice of the peace to succeed Mr. Humphreyville, and a commission dated April 15, 1901, was issued to said Richardson, which commission is "for the term of three years from the date of qualification." Two questions are presented on this state of facts.

1. When does the term of office of Mr. Richardson begin?
2. When should he qualify by taking the oath of office and filing his bond?

And of these in their order:

1. The provisions of the constitution of Ohio in relation to the election and term of office of justice of the peace, are as follows:

"Township officers shall be elected by the electors in each township at such time and in such manner, and for such term, not exceeding three years, as may be provided by law, but shall hold their offices until their successors are elected and qualified."

Article 10, Section 4.

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

Article 4, Section 9.

The term of office of a justice of the peace is fixed by these constitutional provisions, at three years, and there is no power residing anywhere, except with the people, who created that instrument, to shorten this term. Neither the legislature, by providing for the election and qualification of a justice of the peace before the time when the term would regularly begin, nor the Secretary of State, by issuing a commission to run from the date of qualification, can shorten the term, either of the present incumbent of the office, or of the person elected to succeed to the office. What I mean is that the present incumbent is entitled to serve as justice of the peace for the full term of three years; and, also, the justice elect is entitled to the office for the term of three years. This does not mean that he shall hold a commission for three years, but it means that he shall enjoy the honors and emoluments of the office for such term. Manifestly, two persons cannot occupy the same office at the same time. Hence, the term of the justice elect cannot begin until the term of the present justice expires, and such term will not expire until he shall have served the full three years from the date of his original assumption of the office. The designation of the time in the commission which such justice is to serve, viz., "for three years from the date of qualification," cannot control either the time of beginning or the time of ending of such term.

2. The statutes necessary to consider in relation to the time of giving bond and taking the oath of office, are as follows:

"Any person elected or appointed to an office, of whom bond or security is by law required previous to the performance of the duties enjoined on him by his office, who refuses or neglects to give such bond or find such security, agreeably to, and within the time for that purpose prescribed by law, and in all respects to qualify himself for the performance of such duties, shall be deemed to have refused to accept the office to which he was elected or appointed, and the same shall be considered vacant, and be filled as provided by law.

Section 19, Revised Statutes of Ohio.

"When a person is elected to the office of justice of the peace and receives a commission from the governor, he shall forthwith take and subscribe the necessary oath appertaining to the office * * * * and each justice of the peace so qualified shall, before he is authorized to discharge any of the duties of his office, and within ten days after taking the oath, enter into bond to be approved by the trustees of his township, * * * * and on refusal or neglect to enter into such bond, the office shall be deemed vacant, and the trustees shall give notice of a new election to fill the vacancy."

Section 579, Revised Statutes.

The last section above quoted was a part of the act of March 11, 1853 (51 O. L., 404), which further provided that within thirty days after receiving his commission, such justice should transmit the date of the same to the township clerk, who was required to make a record of the same in a book, and at least sixty days previous to the expiration of such commission, the clerk was required to give written notice to the trustees of the township when such justice's commission would expire, and the trustees, upon receiving such notice, were required to notify the electors of such township to meet and elect a justice of the peace to fill the vacancy arising by reason of the expiration of the term of such justice.

Under this state of the law there was no fixed time for the election of justices of the peace, but such officers were elected in each township at such time as an election became necessary by reason of the expiration of the term of the incumbent of the office. The election being held on or near the expiration of the term, the officer elect was required to qualify forthwith by taking the oath of office, and his commission run for three years from the date of qualification. Under this arrangement there was no interim between the date of the qualification of the officer and the time when such officer was entitled to take his office.

By an amendment to Section 581, enacted by the General Assembly in 1893 (90 O. L., 304), all justices of the peace whose commissions expire within twelve months after the first day of April of any year, are required to be elected at the regular April election in such year. The other provisions of the law of 1853 in relation to the qualification of justices have not been changed. Thus it is that a justice of the peace whose term of office cannot begin, as in the case stated in your letter, until some months after the time of his election, is still required by statute to qualify forthwith upon the receipt of his commission, and the commission is still issued as under the former statute, for the term of three years from the date of qualification.

Manifestly some legislation is needed to render the statute entirely harmonious, but we have to deal with the law as it is, and not as we think it ought to be.

Section 579, above quoted, requires the justice of the peace to take the oath of office forthwith on the receipt of his commission, and before he is authorized to discharge any of the duties of his office, and within ten days after taking the oath, to enter into bond; and provides that on refusal or neglect to enter into such bond the office shall be deemed vacant; while Section 19, above quoted, contains a general provision relating to all offices, to the effect that the failure to give bond within the time prescribed by law shall be deemed a refusal to accept the office, and the same shall be considered vacant. What effect is to be given to these statutory provisions?

> "Where the statute fixes the time within which the official oath must be taken or the official bond given, the weight of American authorities is decidedly in support of the doctrine, that the provisions respecting the time is directory although the statute declares that the office is forfeited by the default; and that, unless the statute expressly declares that the failure to take the oath or to give the bond by the time prescribed, ipso facto vacates the office, the oath may be taken and the bond given at any time afterwards, before judgment of ouster upon an information in the nature of a quo warranto, or other legal declaration that the office is thereby vacated."
>
> Throop of Public Officers, Sec. 173, and authorities there cited.

There are a number of Ohio cases which hold that a failure to give bond within the time prescribed by statute, ipso facto renders the office vacant.

I quote the language of Welch, Judge, in Kelly vs. State, 25 O. S., 577:

> "The effect of the treasurer's failure to give bond or take the oath of office on or before the first day of the term involves a more serious question. The statute expressly declares that upon such failure the office shall be held to be vacant, and makes it the duty of the commissioners to fill it by appointment. I suppose the true construction of this statute to be that upon such failure to give bond and take the oath, the office, ipso facto, become vacant without any resolution of the commissioners to that effect, and without the appointment of any one to the office, and that the treasurer elect, in such case, is liable at any time thereafter to be ousted from the office by a proceeding on the part of the public or an appointee."

In this case, and in the case of the State ex rel. Poorman vs. Commissioners, 61 O. S., 506, the bond was not given until after the beginning of the term for which the person offering the bond was elected, while the statute in each case requires such bonds to be given before the commencement of the term.

The only case in Ohio that seems to be similar to the one under consideration is the case of Ohio ex rel. Epler vs. Lewis, 10 O. S., 129. The facts of this case were that said Epler was elected at the October election to the office of sheriff, and received his commission on the 10th day of December, while the term of office should begin on the first day of January, following. The statute at the time provided "that all sheriffs shall, within ten days after they have received their commissions give bond to the State of Ohio, etc., and if they fail to give the necessary security within the time prescribed by law, the commissioners are thereby authorized and required to declare the office vacant." Epler, however, did not present his bond to the commissioners until the 8th day of January, being eight days after the commencement of his term. The court held, First: That the first section of the act of January 10, 1853, requiring sheriffs elect to give bond within 10 days from the receipt of their commissions, has reference to the reception of commissions which cover a present right to the office, and not to those which cover a right to the office at some future period. Second: That the recipient of such commission has, under the law, a right to tender his bond to the county commissioners within ten days from the commencement of the term for which he was elected.

The reasoning by which the court reached the above conclusions is fully applicable to the case under consideration. A failure to give bond within ten days from the receipt of the commission cannot render the office of justice of the peace vacant, for the reason that the office is filled by an incumbent who has a right to retain it for several months. Hence, Section 19 and Section 579, above quoted, both of which provide that on failure to give bond the office shall be deemed vacant, and shall be filled either by a new election or by appointment, cannot apply to a case like the one under consideration, where the office is not vacant, and, hence, cannot be filled either by a new election or by appointment.

When we remember that section 579 was enacted at a time when there was no interval between the time of issuing the commission and the time when the recipient was entitled to occupy the office, it is manifest that the statute only sought to provide against a person holding the office who had not entered into bond, and that the limit of ten days within which such bond might be given

after the taking of the oath of office, was established in order that the office might not remain vacant. But where the office does not become vacant by the failure of the person elected to enter into bond, for the reason that the term of the former incumbent has not expired, I am of the opinion that the case falls within the principle announced in the case of the State ex rel. vs Lewis, above cited, and that a bond given at any time before the time for the commencement of the term would be sufficient, and would entitle the person elected to enter upon the office.

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

WHETHER SECTIONS 16 AND 29 ARE EXEMPT FROM TAXATION.

COLUMBUS, OHIO, July 29, 1901.

L. A. Edwards, Prosecuting Attorney, McArthur, Ohio:

DEAR SIR: — Yours of recent date, seeking an opinion from this office as to whether Sections 16 and 29 of each township included within the Ohio Company's purchase, which have not been sold, but are leased for more than fourteen years, and subject to revaluation, are exempt from taxation under the laws of Ohio, came duly to hand.

An answer to this question necessarily involves an examination of the terms and conditions upon which these two sections were donated and the purposes of their donation; also involves an examination of the legislation of Ohio upon this subject.

On October 27, 1787, a contract was entered into between the Board of Treasury on behalf of the United States, and Manasseh Cutler and Winthrop Sargent, as agents for the Ohio Company of Associates, for the sale to the Ohio Company of Associates of certain lands described, which have become known, and are usually designated as the "Ohio Company's Purchase."

One of the conditions of this contract of sale was that these lands should be surveyed into townships containing thirty-six lots, or sections each, and that there should be reserved out of each township "lot number sixteen for the purposes mentioned in said ordinance of the 20th of May, 1785; lot number 29 to be appropriated to the purposes of religion."

The Ordinance of May 20, 1785, provided for the survey and sale of the Northwest Territory, and also provided that "there shall be reserved lot sixteen of every township for the maintenance of public schools within said township." The deed for the "Ohio Company's Purchase" was executed May 10, 1792. This conveyance was made "subject, however, to the reservations expressed in an indenture executed on the 27th day of October, in the year 1787, between the then Board of Treasury for the United States of America, of the one part, and Manasseh Cutler and Winthrop Sargent, agents for the directors of the Ohio Company of Associates, of the other part.'

It thus appears that section 16 of each township, was reserved for school purposes, and section 29 was required to be appropriated for religious purposes. By express enactment of Congress, and an acceptance on the part of the Legislature of Ohio, title to all the lands reserved for school purposes was transferred to the State of Ohio.

First Chase's Statutes, 70, 72.
Bently vs. Barton, 41 O. S., 410, 412.

But lands set apart for religious purposes were not so disposed of. At least, I have been unable to discover any provision by which title to these lands passed to the State. But I am of the opinion that, by the terms of the contract of October 27, 1787, and the deed executed pursuant to its provisions, title to section 29 was transferred to the grantees named in the deed, in trust for the purposes of religion.

The legislature of Ohio has recognized this trust, and ever since the year 1800 statutory provisions have existed for the leasing and caring for these lands, by trustees.

Art. 8, Sec. 26, Constitution 1802.
Land Laws of Ohio, page 161, et seq.
First Bates Revised Statutes, Sections 1366 to 1375; 1404 to 1417.

From the time of the organization of the State to the adoption of the new constitution it was the policy of the State to exempt from taxation both the school lands, and lands set apart for religious purposes.

Armstrong vs. Treasurer, 10 Ohio, 235, 238.
Swans Statutes (1841), 907.

Article 12, Section 2, of the constitution of 1851, provides that all property, real and personal, shall be taxed by uniform rule 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 public purposes and personal property to an amount not exceeding in value $200, for each individual, may, by general laws, be exempt from taxation; but all such laws shall be subject to alteration or repeal." Unless, then, this provision of the constitution authorizes the legislature to exempt these lands from taxation, and the legislature has, by positive enactment, exempted them, they are subject to taxation.

Does the constitution authorize the legislature to exempt these lands from taxation?

As title to section 16 is in the State of Ohio, it is not taxable unless made so by statute. The land, as such, is expressly exempt by the provisions of Section 2732, Revised Statutes. Is the leasehold estate taxable under the provisions of Section 2733? I think not. Two conditions are necessary under the provisions of this section in order to make the leasehold estate taxable.

1st: The lands subject to the leasehold estate must be held under a lease for a period of more than fourteen years.

2d: They must not be subject to revaluation.

These lands are held by leasehold estate for more than fourteen years, but they are subject to revaluation. Hence, they do not come within the provisions of Section 2733, and, in my opinion, are not taxable.

Has the legislature the constitutional power to exempt section 29 from taxation? As above stated, title to this section, in my opinion, is not in the State of Ohio, but was originally taken in the name of the trustees of the Ohio Company, in trust for the purposes expressed in the deed, and has been transferred by operation of law to the trustees provided by statute, who are required to lease, manage, and control the same, and pay the proceeds to the religious societies of the respective townships where the lands are located.

Let it not be forgotten that exemptions from taxation are not looked upon with favor, but with disfavor. Hence, all provisions exempting property from taxation are strictly construed.

See College vs. State, 19 Ohio, 110.

> "The exemption must be shown indubitably to exist. At the outset every presumption is against it. A well-founded doubt is fatal to the claim. It is only where the terms of the concession are too explicit to admit fairly of any other construction that the proposition can be supported."

Ry. Co. vs. Supervisors, 93 U. S., 595.

This proposition is elementary, and needs no elaboration.

As above observed, all real and personal property by the provisions of the constitution are required to be taxed by uniform rule, except certain classes named, which the legislature may, by general laws, exempt from taxation.

These classes are:

1st. Public burying grounds.
2d. Public school houses.
3d. 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 $200 in value for each person.

The first, second, and sixth exemptions I need not discuss, and it is needless to say that section 29 cannot come within the third exemption, for it is not a *house* used exclusively for public worship.

It was held in Gerke vs. Purcell, 25 O. S., 229, that a parsonage did not come within this exemption.

Nor can section 29 come within the fourth exemption; it is not an institution of purely public charity. Nor do the rents and profits of this section go to public charity, but to the support of religion. In law these are two entirely separate subjects.

Nor can it be claimed, with any more show of reason, that this land comes within the fifth exemption — public property used exclusively for any public purpose. There is a clear distinction between property used for public purposes, and property used for religious purposes, as already suggested. Even though public purpose were held to include religious purpose, yet the property to be exempted must be *used* for a public purpose. Here the property sought to be taxed is rented to private individuals, it becomes a place of private abode, and is used for the private purposes of lessees only. The rentals are applied to the support of religion.

In Gerke vs. Purcell, 25 O. S., 249, Judge White speaking for the Court, says:

> "For the purposes of taxation, there is a marked distinction between property appropriated for the support of public worship, and that which is appropriated as a place of public worship. The exemptions authorized are not of such houses as may be used for the *support* of public worship, but of houses used exclusively as *places* of public worship."

Hence, I am of the opinion that the legislature has no constitutional power to exempt section 29 from taxation, even though it sought to do so. But I am

unable to find any provision where the legislature has sought to exempt this section from taxation. Hence, in my opinion, this section is subject to taxation under the laws of Ohio.

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

COMPENSATION FOR COUNSEL APPOINTED BY COURT TO PROSECUTE PERSON CHARGED WITH CONTEMPT OF COURT.

COLUMBUS, OHIO, July 30, 1901.

Roy H. Williams, Prosecuting Attorney, Sandusky, Ohio:

DEAR SIR: — Yours of July 29th, making inquiry as to whether where counsel are appointed by a court to prosecute a person charged with contempt of court they are entitled to compensation for such services, out of the county treasury, is at hand. While strictly speaking this is not a question which comes within my province as Attorney General to answer (R. S., Sec. 208), yet I will grant you the courtesy of an opinion upon the subject.

Your inquiry will admit of but one answer. The law makes no provision for payment out of the county treasury for such services. Hence, the commissioners have no authority to allow such a claim.

Lawyers are officers of the court, and it is their duty to assist the court in the administration of justice; and if the court asks their assistance in a proceeding for contempt, they must render such assistance as the court may require, gratituitously. That is an obligation lawyers assume upon being admitted to the bar. Although the law makes no provision for compensation to an attorney who is appointed to defend an indigent prisoner in the United States Court, yet, if appointed, he is not at liberay to decline. Why? Simply because the court has requested his assistance in the administration of justice, and if the law makes no provision for compensation, he can receive none.

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

RIGHT OF COUNTY AUDITOR TO TEN PER CENT. ADDITIONAL ON SALARY AND FEES UNDER SECTION 1365.

COLUMBUS, OHIO, July 30, 1901.

C. B. Nichols, Prosecuting Attorney, Batavia, Ohio:

DEAR SIR: — Yours of July 26th at hand and contents noted. It appears from your letter that a person having been appointed to investigate the accounts of the county auditor, found that he had drawn 10 per cent. in addition to his fees and salary as provided by law, the auditor claiming his right to do so by virtue of a resolution of the Board of Commissioners increasing his fees and salary to that extent; that the examiner holds that this 10 per cent. is illegal, for the reason that Section 1365, under which the commissioners assumed to grant the 10 per cent. increase, does not apply to Clermont County. You ask an opinion from me upon this same subject, before commencing an action to recover back this money which is claimed to have been wrongfully paid.

In the first place, in view of the fact that the examiner has made this finding, it seems to me, unless you are very clear that he is wrong, the proper thing to do would be to commence an action to recver back the mney, regard-

less of the opinion of the Attorney General. But, in my opinion, he is not wrong in his conclusion. I do not think Section 1365 applies to any county with a population of 20,000, or more, inhabitants. It is true the language of this section is that it shall not apply to "counties having 20,000 inhabitants the last federal census." I think the legislature intended to make this exception in favor of counties having 20,000, or upward, of population, because if that is not the construction to be placed upon this provision, it might as well be left out of the statute altogether, for it is perfectly evident that there was not a single county in the State of Ohio that had exactly 20,000 population at the census preceding the enactment of this provision. The legislature evidently thought that in counties having 20,000 inhabitants, or upward, the fees provided by law for the auditor would be ample for full and just compensation. Hence, made this provision.

You state in your letter that the auditor drew this extra 10 per cent. not only upon the fees allowed by law, but upon the salary provided for him in Sections 1069 and 1070. Even though Section 1365 applies to the county it does not purport to authorize the commissioners to grant an increase of 10 per cent. on the salary of the auditor; only the fees. Nor did the commissioners, in their resolution, assume to grant the increase on anything but his fees. As is suggested in your letter, if the statute assumed to give the commissioners power to increase the salary of the auditor, it is very questionable whether it would not be in conflict with Article 2, Section 20 of the constitution of Ohio.

I have not given this question as careful consideration as I would did I not know that you are contemplating a suit to recover back these fees. An opinion from me would have no binding force, and it is the court that must determine whether or not these fees are illegal, and I do not wish to undertake to forestall the action of the court by giving you a carefully prepared and elaborate opinion upon this subject.

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

"TROT-LINE" FISHING.

COLUMBUS, OHIO, August 5, 1901.

Hon. L. H. Reutinger, Chief Game Warden, Athens, Ohio:

DEAR SIR: — In your letter of July 31st, you ask an opinion from this office as to whether or not "trot-line fishing is permitted in the reservoirs of this state." I take it that the reservoirs of the state belong to the public. No question of riparian ownership can arise as the state owns, in fee, the land covered by the waters of the reservoirs, as well as the banks, dykes, etc. Being public waters the right to fish therein is common to the public. This right, however, may be limited or restricted by the legislature. The question to be determined then is, not whether "trot-line fishing is permitted," but whether such fishing is prohibited by the statutes of the state.

Section 6968, as amended April 16, 1900, (94 O. L., 321 and 349), provides:

> "No person shall draw, set, place, locate or maintain any pound net, seine, fish-trap, trammel-net, gill-net, fyke or set-net, or any device for catching fish in any of the waters, either natural or artificial, lying in the state of Ohio, or part therein, nor catch without any device in any of the waters of this state, except with

hook and line, with bait or lure. * * * And all pound-nets, seines, fish-traps, trammel-nets, gill-nets, fyke or set-nets, or any device for catching fish, set, placed, located or maintained in or upon any such of the waters of this state or on the shores of any such waters, in violation of this act, shall be deemed a public nuisance, and shall be abated."

See also Section 6968-1, as amended April 14, 1900, (94 O. L., 215). Do these sections prohibit "trot-line" fishing?

As I understand "trot-line" fishing, it is carried on by means of a strong line or cord firmly secured at each end, in such manner as to stretch the line taut, and retain it at or near the surface of the water. To this main line short lines, carrying hooks, and baited in the usual way, are attached at intervals in such manner as to leave the hook and bait depend in the water. By the use of this contrivance a single fisherman may have at all times a large number of hooks in the water, sufficient to make his occupation a business at which to earn a livelihood, rather than a sport.

If it be claimed that the legislature, in enacting the statute above quoted, intended to prohibit all methods of fishing except fishing for pleasure or recreation, and with rod and line, then "trot-line" fishing is prohibited. But is it absolutely certain that such was the legislative intent? Such statutes, being in derogation of common law, require a strict construction. Their terms cannot be extended beyond what is clearly expressed. By the express terms of this statute, fishing with hook and line, with bait or lure is not prohibited. In "trot-line" fishing nothing more is used than "hook and line with bait or lure." True, a single fisherman may use an indefinite number of hooks at the same time; but if it is lawful to use a single hook and line, what is there in the statute to prevent his using two or a dozen, or any number he may desire? True the statute declares that "no person shall set, place or locate * * * any device for catching fish," and a trot-line is a "device" set or placed, or located for that purpose. But a proper construction of the term "device" as used in this section, will limit it to such "devices" as are similar to those enumerated in the section. Applying the maxim noscitur a sociis, the general term "device" will be limited by the words associated with it. These words are all descriptive of nets and traps used for catching fish by impounding them, and the general term "device" must be construed to relate to such apparatus as are similar to those named.

I am of the opinion therefore, that trot-line fishing is not prohibited by the statutes above cited, nor by any other that I have been able to find.

Respectfully,
J. M. SHEETS,
Attorney General.

POWER OF POLICE JUDGE TO GRANT REHEARING AND DISCHARGE DEFENDANT FROM BOYS' INDUSTRIAL SCHOOL.

COLUMBUS, OHIO, August 5, 1901.

Hon. C. D. Hillis, Superintendent Boys' Industrial School, Lancaster, Ohio:

DEAR SIR: — Yours of August 2nd at hand and contents noted. You inquire whether a letter addressed to you, dated July 15th, signed by the Judge of the Police Court, of Toledo, stating that upon a rehearing granted in the case of the State of Ohio against George Fury, et al., he had ordered the defendants discharged, is sufficient authority for you to discharge the defendants, and return them to their homes. In my judgment it is not.

While a police court has power, upon motion being filed within the proper time, to grant a new trial, the same as any other court, yet, neither a police court, nor any other court has, after a boy has been committed to the Home, and after the time is up for filing a motion for a new trial, power to grant a rehearing, and discharge the defendant. Courts had such power by virtue of the provisions of Section 752 of the Revised Statutes, as amended February 18, 1885, (82 O. L., 64), until that power was taken away by the legislature by the act of April 25, 1898, (93 O. L., 311).

I observe, however, that courts have assumed to continue the exercise of this power, although it has been taken from them.

Yours very truly,

J. M. SHEETS,

Attorney General.

RIGHT OF TOWNSHIP BOARD OF EDUCATION TO EMPLOY TOWNSHIP CLERK AS TEACHER IN SCHOOLS UNDER ITS CONTROL.

COLUMBUS, OHIO, August 19, 1901.

H. W. Kuntz, Prosecuting Attorney, Caldwell, Ohio:

DEAR SIR: — In your letter of August 14th, you ask an opinion from this office on the question, whether the township clerk can be employed by a township board of education as a teacher in one of the schools under the control of said board?

The question is a somewhat novel one, and not free from difficulty. It is provided by Section 3915 R. S.,

> "That the clerk of the township shall be ex-officio, the clerk of the board, but shall have no vote except in case of a tie."

The duties of public officers are either ministerial or judicial. A judicial duty is one which requires the exercise of judgment, or discretion on the part of the officer, while a ministerial duty does not involve the exercise of any discretionary power. The duties of a township clerk as clerk of the school board are ministerial in character except in those cases where he is called upon to decide a tie vote, then his duties become judicial. It is a principle as old as the common law that a public officer cannot exercise any judicial function in respect to a matter in which he himself is interested. Independently of any statutory provision, this principle is continually applied to cases, as they arise, by courts. No such prnciple obtains, however, in respect to duties which are purely ministerial. Hence, although the clerk is ex-officio a member of the board of education, there can be no objection to his being interested in a contract made by the board so long as his duties in respect to the transactions of the board are purely ministerial. And this would always be true, were it not that the statute gives him power to decide a tie vote.

It would be a strained construction of the law, however, to hold that because the statute gives him this power in the case of a tie, that it so changes his relation to the board as to make unlawful any contract which he otherwise might make. I am of the opinion, therefore, that so long as the vote of the clerk is not necessary to the contract, that there can be no impropriety in the board of education employing the clerk as a teacher in the schools under the charge of said board.

I fail to find anything either in Section 6975*a* referred to in your letter, or in any other section of the statute which is in conflict with the view above expressed.

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

MEANING OF "DETAILED ITEMIZED."

COLUMBUS, OHIO, August 19th, 1901.

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

DEAR SIR: — Your letter of the 14th inst. at hand. You inquire as to the construction now to be given to Section 917, R. S., as amended April 16, 1900 (94, O. L., 400).

Prior to the amendment above referred to, this section provided:

> "The county commissioners annually * * * shall make a detailed report in writing to the court of common pleas of the county, of their financial transactions during the year next preceding the time of making such report."

This language was construed by the Supreme Court of Ohio in the case of the State ex rel. v. Commissioners, 56, O. S., 631, and it was held that the report,

> "Is sufficient if it sets forth the several immediate subjects of expenditure, and the sums paid on account of each, although it does not state specifically each item of the sums thus expended."

In the opinion in the above case, Bradbury J., used the following language:

> "In the report under consideration, the county commissioners classified the several heads of expenditure, concisely and clearly, and, under its appropriate head, stated separately, each particular subject of expenditure. In every instance, the purpose to be attained by the money expended, was clearly shown. The report afforded the data necessary to enable the committee appointed, pursuant to the statutes, to intelligently examine it. It advised the tax-payers of the county of the several subjects to which the public revenue had been devoted, and the amount expended upon each subject. And this, we think, is all the statute requires."

The amendment of April 16, 1900, however, seems framed for the single purpose of avoiding the construction placed upon this section by the Supreme Court. It now provides that:

> "The county commissioners, annually, on or before the third Monday in September, shall make a detailed report in writing, *itemized as to amount, to whom paid and for what purpose*, to the court of common pleas of the county, of their financial transactions during the next year preceding the time of making such report."

There can be no doubt of the power of the Legislature to require the publication of a report itemized as to the minutest detail.

By the amendment above quoted, the statute actually does require that the report of the commissioners shall be itemized to a sufficient extent to show three

things: (a) The amount. (b) To whom paid, and (c) For what purpose. A report which did not clearly state these three things in reference to each item of expenditure, would not conform to the statutory requirement, while, on the other hand, any amount of condensation is permissible so long as these three things are distinctly shown.

But a question might arise, however, as to whether the report thus itemized is required to be published. In the latter part of the section, it is provided that the examiners appointed by the court shall leave

> "Said financial statement and the report of their examination, with the auditor of the county for the use of the commissioners, who shall immediately thereafter cause said statement, together with the report of the examiners, to be published in a compact form," etc.

It thus appears that the publication is to be in "compact form." This may mean either that the matter is to be set up without unnecessary spacing or lead lines, or it may mean that the report may be condensed for the purpose of publication. The publication of a report itemized to its minutest detail, would add largely to the cost of making such publication without in any way adding to the value of such report. Referring again to the language of Bradbury, J., in State ex rel. v. Commissioners, Supra:

> "In the more populous and wealthy counties, Hamilton and Cuyahoga, for instance, the report would swell into an immense volume if thus extended, no one would be found patient enough to wade through the vast mass of detail, and each item would be lost in the multitude of its fellows. It is, of course, within the power of the general assembly to require such minuteness as this in the report made by the commissioners, but unless the language chosen by that body imperatively demands such construction, the section, should not, in our opinion, be so construed."

While it is not absolutely certain that the Legislature intended that the report of the commissioners should be condensed for the purpose of publication, and certainly no one is authorized by the statute to require such condensation, still, I am of the opinion that a report in the form of the one set out in the case of State ex rel. v. Commissioners. Supra, would comply with the statute in respect to publication, although it might not be sufficient as a detailed report to lay before the examiners appointed by the Court.

Very truly,

J. E. TODD,

Assistant Attorney General.

RIGHT OF SCHOOL EXAMINER TO ACCEPT AGENCY FROM BOOK PUBLISHING FIRM.

COLUMBUS, OHIO, August 22nd, 1901.

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

DEAR SIR: — Your letter of August 21st at hand. You state that one of the county school examiners of your county has accepted the agency for a book company, and intends making that his sole business, but that the company with which he is engaged does not, in any way, handle school books, and you inquire whether under Section 4069, Revised Statutes, such employment disqualifies him from holding the office of county school examiner.

Section 4069, Revised Statutes, provides, in part, as follows:

> "And no person shall be appointed to the position or exercise the office of state, county, city, or village examiner of teachers who is the agent of, or is interested in any book publishing or book selling firm, company, or business."

This language was added to this section of the statute in the revision of 1880; it appears to be plain and unambiguous. No distinction is made in the statute between publishing houses or firms which handle school books and those which do not, and while it may appear that such a distinction ought to be made, the fact remains that the legislature has not seen proper to make it. I know of no rule of statutory construction which would authorize a court to make such distinction. As was said by the Supreme Court of Ohio in the case of Woodbury & Company vs. Berry, 18 O. S., 456:

> "Where the words of a statute are plain, explicit and unequivocal, a court is not warranted in departing from their obvious meaning, although from considerations arising outside of the language of the statute, it may be convinced that the legislature intended to enact something different from what it did in fact enact."

I am of the opinion, therefore, without further citation of authorities, that Section 4069, R. S., above quoted, applies to a county school examiner who accepts an agency with a book publishing or book selling firm which does not handle school books as well as such employment or agency with a firm which does handle school books.

I am, yours very truly,

J. E. TODD,
Assistant Attorney General.

DOW TAX ASSESSMENTS.

COLUMBUS, OHIO, August 24th, 1901.

Chas. F. Howard, Prosecuting Attorney, Xenia, Ohio.

DEAR SIR: — Your letter of August 22nd at hand. You state that the county auditor has information that a certain druggist in your county had made a sale of intoxicating liquors during the month of June without having paid the Dow Tax Assessment, and you inquire as to what amount of assessment should be placed on the duplicate against such person, and what penalties should be added?

I assume that the sale referred to was not upon prescription or for known mechanical, pharmaceutical or sacramental purposes. Without discussing or in any wise passing upon the question whether a single sale of intoxicating liquors by a druggist is sufficient to constitute a "trafficking in intoxicating liquors" as defined by the eighth section of the Dow Law, I proceed to a consideration of the assessments and penalties provided for by said law.

The Dow Tax as it is commonly called consists:

First, Of an original assessment.

Second, An increased assessment.

Third, Penalties.

The original assessment is in the sum of $350 per year for each place where such business is carried on during the entire year, or a proportionate amount of such sum when the business is commenced after the fourth Monday of May. (Section 1 of Dow Law.)

An increased assessment amounting to $400.00 is authorized by Section five of the Dow Law when the person conducting such business fails or refuses "on demand" to furnish the necessary information to the assessor to enable him to make the return provided for by said section. The purpose of this provision evidently is to secure prompt and complete return of all such places of business by making it more profitable to make returns to the assessors than not. There seems to be no authority, however, for making such increased assessment except when demand has been made for the information required by said Section five of the Dow Law.

The penalties provided are as follows:

(a) A penalty of twenty per cent is added if the original assessment is not paid when due. The original assessments are due, one-half on or before the 20th day of June; one-half on or before the 20th day of December of each year where the business is conducted throughout the year. (See Section 2 of the Dow Law.) But when such business is commenced after the fourth Monday of May, the proportionate assessment charged for the remainder of the year is due and required to be paid within ten days after such commencement. (See Section 3 of the Dow Law.)

> "The penalty prescribed by the last paragraph of section five applies to the original assessment if not paid as provided by section two; also to the proportionate assessments under section three when they are not paid within ten days after the business is commenced." Simpson vs. Servis, Auditor, 3 C. C., p. 440.

(b) By an act passed April 16, 1900 (94 O. L., 332), provision is made for a complaint to be filed in the probate court and a hearing on such complaint; and if upon such hearing, the probate court find that the person complained of is engaged in trafficking in intoxicating liquors and has refused or neglected to pay the assessment made thereon, commonly known as the Dow Tax, said court shall immediately certify its findings, together with the amount of all costs, to the auditor of said county, and said auditor shall forthwith place the business of such person liable to assessment or increased assessment, upon the duplicates of the county, and the auditor shall add to any assessment or increased assessment or penalties due upon such business, an additional penalty of $100.00, together with the amount of all costs certified to by the probate court. This additional penalty of $100.00 and costs, however, can only be added by the auditor when complaint has been made to the probate court, and a hearing and trial had under the provisions of said act.

(c) A still further penalty is provided by Section 4 of the Dow Law when the treasurer is required to resort to levy and sale of property for the collection of the tax. In such case four per cent collection fees and costs are added to all former assessments, increased assessments and penalties.

To recapitulate, the increased assessment authorized by Section five of the Dow Law can only be charged when demand has been made for the information required by said section and refused. The twenty per cent penalty can only be charged when there has been a failure to pay the original assessment or increased assessment when due. The $100.00 penalty can only be charged when proceedings are had before the probate court, and the four per cent collection

fees are not charged upon the duplicate, but are collected by the treasurer together with the costs of collection.

Trusting the above will be satisfactory, I am,

Very truly yours,

J. E. Todd,
Assistant Attorney General.

REFUSAL OF SCHOOL BOARD TO APPROVE BOND OF CLERK.

Columbus, Ohio, August 28th, 1901.

Hon. L. D. Bonebrake, State School Commissioner, Columbus, Ohio:

Dear Sir:—In your communication of the 27th inst., you state that the Clerk of the Board of Examiners of Nelsonville School District has tendered his bond to the School Board. That said bond is sufficient in amount and with ample security, but that the School Board has failed and refused to approve said bond, and you inquire:

(a) Whether such Clerk is authorized to act, and whether the Board of Examiners is a legally constituted board; and,

(b) Whether the certificates issued by the County Board of Examiners can be used in said School District.

Section 4073, R. S., relating to the County Board of Examiners provides:

> "The Board may grant certificates for one, two and three years from the day of examination, which shall be valid in the county wherein their are issued, except in city and village districts that have Boards of Examiners, in which they shall not be valid."

It appears that Nelsonville School District has a Board of Examiners. I am not advised as to the manner in which such a board was originally created, but I assume without passing upon the question, that it was and is a legally constituted board in all respects, except in the matter of having a clerk at the present time. This being true, the fact that the board is temporarily without a clerk, if such be the fact, could not affect the legal existence of the board. It would still continue to be a Board of Examiners for that district until it is abolished as a board. This could not be done by the School Board refusing to approve the bond of the clerk. The most that can be claimed for such failure on the part of the School Board to approve such bond, would be to deprive the board of a clerk, and thus impair its usefulness. Even that could in no way affect its existence as a board. It follows then, the certificates issued by the County Board of Examiners are not valid within Nelsonville School District for the reason that said district has a Board of Examiners.

But is the Nelsonville Board of Examiners without a clerk?

Section 4079, R. S., provides:

> "The board shall organize by choosing from its members a president and a clerk, and the clerk shall give bond in the sum of five hundred dollars with surety to be approved by the Board of Education, conditioned that he will perform faithfully the duties required of him by this chapter, which bond shall be filed with the Clerk of the Board of Education."

No precise time is fixed for the giving of the bond of the clerk or its approval by the Board of Education. It appears in this case that the bond has been tendered and is sufficient in amount, and with sufficient surety, but that the Board of Education refuses to approve it. If the refusal to approve it is because of any insufficiency in the bond, it undoubtedly would be the duty of the clerk to furnish a new bond. But if the refusal of the Board of Education to approve the bond is simply to defeat the right of the clerk to discharge the functions of his office, such refusal can have no effect if the clerk has tendered a sufficient bond. He has done all the statute requires of him, and he has a right to enter upon the discharge of the duties of the office to which he has been elected, and to receive the emoluments thereof. The failure of the board to act cannot prejudice his rights. He does not even need to institute mandamus proceeding to compel the board to act, but has done all that the statute requires of him. He is a *de facto* officer and if his right to the office should be questioned by quo warranto, he might rely upon the tender of the bond as a defense to such proceeding. The bond which he has tendered is binding not only upon him, but also upon his sureties, whether approved by the Board of Education or not. (See Throop on Public Officers, Chapter II, and authorities there cited.)

I am of the opinion, therefore, on the facts presented that the Nelsonville Board of School Examiners is a legally constituted board; that the clerk is entitled to act as a *de facto* officer; that the proceedings of such board would be legal; that the clerk and his sureties are bound by the bond tendered, and that the certificates issued by the County Board of Examiners are not valid within said Nelsonville School District.

Very truly,

J. E. Todd,

Assistant Attorney General.

DOW TAX ASSESSMENT.

Columbus, Ohio, August 29th, 1901.

Chas. F. Howard, Prosecuting Attorney, Xenia, Ohio:

Dear Sir: — In your letter of August 26th you inquire further in regard to the Dow Tax assessment concerning which I wrote you under date of August 24th.

Conceding that the druggist in question was engaged in the business of trafficking in intoxicating liquors, the information before the Auditor is to the effect that he was engaged in such business on the 4th day of July. Not having information that the business was commenced before said date, the Auditor is justified in treating the business as having been commenced on said day. The law then requires an assessment of such part of $350.00 as will be proportionate to the remainder of the assessment year. When such business is commenced after the fourth Monday of May, then it is the duty of the person conducting such business to pay the tax on the same within ten days form the time such business is commenced. A failure to do so renders such business liable to a penalty of twenty per cent of the amount of the assessment. The plain provisions of the statutes are as follows: Section three of the Dow Law:

> "That when any such business shall be commenced in any year after the fourth Monday of May, said assessment shall be proportionate in amount to the remainder of the assessment year except that it shall be in no case less than $25.00. And they shall attach and operate as a lien, as aforesaid, at the date of, *and be paid within ten days after such commencement.*"

Section five of the Dow Law:

> "And if any assessment aforesaid shall not be paid when due, there shall be added a penalty thereto of twenty per centum, which shall be collected therewith."

This language is so plain that it does not require the aid of construction.

The Dow Tax assessment differs in some important particulars from an ordinary property tax. It is a tax laid on the business of trafficking in intoxicating liquors by the General Assembly. It does not require the action of any officer of the State or county, such as the listing of property or making a levy, or placing the tax upon the duplicate, to render it effective as a tax. The mere fact that a person has engaged in such business, renders him liable for the payment of such tax. And if he fails to pay the tax within ten days after the business is commenced, the statute imposes upon such business a penalty of twenty per cent. The purpose of the Legislature in imposing this penalty, evidently was to make it more profitable for a person engaging in such business to promptly report the same and pay the tax, than to take chances of such business being discovered and placed upon the duplicate by the County Auditor. The case of Simpson v. Servis fully sustains this view.

Section 3 of the Dow Law provides that the County Auditor upon being satisfied that a person who has paid or is charged with the Dow Tax assessment has discontinued such business, may issue a refunding order," for a proportionate amount of said assessment except that it shall be in no case less than $50.00." I think the Legislature intended by this language to limit the amount of the assessment and not the amount of the refunding order. The former part of the section establishes the minimum assessment that can be made when the business is commenced near the close of the assessment year, and I think the latter part of the section establishes a minimum amount that must be retained by the county when a refunding order is issued. It would be absurd to say that a refunding order must issue for the remainder of the assessment year, but that such refunding order cannot be less than $50.00, whether the proportionate amount of the assessment for the remainder of the year would amount to $50.00 or not. The provision for a refunding order, however, relates only to the assessment. It has no reference whatever to the penalty. No authority is given in the statutes for refunding any portion of the twenty per cent penalty. This penalty, as above indicated, is imposed upon the business for a failure to report the business and pay the tax within ten days from the time it is commenced. Such direlection upon the part of the person conducting such business is not atoned for by afterwards discontinuing the business. Hence, the statutes very properly make no provision for refunding any portion of this penalty.

Trusting the above fully answers your inquiries, I am,

Very truly yours,

J. E. Todd,
Assistant Attorney General.

ON "SPECIAL PERMIT, FOR HEATING ONLY," ISSUED BY A MUNICIPAL CORPORATION.

Columbus, Ohio, August 30th, 1901.

Hon. G. M. Collier, Chief Examiner of Steam Engineers, Columbus, Ohio:

Dear Sir: — I have your request of even date herewith for an opinion upon the permit handed to me by you, as to whether or not same constitutes a license such as is required by Section 7 of the act of March 1st, 1900, re-

lating to your department, and such as would exempt the holder thereof, when issued by a municipal corporation, from examination as provided by such act.

Upon examination of the permit it will be found to be styled "Special Permit, for Heating Only," and its purpose to be defined "a special permit to operate a steam heating plant."

The only method provided by the Act of March 1st, 1900, by which an engineer may be exempted from the necessity of the examination is contained in Section 7, and provides:

> 1. "Such as have been employed continuously as a steam engineer in the State of Ohio for a period of three years prior to the passage of this act, and who files with his application a certificate of such fact, under oath," etc.
>
> 2. "One who holds a license issued to him under any ordinance of a municipal corporation of this State."

The license mentioned in Section 7, to my view would be one entitling a person to operate a steam engine. Such have been issued by municipal corporations before the passage of this general act.

The permit in question is not one authorizing the individual to operate a steam engine, but only to operate a steam heating plant. This does not require the service, ability or experience that is required of a steam engineer. Hence, I hold that upon presentation of such a permit to you, you are not required to issue a license to such person to operate a steam engine without first compelling the applicant to undergo the examination required of others.

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

RIGHT OF COMMISSIONERS TO TRANSFER FUNDS.

COLUMBUS, OHIO, September 5, 1901.

Robert H. Day, Prosecuting Attorney, Canton, Ohio:

DEAR SIR: — Yours of August 27th, at hand and contents noted. Owing to press of other matters that were awaiting me on my return home, I could not give it as early attention as I would like.

The question for solution as presented in your letter is, whether the commissioners have a right by virtue of the provisions of Section 876, R. S., to transfer temporarily, money in the building fund to the bridge fund, the building fund to be reimbursed upon the next payment of taxes?

It does not appear from the statement of facts that the amount in the building fund proposed to be transferred is not needed for the purpose for which it was levied and collected. As it is proposed to reimburse the building fund from the bridge fund when the bridge fund is replenished by a collection of taxes, I take it for granted that this fund is needed either for the erection or repair of the buildings of the county.

The power to transfer funds, (if it can be exercised under the constitution), is a dangerous power and should be sparingly exercised. It opens the door to extravagance, and sometimes even fraud. I have known instances of the county commissioners making annual levies for the building fund when there was no call for it, and with the purpose in view at the time the levy was made, to transfer

the tax when collected, to the county fund. Levying taxes ostensibly for one purpose and using the money when collected for another, became a favorite method of evading the law, and to put a stop to it the framers of the constitution of 1851 adopted the following provision:

> "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." (Art. 12, Sec. 5.)

The law authorizes the levy of a tax for building purposes; i. e., for the repair or erection of county buildings. (Sec. 2823, R. S.) And the Constitution provides that when levied and collected, it can be diverted to no other purpose. Here is an effort to divert at least temporarily, a fund raised for one purpose to that of another. If the legislature can authorize a temporary diversion of a fund, why can it not authorize a permanent diversion of the same fund? It appears to me that the power is different only in degree, not in kind. The building fund is one, which, of necessity must be used sooner or later for building purposes, and it cannot be claimed that if it could not be transferred it would lie idle in the treasury for all time to come.

I am quite clear that the legislature cannot constitutionally authorize the permanent transfer of a tax levied and collected for one purpose to that of another where the tax can be used for the purpose for which it was collected.

The difficult question however, is, whether the legislature may authorize a temporary transfer of a fund as is sought to be done in this instance? It might be claimed with some show of reason that a temporary transfer of a fund was a mere loan of a fund, hence, not an infraction of the Constitution, and that the officers could be compelled to reimburse the fund from which the transfer was made as soon as the fund to which the transfer was made became replenished by a collection of taxes. But if the taxing officers should refuse to make the necessary levy to replenish the fund to which the temporary transfer was made, that refusal might work a permanent transfer of the fund.

Hence, I am inclined to the view that the commissioners would have no constitutional right to make even a temporary transfer of funds, if the fund proposed to be transferred, would, in the nature of things, be needed for the purpose for which the levy and collection was made.

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

ABATEMENT OF NUISANCE.

COLUMBUS, OHIO, September 7, 1901.

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

DEAR SIR: — Yours of this date is at hand and contents noted. The question for solution is whether where tenants fail to pay the water rent and the water is cut off by the water company, and thereby the water closets become foul, and in the opinion of the Board of Health, dangerous to health, and to abate the same requests the water company to turn on the water to flush the closets, and thus abate the nuisance, the expense thus incurred may be charged up against the property, and certified to the county auditor, as provided in Section 2128, R. S.

In my opinion this may be done. This section gives the Board of Health broad discretionary powers to use such means as are necessary and proper to abate a nuisance. Certainly foul and filthy water closets are dangerous to health, and are a nuis-

ance, and the Board of Health may take such means s is proper to abate the nuisance thus created, and charge the cost thereof to the property upon which the nuisance is located. The most effectual and economical way is to flush the closets and keep them flushed, and the Board of Health may pay the water company for the water thus used, and have the expense assessed against the property upon which the nuisance is located.

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

BOXWELL GRADUATES HAVE NO RIGHT TO ATTEND ANY HIGH SCHOOL WHICH THEY MAY SELECT.

COLUMBUS, OHIO, September 11, 1901.

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

DEAR SIR: — From your letter of September 7th, and enclosures it appears that you have rendered an opinion to the clerk of the board of education of Shiloh, Ohio, to the effect that Boxwell graduates have a right to attend any high school in the county in which they reside or any adjoining county which they may select, and the board of education of the district in which they reside are required by the Act of April 14, 1900, to pay the tuition of such students. And you ask whether or not, this office approves the opinion so rendered?

I regret to say that I cannot concur in your view of the law in this case. It seems to me that it is opposed to the entire public school system of the state. The duty of providing schools for the instruction and education of the youth of the state is imposed by statute upon the boards of education of the respective districts into which the state is divided. Such boards of education must provide facilities for the education of all youth residing in their respective districts. Certainly, so far as the primary schools are concerned, the pupil cannot select the school he desires to attend, but must attend the school provided by the board of education for the district in which he resides. This is the general rule although there are some exceptions provided for by the statutes. The boards of education of the various township, village and special school districts are also authorized to provide schools of a higher grade than the primary schools for the better education of the youth of their respective districts. Further, two or more of such districts may be united for the purpose of maintaining a joint high school for the common benefit of all the districts so united. If a township district, either singly or in connection with adjoinig districts maintain a high school, the pupils residing in such district would doubtless be required to attend the high school so maintained by their district.

In addition to these general provisions for the education of the youth residing in any district, Section 4022 provides:

> "The board of any district may contract with the board of any other district for the admission of pupils into any school in such other district on such terms as may be agreed upon by such boards, and the expense so incurred shall be paid out of the school funds of the district sending such pupils."

In this condition of law, the so-called Boxwell law was passed. This law provided for examination of students in the primary schools, which examinations were required to be

> "of such a character as shall permit the successful applicants upon the payment of tuition to enter any high school in the county in which the applicant resides or in any adjoining county in which said applicant desires to attend such high school."

And the further provision was made that the tuition of such applicants might be paid by the board of education of the district in which the applicant resides. The payment of the tuition was, by this law, left optional with the board of education, and hence, no attempt was made to limit or restrict the school which such applicant might attend, it only being required that the examination be of such a character as would admit a pupil to some high school in his or an adjoining county, "which said applicant desires to attend."

By the amendment of the Boxwell Law, April 14, 1900, the words above quoted, to-wit: "in which said applicant desires to attend," are eliminated, and the payment of tuition is made mandatory upon the board of education of the district in which the student resides. The omission of the language above quoted is significant. The school board no longer has the option to pay or not to pay the tuition, but is required to make provision for all Boxwell graduates who desire to attend high school. This the board may do, either by maintaining a high school of its own, or a joint high school, or by virtue of Section 4022, R. S., by making contract with another board of education. These statutes being *in pari materia* must be construed together. In the passage of the Act of April 14, 1900, the legislature must be supposed to have had in mind and in contemplation, the existing legislation on the subject of schools, and to have shaped its new enactment with reference thereto. Not only must these statutes be construed together, but they must be so construed as to render the entire body of law harmonious throughout.

I am of the opinion, therefore, that the Act of April 14, 1900, by making it mandatory upon the board of education to provide high school facilities for the pupils within their respective districts, takes from such pupils the option of selecting a high school which they will attend, and gives to the board of education the power to make such arrangements as are authorized by the other sections of the statutes above quoted.

I am very truly yours,
J. E. Todd,
Assistant Attorney General.

APPLICATION OF SECTION 2702 TO EXPENSES OF BOARDS OF HEALTH.

Columbus, Ohio, September 16, 1901.

Dr. C. O. Probst, Sec'y State Board of Health, Columbus, Ohio:

Dear Sir: — In your letter of September 10th, you ask an opinion from this office on two questions, to-wit:

1. Does Section 2702, R. S., apply to the expenses of boards of health?

2. What is the proper proceeding in a case where the council refuses to pay the expenses of the board of health?

Section 2140, R. S., makes provision for the expenses of boards of health as follows:

> "When expenses are incurred by the board of health, under the provisions of this chapter, it shall be the duty of the council,

> upon application and certificate from the board of health, to pass the necessary appropriation ordinances to pay the expenses so incurred and certified; and the council is hereby empowered to levy, subject to the restrictions contained in the ninth division of this title, and set apart, the necessary sum to carry into effect the provisions of this chapter."

This section is found in Title 12 of the Revised Statutes, and the ninth division of this Title relates to finance and taxation, and contains certain restrictions upon the power of the council of a municipality to levy taxes and to borrow money.

Section 2682 prescribes the amount of taxes that may be levied annually by the council of a city or village, "for the general purposes of the corporation." Section 2683 enumerates some additional purposes, including "sanitary and street cleaning purposes" for which taxes may be levied, while Sections 2689 and 2689a, R. S., prescribe the maximum rate or aggregate of all taxes that may be levied for all purposes by a municipal corporation.

These restrictions upon the power of the council to levy taxes must control unless a higher levy is authorized by a vote of the electors of the corporation as provided in Section 2687, R. S.

The expenses of boards of health are subject to these restrictions. The council must provide the money with which to meet such expenses by taxation, and in levying such taxes the council must keep within the limit prescribed by the sections above cited, unless a higher levy is authorized by a vote of the people.

The power of the council to borrow money for sanitary purposes is limited by Section 2685, which reads as follows:

> "The council may anticipate the tax authorized to be levied for sanitary and street-cleaning purposes, by temporary loans; but no loan shall be made in excess of the gross amount of revenues raised by taxation for expenditures for such purposes during the then current year, except in cases of extraordinary emergency caused by the general prevalence of an epidemic; and money so borrowed, when paid into the treasury, shall be applied first in the payment of such loan."

The sanitary expenses of a municipal corporation might appropriately be classified as the ordinary expenses and the extraordinary expenses. Under the head of ordinary expenses might be included those which are incidental to the maintenance of a board of health, and the regular and orderly discharge of the duties of such board. Under extraordinary expenses might be included such as are made necessary by the existence of an emergency or an epidemic of a contagious disease. It is as much the duty of the council to provide for the ordinary sanitary expenses of a corporation by an annual levy, as it is its duty to provide for any other department of municipal expense. The money arising from such levy should be set aside for the use of the board of health, and the expenses of such board should be paid from this fund. By section 2685, R. S., above quoted, the council is authorized to anticipate the collection of this tax by temporary loan, and in the case of extraordinary emergency caused by the general prevalence of an epidemic, council may make a loan in excess of the gross amount of revenues which the levy will produce for the current year.

Section 2702, commonly known as the Burns Law, provides:

> "No contract, agreement or other obligation involving the expenditure of money shall be entered into, nor shall any ordinance, resolution or order for the appropriation or expenditure of money, be passed by the council or by any board or officer of a municipal corporation, unless * * * * the clerk thereof, shall first certify that the money required for the contract, agreement or other obligation, or to pay the appropriation or expenditure, is in the treasury to the credit of the fund from which it is to be drawn, and not appropriated for any other purpose; * * * * and all contracts, agreements or other obligations, and all ordinances, resolutions and orders entered into or passed contrary to the provisions of this section shall be void."

The evident purpose of the Burns Law was to prevent the incurring of any indebtedness by a municipal corporation, or any officer or board thereof which would have to be met by any increase in the tax levy. The board of health is not specifically exempt from the operation of this law, and since the money to pay the expenses of such board must be obtained by taxes levied by the council, the same as the expenditures of any other municipal board, no good reason can be urged why such board should be exempt. Council has at all times power to provide the board of health with the necessary funds to enable it to properly discharge its duties. And as above pointed out, the council may make an annual levy for this purpose, may anticipate such levy by borrowing money, and may even exceed the levy in cases of an emergency and epidemic. The application of the provisions of Section 2702 to boards of health does not necessarily cripple or hamper said board in the discharge of its duties, but merely leaves its expenditures subject to the control of the council, the same as the expenditures of the other departments of a municipality. A board of health is nowhere authorized to levy taxes, and it ought not to be permitted to do indirectly what it could not do directly. That is, it ought not to be permitted to create an indebtedness against a municipality which the council would have to provide for by a tax levy. Council being charged with the duty of providing funds for all the departments of a municipality and being limited as to the amount of taxes it may levy, must necessarily be clothed with power to restrict the expenditures in each and all of the departments, or it might soon become impossible for the council to provide the required revenues, and at the same time keep within the prescribed limits of taxation. Neither is it to be supposed that the public health and welfare will suffer because of this limitation placed upon the expenditures of boards of health. The members of the council being elected by the people, while the members of the board of health are appointed by the council, the men who would be responsible for any neglect or injury resulting from a lack of funds at the disposal of the health department, must answer directly to the people for their shortcomings. It is but reasonable to suppose that the members of the council elected directly by the people would be as careful of the public health and welfare as any board which such council might appoint.

In a somewhat extended examination of authorities, I have found but two cases which in any way militate against the views above expressed. In the case of Lima Gas Company against the City of Lima, 4 C. C. Rep., on page 28, Seney, Judge, said:

> "We are referred to Section 2702 of the Revised Statutes in opposition to this holding. Sufficient is it to say that we do not

> think this section has any application so far as contracts affecting the expenses in running the city are concerned. The application is to contracts affecting improvements, etc., to be made in the city."

The contract in question in this case, was a contract between the city and the gas light company whereby said gas light company agreed to furnish gas to said city for city purposes, as well as to furnish gas to all residents of said city at a certain stipulated price for the period of nine years. Other sections of the statute authorize a municipal corporation to contract with a gas company for supplying with gas, the streets, squares, and other public places in the corporate limits, and also authorize the council to fix the minimum price at which such gas is to be furnished for a period not exceeding ten years. Manifestly, a contract extending through a long series of years, the expenses of which are to be met by taxation within each year, could not well come under the provisions of Section 2702, R. S. As was said by Minshall, Judge, in the case of City of Cincinnati vs. Holmes, Administrator et al., 56 O. S., 113, referring to this section,

> "But it has not the vigor of a constitutional provision, and cannot therefore apply to a statute that not only authorizes the making of a particular kind of improvement, but also provides the mode and manner in which the funds are to be raised to defray the costs and expense of it."

Abundant authority might be found why Section 2702, R. S., would not apply to a contract such as the one under consideration in the Lima case, without resorting to the distinction made by Judge Seney in the paragraph above quoted in that case. No argument is advanced by the Judge in support of his proposition. But even if the distinction announced in that case is a valid one, I do not see how it can apply to the expenses of a board of health.

In the case of Turner against the City of Toledo, 15 C. C. Rep., 627, a petition was filed in the court of common pleas setting out a contract made by plaintiff with the board of health. No allegation was made in the petition that the certificate required by Section 2702, R. S., was furnished, and in fact, the question appears not to have been presented to the court in any way. The demurrer to the petition on behalf of the City of Toledo was sustained by the court of common pleas, and the judgment of the court of common pleas was reversed by the circuit court. King, Judge, said:

> "If the board of health entered into a contract with these people to furnish nursing, care, board, lodging, etc., they had the power to do it, and the city is unquestionably liable."

While the question as to the issuing of a certificate by the clerk, does not appear to have been presented to the court, yet, the inference from the above language is that the court did not deem a certificate necessary. Whether the court would have so held had the question been made, is doubtful. Outside of these two cases, I have not been able to find any case fully in point, and these two cases, I do not regard as decisive of the question.

From a careful consideration of the statutes quoted in the former part of this opinion, I have reached the conclusion that Section 2702, R. S., applies to the expenses of boards of health. Having reached this conclusion, your second question need not be considered.

Very truly,

J. E. TODD,

Assistant Attorney General.

A PERSON APPOINTED TO THE OFFICE OF SURVEYOR SHALL HOLD FOR THE FULL UNEXPIRED TERM.

COLUMBUS, OHIO, September 18, 1901.

E. G. McClelland, Prosecuting Attorney, Bowling Green, Ohio:

MY DEAR SIR:—Your inquiry is at hand and contents noted. The facts upon which an opinion is sought may be stated as follows:

A county surveyor whose term would have closed on the first Monday of September, 1902, died on the 14th of September, 1901. Upon this state of facts, the question arises whether the appointee shall hold to the first Monday of September, 1902, or should a person be elected at the coming election to fill the unexpired term?

There is no provision of law authorizing a surveyor to be elected to fill an unexpired term. That being the case, when a surveyor is elected, he is elected for a full term. The time for him to qualify and enter upon the discharge of his duties is the first Monday of September after his election. (Section 1163, R. S.) Section 1167, R. S., provides that when the office of county surveyor becomes vacant, the court of common pleas, if in session, and if not in session, the county commissioners shall appoint a suitable person to the position, who shall give bond and enter upon the discharge of the duties of the office. Section 11, R. S., provides that when an elective office becomes vacant and is filled by appointment, such appointee shall hold until his successor is elected and qualified and such successor shall be elected at the first proper election that is held more than thirty days after the occurrence of the vacancy. Hence, as there is no provision of law for the election of a surveyor to fill a vacancy, and as the successor is always elected for a full term, and as the time for qualifying and entering upon the term is the first Monday of September after the election, and as by the provisions of Section 11, R. S., the appointee holds until his successor is elected and qualified, he, of necessity holds until the first Monday of September following the election.

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

VOTING MACHINES NOT FURNISHED FOR WARDS AND PRECINCTS WHERE A MAJORITY OF THE VOTES OF SUCH WARDS AND PRECINCTS WERE IN FAVOR OF IT WHEN BY VOTE OF THE WHOLE CITY, THE PROPOSITION WAS NOT CARRIED.

COLUMBUS, OHIO, September 18, 1901.

Hon. L. C. Laylin, Sec'y. of State, Columbus, Ohio:

MY DEAR SIR:—Yours of September 17th at hand and contents noted. I gather from your communication that at the April election, 1901, of the City of Newark, the question was submitted to the voters of that city as to whether voting machines should be adopted. The vote resulted in defeating the proposition in the city, but some of the wards and precincts cast a majority of votes for it; the question submitted for solution being, whether, under such circumstances, the proper board of elections is authorized to purchase voting machines to be used in the wards and precincts voting in favor of the proposition.

In my opinion, this question should be answered in the negative, for two reasons:

First: The proposition was submitted to the whole city of Newark as a unit. It was voted down as a unit. Hence, the proposition was lost. With no more propriety can it be claimed that voting machines should now be furnished to those wards and precincts that cast a majority of votes in favor of the proposition, that, had the proposition carried in the city, then those wards and precincts which cast a majority of their vote against it should not be furnished with voting machines. One proposition cannot be true without the converse being true. In other words, had the proposition carried, voting machines would then be furnished the whole city regardless of the fact that some of the wards or precincts might have cast a majority of their vote against it. But as the proposition was lost, no voting machines can properly be purchased for any part of the city.

Second: Section one of the act authorizing the adoption of voting machines (94 O. L., 309), provides that where the proposition of adopting voting machines has been submitted to any city, village, town, precinct or other civil division of the state and has been carried, the proper election officers may purchase machines at the expense of such

> "city, village, county, precinct or other civil division of the state now chargeable by law with the expenses of the material and supplies for holding general elections in such election district or districts."

It will thus be observed that the board of elections is not authorized to purchase voting machines and charge the costs back to any civil division except those "now chargeable by law with the expenses of the material and supplies for holding general elections in such election district or districts."

It is unnecessary to call attention to the fact that wards and precincts in cities are not chargeable separately with any of the expenses of holding elections. In fact, wards and precincts in cities have no fund of any kind; have no power to levy taxes, consequently, charging expenses to wards and precincts would be a futile act, for they could not pay the bill.

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

AS TO WHEN A COUNTY TREASURER SHALL BE ELECTED AND HOW LONG THE APPOINTEE SHALL HOLD THE OFFICE.

COLUMBUS, OHIO, September 20, 1901.

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

DEAR SIR: — It appearing from your communication of this date that the treasurer of Hancock County having died recently and within a few days after entering upon his second term, and said office being now filled by appointment by the county commissioners, the question is presented, when should a treasurer be elected in said county, and how long will the person now holding the office by appointment, be entitled to fill the same?

An examination of the various sections of the statutes relating to filling vacancies in the office of county treasurer, renders an extended discussion of these questions unnecessary.

Section 8, R. S., provides that any person holding an office or public trust shall continue therein until his successor is elected or appointed and qualified.

Section 1079 provides that a county treasurer shall be elected biennially in each county at the fall election, and fixes his term of office at two years, beginning on the first Monday of September next after his election.

Section 1082 merely provides that in case of a vacancy in the office of county treasurer, the county commissioners shall appoint some suitable person to fill such vacancy. Nothing is said in this section relating to the length of time such appointee shall be entitled to occupy said office, nor is there anything said as to the election of a treasurer to fill a vacancy, or for an unexpired term. This renders it necessary to recur to Section 11, R. S., to determine when a successor should be elected to said office.

This section provides that when an elective office becomes vacant and is filled by appointment, the appointee shall hold the office till his successor is elected and qualified, and such successor shall be elected at the first proper election that is held more than thirty days after the occurrence of the vacancy. "The first proper election" is the regular fall election occuring more than thirty days after the vacancy in such office.

See Ohio Constitution, Article 10, Section 2.
State vs. Barbee, 45 O. S., 347.
State vs. Slough, 12 C. C., 105.
State ex rel. vs. Hadley, 59 O. S., 167.
Sec. 1079, R. S.

The vacancy in the office of county treasurer of Hancock County occurring more than thirty days before the regular fall election of 1901, it follows from the above cited authorities that the election of a county treasurer should be held in that county at said November election. Nothing being said in the statutes about electing a county treasurer for an unexpired term, it follows that the treasurer elected must be elected for a full term of two years, and as the term of office of county treasurer is fixed by statute to begin on the first Monday of September next after his election, it follows that the present appointee would be entitled to occupy the office until the first Monday of September, 1902, or until his successor is elected and qualified, which election and qualification cannot be earlier than said date.

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

LOTS APPRAISED AT LESS THAN $10.00 SHOULD BE PLACED UPON THE DUPLICATE AT THAT SUM.

COLUMBUS, OHIO, September 27, 1901.

A. E. Jacobs, Prosecuting Attorney, Jackson, Ohio:

MY DEAR SIR: — Yours of September 21st came duly to hand. Owing to press of other matters, I could not give it immediate attention.

You inquire, whether, under the provisions of Section 2819, R. S., the county auditor is required to place all lots appraised at less than $10.00 on the tax duplicate for that sum, or whether he shall drop from the tax duplicate all appraised under $5.00 and place all over $5.00 upon the duplicate at $10.00.

The statute in question requires that the auditor shall add or subtract such sum under $5.00 from the appraised value of each parcel of land as will make its value $10.00, or some multiple thereof. It is true, the sum thus required

to be added or subtracted is less than $5.00 so as to make the value of the tract $10.00 or some multiple thereof, yet, the law also provides that each tract of land must be at least $10.00. So that it appears to me that to drop the lots appraised at $5.00 or under from the duplicate, would not be a compliance with the statute. The constitution requires that all property, both real and personal, must be taxed, and that, at a uniform rate, and the statute does not contemplate that any property shall escape taxation except that expressly exempted by the provisions of the constitution. Hence, I am inclined to the view that each parcel of land appraised at less than $10.00, should be put upon the duplicate by the auditor at that sum.

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

CLASSIFICATION OF RISKS.

COLUMBUS, OHIO, October 5th, 1901.

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

MY DEAR SIR:—In your communication of October 3rd, you submit to this office the following questions for answer:

> 1. Can a Mutual Protective Association, organized under Section 3686 et seq., R. S. of Ohio, classify the risks insured with respect to the hazard of such risk?
>
> 2. Can such associations collect assessments in advance of actual loss?

Such associations are bodies corporate, and possess in addition to the powers specifically conferred by the statute, all such implied powers as are necessary to carry into effect the powers specifically granted, or to accomplish the purposes of the corporation. This principle is so well established, that it is needless to cite authorities.

The purpose or object for which such associations are incorporated is to enable its members

> "To insure each other against loss by fire and lightning, cyclones, tornadoes, or wind storms and other casualties, and to enforce any contract which may be by them entered into, by which those entering therein shall agree to be assessed specifically for incidental purposes, and for the payment of losses which may occur to its members."
>
> Section 3687, R. S.

More concisely stated, the purpose of such an association is to insure its members against loss. And in affecting this purpose, such associations are specifically authorized to

> "Make, assess and collect upon and from each other, such sums of money from time to time as may be necessary to pay losses;" and,
>
> "To regulate the assessment and collection of such sums of money by the constitution and by-laws of the association."

And further power is conferred

> "To enforce any contract which may be by them entered into, by which those entering therein shall agree to be assessed specifically for incidental purposes, and for the payment of losses which occur to its members."

The enumeration of these specific powers, however, in no way precludes the use and enjoyment by the association of such implied powers not inconsistent with those specifically enumerated, as may be necessary to successfully accomplish the purpose of the corporation.

The business of insurance is much older than the statute under consideration. It is believed that it is an almost uniform custom in this business to classify the risks taken, not only with respect to the value of the property insured, but also with respect to the hazard of the risk, or its liability to loss by the contingency insured against. Indeed, it is not easy to understand how the business of fire insurance could be conducted with fairness and equality among the insured, without such classification. The man whose property is worth $1,000, or is insured for that amount, under any equitable plan of insurance, will certainly be required to pay more for his indemnity than he whose property is only insured for $100. The same considerations of justice and fair dealing would require that a man whose chance of loss might be estimated as one to ten, should pay more in proportion to the amount insured, than he whose chance of loss would only be as one to one hundred. These distinctions of value and hazard are fundamental in the business of insurance. They enter into every insurance contract. They cannot be disregarded without gross injustice and inequality among the insured. When the Legislature authorized persons residing within the State

> "To insure each other against loss."

it must be presumed to have intended that such persons should have a right to enter into contracts which would be just and equitable, and in conformity with the usual principles recognized in such business. It was not necessary that the power to make the distinctions above pointed out should be specially conferred upon such associations. They possess such powers as a necessary incident to the right to make insurance contracts. When the right to "insure each other" was conferred upon such associations, it carried with it the power to do an insurance business in the manner in which such business was usually done, except in so far as that power was restrained by the provisions of the statute. Starting with the proposition that the members of such associations are authorized to insure each other against loss, the question is not, what additional powers are conferred, but rather what limitations or restrictions are imposed upon this power. Finding no restriction in the statute in relation to the classification of risks, I am of the opinion that associations organized under this section may classify their risks in the particulars above pointed out.

To avoid any possible misunderstanding, I add that this classification cannot be extended to a division of the members of an association so that a member would only be liable to contribute to the payment of losses occurring in his class. There can only be one class of members with mutual obligations and rights. Each member of such an association has a right to call upon every other member of the association to contribute to the payment of any loss, and each member is under corresponding obligations to contribute to the payment of any loss sustained by any other member.

But this does not prevent the association from adopting rules and regulations by which the amount to be paid by each member shall be determined by the amount of his insurance and the respective hazard of his risk.

In this connection my attention has been called to an opinion rendered by Attorney General Richards to your department under date of February 26, 1895, in which the following language is used:

> "There is no authority in these sections for a classification of members, for discrimination between members, for saying that a certain set of members shall be assessed more than another set of members; all members stand under the statute on precisely the same footing, liable to be assessed specifically for incidental purposes and for the payment of losses occurring to any of the members of the association. * * * *
>
> "Such association cannot legally require the payment of what it terms "a membership fee," graduated according to the hazard of the risk, or with reference to an adopted tariff of rates, and then base subsequent assessments on such membership fee."

The learned Attorney General does not attempt to give any reasons for these conclusions, and so far as may be judged from a reading of the entire opinion, he was especially considering the question of the manner in which such associations should provide the necessary funds to pay losses, whether from annual premiums, or from assessments. The views expressed in the language above quoted, seems to be but incidental to the discussion of the main question. In so far as these views conflict with the conclusions above stated, we think they are erroneous.

We can fully endorse, however, the conclusions reached by Attorney General Richards in the opinion above referred to with respect to the method by which the funds to meet losses are to be procured. He says:

> "I can understand how a reasonable fee, having no relation to the amount insured, but designed simply to cover the expense attending the entrance into the association of the new member, may properly be exacted; but the collection in advance of considerable sums of money for the purpose of paying losses and expenses, by whatever name the payment may be designated, whether annual deposit or membership fee, or what not, constitutes in effect in each case a cash premium. To permit the collection in advance of such sums upon policies or certificates of membership in these associations, is to offer the strongest inducement for their operation for the benefit of the officers and agents alone. Too often money thus received is for the most part applied to the expenses "of management"; a few pressing losses are paid and the others accumulate until finally the association winds up hopelessly insolvent."

Such associations are authorized to assess and collect upon and from each other, such sums of money from time to time as may be necessary to pay losses. The specific authority thus conferred to raise money by assessment, precludes the association from the power to raise money in any other way.

This subject, however, is so fully discussed by Judge Burket in his opinion in the case of State ex rel. v. Fire Association, 50 O. S., p. 148, that nothing further need be said on that question.

Very truly,

J. E. Todd,
Assistant Attorney General.

EXTENSION OF SEWER AT SOLDIERS' HOME AT SANDUSKY.

COLUMBUS, OHIO, October 8th, 1901.

Hon. George K. Nash, Governor of Ohio:

DEAR SIR:—I have the honor to acknowledge the receipt of your communication of October 4th, with enclosure.

The question submitted for answer is whether it is the duty of the State of Ohio or the City of Sandusky to extend the sewer connecting the Soldiers' Home at Sandusky with Sandusky Bay a sufficient distance into the bay to free it from its present unsanitary condition.

From the statement of facts submitted it appears that the City of Sandusky, in order to induce the State to locate the Soldiers' Home at that City, agreed to donate a tract of land upon which to build the Home, and also build a good and sufficient sewer from the grounds to the bay. The proposition was accepted, the land was donated, the sewer was built, and was accepted by the Board of Trustees of the Home as sufficient for the purpose; but, owing to the filling up of the bay, the sewer has, after some years of use, become unsanitary and needs to be extended farther into the bay.

There are two reasons why the city it not obligated to make the extension: The agreement to build the sewer, in the first place, was ultra vires, and could not have been enforced against the city. Second: Waiving that question, however, the city only agreed to build a sewer that would be good and sufficient at the time. This it did, or, at least, it was accepted by the Board of Trustees as good and sufficient. It did not agree to build a sewer that would be good and sufficient for all time to come. It has fulfilled the terms of its contract and is under no obligations to do more. Hence, it is my pinion that the duty devolves upon the State to extend the sewer.

Yours very truly,

J. M. SHEETS,

Attorney General.

RIGHT OF CUSTODIANS OF STATE PROPERTY TO PREVENT HUNTING ON SAME.

COLUMBUS, OHIO, November 5th, 1901.

Henry C. Eyman, M. D., Superintendent Massillon State Hospital, Massillon, Ohio.

DEAR SIR:—Your letter of November 1st, inquiring as to the right of the custodians of State property to prevent hunting upon the same, is at hand.

Section 6966, Revised Statutes, as amended April 16th, 1900 (94 O. L., 230), provides: "Whoever without having first received written permission from the owner or agent or the person having control of any lands, pond, lake or other private waters, except waters claimed by riparian right of ownership of adjacent lands, hunts upon the same," etc., "shall be deemed guilty of a misdemeanor," etc. I am unable to see any reason why this statute does not apply to the state lands as well as to the lands of private parties. The Board of Trustees are "persons having the control" of these lands, and written permission to hunt upon such lands would be necessary before any person would be authorized to do so. The game warden you refer to has probably been misled by the expression "private waters" used in this act. This term, "private waters," is used to distinguish the waters of the state over which the legislature has control from the public waters of Lake Erie, where the right of fishing and hunting is common

to all citizens, and outside of certain limits to the world, but whatever may be the construction of this statute as to "waters," there is no limitation in its application to "lands," and it applies with equal force to lands owned by the state as to other lands.

I am aware there is a familiar rule of construction of statutes to the effect that the State is not bound by a statute unless expressly named therein, but it is to be observed that this statute does not seek to bind the State; it imposes no right, duty, or obligation upon the State. It is directed to the citizens of the State and requires each citizen who desires to hunt upon the lands of another to obtain permission, hence, the rule above stated as to application of statutes does not apply in the construction of this statute. You are advised, therefore, that no person has a right to hunt upon the lands owned by the State and under your control, without first having obtained written permission from the Board of Trustees, or those in control of such lands.

Yours very truly,

J. E. TODD,
Assistant Attorney General.

PROPERTY OF ELECTRIC STREET RAILWAYS COMES WITHIN THE PROVISIONS OF SECTION 3643A.

COLUMBUS, OHIO, November 7th, 1901.

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

DEAR SIR: — In your letter of October 17th, you ask an opinion from this office as to whether insurance on property of electric street railway companies, or property of companies operating electric railways in municipalities, or property of companies operating so-called interurban electric railways, is exempt from the operation of the provisions of Section 3643a of the Revised Statutes, relating to co-insurance, by reason of the exception contained in said section, which provides, "That the provisions of this section shall not apply to railroad or marine insurance."

It is pertinent first to inquire, what is meant by "railroad or marine insurance"?

Marine insurance is well known. It is defined as:

> "A contract whereby one for a consideration agrees to indemnify another for loss or damage on a certain interest subject to marine risks by certain perils of the sea, or specified casualties during a voyage or fixed period." Joyce on Insurance, Section 3.

It is also defined in the Code of several of the States as follows:

> "Marine insurance is an insurance against risks connected with navigation to which a ship, cargo, freightage, profits or other insurable interest on movable property may be exposed during a certain voyage, or a fixed period of time." Anno. Civil Code of Cal., Section 2655.

The term "marine insurance" covers not only goods and merchandise in course of transportation, but also the vessel in which it is carried. It is applied exclusively, however, to movable property.

There seems to be no definition of "railroad insurance" in the books. It has not as yet been recognized either by text-book writers, legislators, or courts as a distinct class of insurance. From the fact, however, that the business of railroading is of the same general nature as that originally covered by marine insurance, to-wit, the carrying or transportation of goods, and the fact that in the section under consideration the legislature speaks of railroad and marine insurance as co-related terms, it would seem that the legislature had in mind, in making the exception above referred to, the general business of transportation of goods, and the insurance connected therewith. We would be justified, then, in considering railroad insurance as being of the same general nature as marine insurance. When so considered, it would include not only goods and merchandise in course of transportation, but also the cars and other movable property used in that connection. This class of property is readily distinguishable from the great bulk of property subject to insurance, which has a fixed *situs*. And whatever reason may have existed to lead to the exemption of property covered by marine insurance from the operation of the section under consideration, may, with equal force, be urged in favor of the exemption of all such movable property as is used in connection with the transportation of goods by rail.

Having thus determined what the legislature had in mind when it used the term "railroad insurance," we are ready to consider whether the term "railroad" is broad enough to include electric street and interurban railways.

It is true that in the Statutes of Ohio, a distinction is observed between railroads using steam as a motive power, and street railroads; and laws applicable to the one class of railroads are held not to apply to the other. But the provision of the section under consideration does not relate particularly to either class of railroads. It relates to the business of insurance, and I am unable to perceive any valid reason why it should be limited in its operation to insurance of property transported by a particular kind of railroad. It would be just as reasonable to say that because, when marine insurance first had its origin, it applied exclusively to insurance of sail boats and their cargoes, that it did not now apply to marine transportation by steam boats.

At the time this section was enacted, there were but few, if any, electric railroads in the State, excepting street railroads operating within the limits of a municipality. Now they are fast forming a network over the country, and are entering into formidable competition with steam lines, not only in carrying passengers, but also in the transportation of freight, express and mail. It is believed that it is in keeping with the growth and progress of the law, to hold that the provision under consideration applies to the new means of transportation as well as to the old.

It is to be observed, however, that the distinction between property covered by railroad or marine insurance, and all other property, lies in the nature and situation of the property, or use to which it is devoted, and not in its ownership. It is not the fact that property is owned by steamship or railroad companies that brings it within the purview of the exception under consideration, but it is the fact that such propery is *in transitu*, or is used in connection with the actual transportation of such property. As in marine insurance, it is only the movable property, such as ships, cargo, freightage, etc., that is covered by such insurance, so railroad insurance must be understood to be limited to the same class of property. Fixed, immovable property, such as depots, round houses, car barns, etc., although belonging to a railroad company, could not be included in the term "railroad insurance."

Very truly,

J. E. TODD,
Assistant Attorney General.

FEES OF CONSTABLES IN ATTENDANCE BEFORE JUSTICES OF THE PEACE AND CORONERS.

COLUMBUS, OHIO, November 12th, 1901.

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

DEAR SIR: — Your communication of November 8th, enclosing letter of E. M. Fullington, is at hand. The letter of Mr. Fullington requires a construction of that part of Section 622, R. S., which relates to the fees of constables in attendance before justices of the peace and coroners. The provision is as follows:

> "For each day's attendance before justice of the peace or jury trial, $1.00; for each day's attendance before justice of the peace on criminal trial, $1.00; for each day's attendance before justice of the peace in forcible detainer without jury, $1.00."

The precise question is whether such constable is entitled to $1.00 for each case tried before a justice of the peace, or whether, when several cases are tried the same day, the constable is entitled only to $1.00 for the day. This statute has been in operation in Ohio for nearly forty years, and it is believed that the uniform custom and practice of constables in charging fees under this statute, has been to charge $1.00 for each case, even where two or more cases have been tried the same day. This section was enacted at the same time with Section 621, R. S., fixing the fees of justices of the peace. In this section the fees of justices were unmistakably fixed at $1.00 for each case, the language of the original section being as follows:

> "For sitting in cases of forcible detainer, $1.00; for trying a jury case, $1.00."

This has since been amended until it now reads:

> "For sitting in the trial of any cause, civil or criminal, where a defense is interposed, whether tried to a justice or to a jury, $1.00."

The change of language between Section 621 and Section 622 is not broad enough to justify a different construction. In our opinion, the language employed in Section 622 means simply that for each day's attendance before justices of the peace in any trial, whether it be a jury trial or before the justice without jury, the constable is entitled for his attendance to a fee of $1.00; and if his attendance is required in more than one trial on the same day, he is entitled to charge his fee of $1.00 for each of such cases.

Very truly,

J. E. TODD,

Assistant Attorney General.

APPOINTMENT OF NOTARIES PUBLIC.

COLUMBUS, OHIO, November 14, 1901.

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

DEAR SIR: — Your communication of November 13th, enclosing letter of E. J. Foster, at hand. It appears from said letter that Mr. Foster resides in Lake County, but maintains an office and transacts his business as an attorney in the City of Cleveland, Cuyahoga County, and he inquires whether he can be commissioned as a notary public in and for said Cuyahoga County.

The appointment of notaries public in Ohio is governed by Section 110, R. S., which provides:

> "The governor may appoint and commission as notary public as many persons of the age of twenty-one years or over, who are citizens of this state, residing in the several counties for which they are appointed, as he may deem necessary. Provided, however, that citizens of this state of the age of twenty-one years or over whose post-office address is a city, village or hamlet situated in two or more counties in this state, may be appointed and commissioned for all of said counties within which said city, village or hamlet is situated."

It appears from this section that the qualifications requisite for appointment as notary public are: First: That the applicant be twenty-one years of age; Second: A citizen of the state, and Third: Residing in the county for which he is appointed.

The holding of our courts that a notary public is an officer, makes the provision that he should reside in the county in which he is appointed, a most wise and reasonable one. The only exception to the qualification of residence is to be found in the provision, that where the post-office address of the applicant is a city, village or hamlet, situated in two or more counties, he may be appointed and commissioned for all of said counties in which said city, village or hamlet is situated.

The case stated by Mr. Foster does not fall within the exception. The City of Cleveland does not extend into Lake County. The mere fact that Mr. Foster has an office in a city in a county different from the one in which he resides, is not sufficient under the statute to authorize his appointment as notary public in such county. All the provisions of the statute relating to the recording of the commission, the disposition of his official register at the expiration of his term, his powers and duties, are in accord with the idea that he can only be appointed for the county in which he resides.

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

DOW TAX ASSESSMENTS.

Columbus, Ohio, November 14, 1901.

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

Dear Sir: — Your letter of November 12th, at hand. You inquire first, should the business of trafficking in intoxicating liquors be commenced after the fourth Monday of May, and prior to the expiration of the first half of the "liquor year," would it be lawful for the auditor to receive from the applicant the proportionate amount of tax due from the time of so beginning to the expiration of the half year, or would he be required to receive the whole amount of tax which would be due for the balance of the year. It is provided by Section 3 of the Dow Law, (4364-II, R. S).

> "That when any such business shall be commenced in any year after the fourth Monday of May, said assessment shall be proportionate in amount to the remainder of the assessment year, * * * and be paid within ten days after such commencement."

This language appears clear and unambiguous. The assessment is a proportionate assessment for the remainder of the year, and the entire amount of such proportionate assessment is required to be paid within ten days after the commencement of such business.

The provisions of Section 2 of the Dow Law relate to the yearly assessment, and provide the times of payment when such business continues throughout the year. But the provisions of this section have no relation to the proportionate assessments, when the business is commenced after the beginning of the year, but the payment of such proportionate assessments is controlled entirely by Section 3 of the Dow Law. A different construction might enable a person to commence the business of trafficking in intoxicating liquors a few days before the expiration of the half year, and by paying the proportionate amount for the half year, he might conduct such business for a few days, and then quit without having paid to the county the minimum assessment on such business, to-wit: $25.00. There is, however, no authority for a proportionate assessment for the half year, but as above pointed out, the proportionate assessment is for the remainder of the year, and must all be paid within ten days after the commencement of such business.

You further inquire, whether a refunding order can be issued for an amount less than $50.00 under the provisions of Section 3 of the Dow Law. This section provides that when any person who has been assessed and who has paid or is charged upon the tax duplicate with the full amount of said assessment, discontinues such business, the county auditor shall issue a refunding order for the proportionate amount of said assessment, "except that it shall be in no case less than $50.00."

It is my opinion that the limitation contained in this exception relates to the amount of the assessment, and not the refunding order. In the former part of the section, the minimum amount that can be received by the county when such business is commenced after the beginning of the year, is fixed at $25.00. The statute as originally enacted, did not contain the exception above noted. Under the statute as it then stood, the business might be commenced one day and the proportionate assessment paid, and the next day, said business might be discontinued and the refunding order for the proportionate amount of the assessment issued, which would leave to the county only the amount of the assessment for a single day. To remedy this discrepancy in the law, the exception found in the last clause of this section was added in 1888.

In view of the history of this legislation, I think it is manifest that the legislature had in mind the amount of assessment that should be retained, rather than the amount of the refunding order, and I am of the opinion therefore, that when the full amount assessed has been paid, or stands charged against such business, that a refunding order should not issue for an amount that would reduce the balance of said assessment to a sum less than $50.00.

You further inquire, whether the provision of Section 1230*b*, R. S., that sheriffs attending before a judge or court shall receive fifty cents, entitles such sheriff to charge said fee of fifty cents each time a prisoner is brought into court for arraignment, trial and sentence, or whether the charge is to be made but once for each prisoner. The charge is not for a case, but is for attendance in court, and the sheriff would be entitled to his fee for each attendance, and if required to attend with the same prisoner on different days, he would be entitled to his fee for each attendance.

Your fourth question relates to fee of the sheriff for copies of criminal subpoenaes. I am unable to find any authority in said section for such charge.

Very truly,

J. E. Todd,

Assistant Attorney General.

COMMISSION OF NOTARY PUBLIC.

COLUMBUS, OHIO, November 18, 1901.

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

DEAR SIR: — Your letter of November 16th, enclosing letter of I. A. Webster, at hand. It appears from Mr. Webster's letter that he holds two commissions as notary public, one expiring December 1, 1901, and the other, November 27, 1902. He further states in his letter that upon receipt of the second commission that he subscribed and took the oath required by the statute, and had his commission duly recorded, and he inquires whether he is entitled to act as notary public under said second commission until it expires.

Section 112, R. S., provides that each notary public duly appointed and commissioned, shall hold his office for the term of three years, unless his commission shall be revoked. There does not seem to be anything in the circumstances stated in Mr. Webster's letter to revoke either of his commissions. The fact that he already held a commission as notary public when the second commission was issued, would not in any way affect the validity of either commission. A portion of the time covered by each commission is also covered by the other. This would not render either commission invalid, but might present a question in case of official misconduct as to which set of bondsmen were liable. That question, however, is not presented here, and I am of the opinion that each commission is valid for the period of three years from its date.

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

PRINTING OF QUESTIONS BY COUNTY SCHOOL EXAMINERS.

COLUMBUS, OHIO, November 18, 1901.

M. Cahill, Prosecuting Attorney, Eaton, Ohio:

DEAR SIR: — Your letter of November 16th, at hand. You inquire whether the county auditor, under the provisions of Section 4075, R. S., should print the lists of questions used by the county school examiners, or whether said school examiners should have said lists printed as a part of the expenses of the examination. There seems to be no clear provision of the statute in relation to printing the lists of questions used by the county examiners. The reason for this doubtless lies in the fact that some years ago the legislature passed an act providing for a uniform system of examinations, and in said act provided that the questions should be prepared and printed by the State Board of School Examiners and the State School Commissioner. (See Section 4071*a*, R. S.) This act, however, has never been operative for the reason that no appropriation has ever been made by the legislature to bear the expenses of the preparation, printing and mailing of such lists of qustions. Hence, it is left to each county board of examiners to provide its own questions for examination.

In view of the absence of any express provision that the county auditor should provide for the printing of said lists of questions, I am of the opinion that such lists should be printed by the board of examiners.

I do not think that the printing of these lists is included in "books, blanks and stationery," which is required to be furnished by the county auditor. Their printing is a separate matter, not specifically provided for by the statute, but which is necessary to be done in order to carry out the purposes of the statutes,

and certainly the proper persons to have charge of the printing of such lists are the board of examiners who prepare the lists and are responsible for their proper care and use. The expenses of printing such lists should be paid as the other expenses of the examinations.

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

DISPOSITION ON MONIES COLLECTED ON FORFEITED RECOGNIZANCES.

COLUMBUS, OHIO, November 26th, 1901.

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

DEAR SIR: — I have before me your communication of November 16th, enclosing letter of Dr. Frank Winders, Secretary of the Ohio State Board of Medical Registration and Examination, and letter of Southard and Southard, Attorneys, at Toledo, Ohio.

These letters moot the question as to what disposition should be made of the money recovered on forfeited recognizances in prosecutions for the violation of the statute relating to medical registration and examination. It is stated in the letter of Dr. Winders that "it is a common occurrence for parties who are charged with the illegal practice of medicine to waive examination before the Justice of the Peace, to be bound over to the grand jury, and to forfeit the bond."

I find nothing in the statute to separate recognizances taken in this class of cases from those taken in other criminal matters. By virtue of the provisions of Section 7181 et seq., forfeited recognizances are to be returned to the County Auditor, who, after making a record of the same, is required to deliver them to the Prosecuting Attorney, whose duty it is to prosecute all such recognizances by civil action for the penalty thereon. Section 1273 makes it the duty of the Prosecuting Attorney "to forthwith pay over to the Couny Treasurer all monies belonging to the State or County which come into his possession for fines, forfeitures, costs, or otherwise." These statutes are as applicable to forfeited recognizances in prosecutions brought for violation of the statutes relating to medical registration and examination, as to recognizances taken in any other manner. The provisions of Section 4403g, which, after prescribing the fines that may be imposed for violation of the medical statutes, and that "such fines when collected, shall be paid, one third to the person or medical society making the complaint or the party furnishing the information, one third to the county poor fund, and one third to the State Board of Medical Registration and Examination," relate exclusively to fines and not to the amount recovered on forfeited recognizances. I am unable to find any authority for making a similar distribution of the monies received from such forfeitures. I am,

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

POWER OF BOARD OF PUBLIC WORKS TO LEASE BERME BANK OR TOWING EMBANKMENT OF CANALS.

COLUMBUS, OHIO, November 27th, 1901.

The Board of Public Works, Columbus Ohio:

GENTLEMEN: — In response to the request of Mr. Goddard, I have examined the statutes in relation to the power of the Board of Public Works to lease any portion of the berme bank or towing path embankment of the canals of the State for railroad or other purposes. A very full discussion of the powers of the Board of Public Works in relation to the leasing of the canals is found in 37, O. S., Report, page 157, in the case of the State of Ohio ex rel. v. The Cincinnati Central Railway Company. In discussing the powers of the Board of Public Works, Judge Johnson said:

> "The Board of Public Works possesses no powers except such as are expressly conferred by law, or as are necessarily implied, the purpose of which is to perfect, render useful, maintain, keep in repair and protect and make the canals useful as navigable highways.
>
> * * * * *
>
> "The most cursory examination of the numerous provisions of law relating to the public works of the State will show, that while the Legislature has freely granted the largest powers to the Board for this purpose, it has at the same time, by regulations, prohibitions and penalties, sought to guard this property from all encroachments, individual or corporate, and to prevent the acquisition of rights or easements in the canal or its banks except by express authority of laws passed for that purpose. The Board of Public Works possesses no power to grant rights, easements or privileges for private advantage, unless expressly authorized by law. The statutes authorizing the abandonment or sale of certain sections of the canals, the transfer to railroads and cities for their purposes, of other sections, the permission granted by statute to use the berme bank in certain instances, the leasing of the canals, the leasing of surplus water, the sale of ice, and the restrictions as to crossing by public roads, and by railroads, all show that the Board in the opinion of the Legislature possessed no implied power to grant rights and privileges, or to create easements or burdens upon this public property in favor of individuals or corporations. In each of these cases express authority was conferred by statute."

It being clear that the Board of Public Works has no powers except such as are conferred by statute, the only question to be determined, is, to what extent the statutes have authorized the leasing of the banks of the canals. This involves an examination of all the acts of the General Assembly in relation to the leasing of canal lands.

Thus, the act found in the 80th volume of Ohio Laws at page 215, authorizes the lease to the Cincinnati, Hocking Valley and Huntington Railroad Company for the purpose of constructing and maintaining a railroad thereon, a portion of the berme bank of the Ohio Canal in Ross County. Also, the act found in 92, O. L., page 7, authorizes the lease of a portion of the embankment of the Miami and Erie Canal in the City of Troy to the Troy Wagon Works Company.

Also, the act found in 93 O. L., page 370, authorizes the lease of the berme bank, etc., to make experiments with electricity as a motive power for the propulsion of canal boats. Also, the act found in 85th volume of Ohio Laws, page 139, authorizes the lease of the berme bank of any canal basin or reservoir for the purpose of laying a line of pipe to transport oil or gas from the natural oil or gas fields for manufacturing purposes. Also, the act found in 79 O. L., page 91, authorizes the lease of a portion of the towing path of the Ohio Canal in Scioto County to the Cincinnati and Eastern Railway Company.

There may be other similar laws which I have not noted, but no general law authorizing the lease of any portion of the berme bank or towing path embankment of the canals of the State is found prior to the enactment of April 16, 1900, found in 94 O. L., 345, which act amends section 218-225 of the Revised Statutes and authorizes the Board of Public Works, the Canal Commission and the Chief Engineer of the Board of Public Works to lease

> "Any part of the berme bank of any canal, canal basin, reservoir, or out-slope of the towing path embankment, which said commission shall find to be the property of the State of Ohio, the use of which, in the opinion of said Commission, the Board of Public Works, and the Chief Engineer of the Public Works, if leased, would not materially injure or interfere with the maintenance and navigation of any of the canals of this State."

Such lease may be for any purpose or purposes other than for railroads operated by steam.

This is the first general provision I have been able to find authorizing the leasing of the berme bank or towing path embankments of the canals. Any and all leases made by the Board of Public Works prior to the enactment of this statute, to-wit, April 16th, 1900, must depend for their validity upon some special act authorizing such lease, and if no act be found specially authorizing such lease, then the lease being in excess of the power of the Board of Public works is invalid and void.

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

EXPENSES OF GENERAL AND SPECIAL ELECTIONS.

Columbus, Ohio, November 27, 1901.

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

Dear Sir: — I am in receipt of your communication of November 23d, seeking an opinion upon the following statement of facts:

It becomes necessary at each election to rent a number of voting places in the city of Tiffin, and a controversy has arisen between the city and the Board of Deputy State Supervisors of Elections what portion of these expenses, including the care and handling of booths and ballot boxes, the city should pay.

Section 2966-27 of the Revised Statutes of Ohio provides:

> "All expenses arising for printing and distributing ballots, cards of explanation to officers of the election and voters, blanks, and all other proper and necessary expenses of any general or special election, including compensation of precinct election officers, shall be paid out of the county treasury as other county

expenses; but, except in the case of November elections shall be a charge against the township, city, village, or political division in which such election was held, and the amount so paid by the county, as above provided, shall be retained by the county auditor from the funds due such township, city, village, or political sub-division at the time of making the semi-annual distribution of taxes."

Section 2966-33 provides that the booths and ballot boxes shall be in the care of the clerk of the municipality or township in which the precinct is situated, whose duty it is to have the booths and ballot boxes on hand and in place at each election before the hour of opening the polls. For which services the Deputy State Supervisors may allow him his necessary expenses.

There are no other provisions that I am able to find, bearing upon this question. Hence, it is clear to me that all expenses incident to holding the annual November elections should be borne by the county; April and special elections in which the city alone is interested should be borne by the city of Tiffin.

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

RIGHT OF COUNTY COMMISSIONERS TO COMPROMISE LITIGATION.

COLUMBUS, OHIO, November 30th, 1901.

C. R. Hornbeck, Prosecuting Attorney, London, Ohio:

DEAR SIR: — Yours of November 29th at hand and contents noted. You inquire whether under the provisions of Section 555, R. S., the board of county commissioners may compound or release a debt due the county from an ex-county official on account of illegal fees drawn from the county treasury by such official. I apprehend that you meant to refer to Section 855, as Section 555 has no bearing upon the subject. Assuming that to have been your intention I answer your inquiry upon that basis.

The bonds of county officials are made payable to the State, and when an action is prosecuted on one of them it must be prosecuted in the name of the State, and judgment rendered for the State although the money, when paid, is required to be paid into the county treasury. Sec 10 O. S., 515; 25 O. S., 567; 32 O. S., 421; R. S., Sections 4994 and 4995.

The commissioners not being proper parties to an action on such bonds it would hardly seem that the law contemplated that they should be at liberty to control this class of cases. I am unable to find any direct adjudication upon the subject except the case of ex parte Moore, 14 C. C., page 241, where it was held that a fine made payable to the State cannot be compounded or released by the county commissioners under the provisions of Section 855, R. S., although the money when collected was required to be paid into the county treasury.

Hence, I am inclined to the view that Section 855 does not authorize the commissioners to compound the class of claims mentioned in your letter.

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

INCOMPATIBLE OFFICES.

COLUMBUS, OHIO, November 30, 1901.

Hunter S. Armstrong, Prosecuting Attorney, St. Clairsville, Ohio:

DEAR SIR: — Yours of November 25th, seeking an opinion from me as to whether the same person may hold the office of clerk of the common pleas and circuit courts, and that of supreme court at the same time, is at hand. The answer to this inquiry depends upon the solution of two questions.

First: Is there a statutory or constitutional provision in the way?

Second: Are these offices incompatible so that they cannot be held by the same person at the same time?

First: Upon a careful examination of the constitution and the statutes I find that there is neither a constitutional nor a satutory provision, making the same person ineligible to hold these two offices at the same time.

Second: That a person cannot at the same time hold two offices that are incompatible is a well recognized principle of common law. The question for solution then is: Are these two offices incompatible?

> "Where one office is not subordinate to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not that imcompatibility from which the law declares that the acceptance of the one is a vacation of the other."
>
> Throop on Public Officers, Section 34.

Incompatible offices "must be subordinate, one to the other, and they must *per se* have a right to interfere, one with the other, before they are inconsistent at common law." People vs. Green, 58 N. Y., page 295.

If this definition of incompatible offices is correct, then the two offices named in your letter are not incompatible. In so far as I have examined the decisions they bear out the definition above quoted. The office of clerk of the supreme court and that of the common pleas and circuit courts are each independent of the other, and neither has the power to interfere with the other, hence, in my opinion, are not incompatible.

It was held in State vs. Moore, 48 Mo., 242, that the offices of county clerk and clerk of the circuit court were not incompatible and that the same person might hold both offices. That case, in my opinion, involved exactly the same principle as that presented in your letter of inquiry.

The Statute of Ohio provides that the clerk of the court of common pleas shall be ex-officio clerk of the circuit court. The circuit court is an appellate and superior court to that of the common pleas as the supreme court is to that of the circuit. Evidently the legislature did not consider the offices of clerk of the common pleas and circuit courts to be incompatible or it would not have provided that the same person should hold both offices.

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

COSTS OF COMMITTING AN INMATE OF SOLDIERS' AND SAILORS' HOME TO INSANE ASYLUM, A PROPER CHARGE AGAINST THE HOME — INMATES LEAVING HOME TEMPORARILY.

COLUMBUS, OHIO, December 3rd, 1901

Hon. George K. Nash, Governor of Ohio:

DEAR SIR: — I have the honor to acknowledge receipt of yours of recent date, enclosing a letter of inquiry from General Thomas M. Anderson, the Commandant of the Ohio Soldiers' and Sailors' Home, in which he requests an opinion upon the following questions:

> First. Where an inmate of the Home is declared insane, and is transferred to the insane asylum are the costs thus incurred a proper charge against the Home?
>
> Second. Where a person has been declared insane, and has been sent to an insane asylum, are there any circumstances under which he may be permitted to leave the institution on probation, subject to be returned without another proceeding in the Probate Court?

As to the first question, Section 674-10, R. S., provides that where an inmate of the Soldiers' and Sailors' Home becomes insane the Probate Judge of the county in which the Home is located may determine the question of the sanity of such person, and the costs incidental to such hearing shall be

> "Paid out of the appropriation paid by the State of Ohio for the support of the Soldiers' and Sailors' Home."

Hence, I am clearly of the opinion that the costs are a proper charge against the Home.

As to the second inquiry, Section 709, R. S., provides that

> "In the case of any patient having no known homicidal or suicidal propensities, the superintendent is authorized, whenever he deems the best interests of such patient to require it, to permit said patient to leave the institution on a trial visit, not in any case to exceed ninety days, the patient being returnable at any time within that date, should such return be necessary, without further legal proceedings."

This is the only provision that I am able to find bearing upon the question of permitting a patient to go beyond the confines of the institution on probation, and to that extent only, in my judgment, may a patient be permitted to leave the institution temporarily. If discharged as cured, before a patient can be readmitted at the insane institution, there must be a hearing before a Probate Judge.

Very truly,

J. M. SHEETS,

Attorney General.

RIGHT OF INVESTMENT COMPANIES TO DO BUSINESS WITHOUT DEPOSITING $100,000.

COLUMBUS, OHIO, December 4th, 1901.

Hon. Roscoe J. Mauck, Supervisor of Bond Investment Companies:

DEAR SIR: — Yours of December 2nd at hand and contents noted. You request on opinion from this office as to whether a bond investment company which was doing business in Ohio prior to the amendment of the bond investment act, April 14, 1900 (94 O. L., 147), but whose license to do business in Ohio was revoked March 27, 1901, because its business was in violation of law, may now, after satisfying its obligations, leave on deposit with the Treasurer of State $25,000 and proceed to transact a lawful business in the State without depositing the $100,000 required in the amended act of companies coming into the State after the date of its enactment. In my opinion they cannot.

Section 1 of this act provides:

> "That every corporation, partnership and association, other than a building and loan company, which shall hereafter commence, in this State, the business of placing or selling certificates, bonds, debentures, or other investment securities of any kind or description, on the partial payment or installment plan, and every investment guaranty company doing business on the service dividend plan, shall, before doing business in Ohio, deposit with the State Treasurer one hundred thousand dollars in cash or bonds of the United States, or of the State of Ohio, or of any county or municipal corporation in the State of Ohio, for the protection of the investors in such certificates, debentures or other investment securities."

That companies might under the provisions of the act of April 25, 1898, (93 O. L., 401), or under the provisions of the amended act of April 14, 1900, proceed in a lawful manner to engage in business in the State there can be no question. In contemplation of law they were not engaged in business in this State under the provisions of the act of April 25, 1898, unless they were engaged in a *lawful business.* The statute did not authorize them to engage in an unlawful business, hence, the provisions of Section 1 of the act of April 14, 1900, exempting all companies that engaged in "such business in the State of Ohio" from the operation of the act, requiring the deposit of $100,000 could have no application to any company that engaged in an unlawful business. These companies were driven from the State because they were engaged in an unlawful business, and they now stand in the same relation to the State as though they never had been engaged in any business within the State. If they now wish to commence "in this State, the business of placing or selling certificates, bonds, debentures or other investment securities * * * * on the partial payment or installment plan," they must come in under the act of April 25, 1900, and comply with all its provisions.

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

RIGHT OF COMMISSIONER OF LABOR STATISTICS TO ENTER ESTABLISHMENTS IN THE PERFORMANCE OF HIS DUTIES.

COLUMBUS, OHIO, December 6th, 1901

Hon. M. D. Ratchford, Commissioner of Labor Statistics:

DEAR SIR: — I have the honor to acknowledge the receipt of your communication of December 5th. You seek an opinion from me upon the following state of facts: Certain women were appointed by you as special agents for your department, for the purpose of collecting "statistics from the working women and girls of our larger cities, with respect to their occupations, nativity, age, number of weeks' work during the year, number of weeks idle, weekly wages, number of dependents, living expenses, etc." That in a number of instances when these women sought admission into factories during working hours for the purpose of performing their duties, they were refused admission by the proprietors, and in some cases admission was refused even at the noon hour.

The question now arises whether the authorized representatives of the Commissioner of Labor Statistics have a right to enter an industrial establishment to collect statistics directly from the persons employed therein.

Section 308 of the Revised Statutes provides that the Commissioner of Labor Statistics "shall collect, arrange and systematize all statistics relating to the various branches of labor in the State and especially these relating to the commercial, industrial, social, educational and sanitary condition of the laboring classes."

This Section also provides that the Commissioner shall establish in certain cities named, free employment offices, and shall appoint a superintendent for each of such offices thus created. The duties of these superintendents are prescribed by this section, among which are "to perform such other duties in the collection of labor statistics as said Commissioner shall determine."

Section 309 of the Revised Statutes provides that any "owner, operator, manager, or lessee of any factory, workshop, warehouse, elevator, foundry, machine shop, manufacturing or other establishment, or any agent or employe of such owner, operator, manager or lessee who shall refuse said Commissioner admission therein, for the purpose of inspection * * * * shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than $50 nor more than $500."

It thus appears that the Commissioner of Labor Statistics, or the superintendent of any free employment office, at the request of such Commissioner, has a right to enter any industrial establishment at all seasonable times to gather statistics of the character named in your letter. In order to gather the statistics, which the Commissioner is authorized to gather, it frequently becomes necessary to enter these establishments during working hours to inspect them and to get needed information from the employes. Hence, it is clearly my opinion that a refusal on the part of the owners or managers of any industrial establishment named in the statute, to permit the Commissioner of Labor Statistics or any superintendent of a free employment office to enter his establishment, even during working hours, to gather such statistics, is an infraction of the law and he may, upon conviction, be fined in any sum from $50 to $500.

Very truly yours,

J. M. SHEETS,
Attorney General.

ALLOWANCE TO PROSECUTING ATTORNEY.

COLUMBUS, OHIO, December 10th, 1901.

C. A. Reid, Prosecuting Attorney, Washington C. H., Ohio:

DEAR SIR: — Yours of December 7th came duly to hand. Your inquiry requires an answer to the following questions:

> First. Can the County Commissioners, under the provisions of Section 1274, R. S., make an allowance to the Prosecuting Attorney, quarterly, for advice to the county officers, or must they wait until their December session and make the allowance then for the entire year?
>
> Second. The County Commissioners having made the quarterly allowance, at their December session, confirmed their previous action, made the allowance for the whole year, ordered the amounts already paid to be credited upon the whole allowance, and ordered the balance to be paid to the Prosecutor. This, however, having been done without the Prosecuting Attorney having filed with the Commissioners a statement in writing of the amount and character of the services rendered, was the action of the Commissioners illegal, and must the Prosecuting Attorney pay back the money so received?

As to the first question: Section 1274, R. S., provides:

> "The Prosecuting Attorney shall be the legal adviser of the County Commissioners and other County Officers and each of them may require of him written opinions or instructions in any matters connected with their official duties and for these services the County Commissioners shall, annually, at their December session, make him such allowance as they think proper."

That the Commissioners cannot legally, by resolution or otherwise, determine in advance what sum the Prosecuting Attorney shall receive for his services rendered under the provisions of this section is clear. The Commissioners are required to make the allowance at their December session — not before. The reason is plain. They cannot tell in advance what sum the Prosecutor will earn they cannot tell the services that will be required of him under the provisions of this section during the year. Hence, the reason of the requirement that the allowance shall be made at the December session, after the services have been rendered. In so far, however, as I am familiar with the custom of the Commissioners of the different counties, I will say that it has been otherwise. Some allow the Prosecutor monthly sums, others quarterly sums, but I think all of these allowances are premature.

As to the second question: This question involves two inquiries. First. Whether the Commissioners may, at their December session, confirm their previous action, and make the allowance for the whole year, — and, Second. If they can do so, is it necessary, in order to give them jurisdiction to make the allowance, that the Prosecuting Attorney shall have filed with them an itemized statement of the services rendered, for which he seeks such allowance?

There can be little doubt that the Commissioners may, at their December session, make an allowance for the whole year and order the payments prematurely made upon the payment allowed credited upon the whole

sum allowed. At their December session they have full authority to act, and the fact that they attempted to act prematurely does not take from them the power to act at the time the statute gives them authority to act. Nor is an itemized account necessary in order to give the Commissioners jurisdiction. The statute does not require the Prosecuting Attorney to file an account. In so far as the Prosecuting Attorney has rendered services to the Commissioners they have personal knowledge, and in so far as he has rendered services to the other county officers the Commissioners may inform themselves through those officers and the Prosecuting Attorney himself.

While it would not be improper for the Prosecuting Attorney to file an itemized statement of the services he claims to have rendered, yet as the statute does not exact it, it cannot be required and the action of the Commissioners cannot be attacked for failure to file such an account. Hence, it follows, as a matter of course, the Prosecuting Attorney need not pay back into the treasury the sums he has thus received.

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

LEGALITY OF COMMITMENT OF ALICE DEWEESE AND LILLIAN MARTIN TO THE GIRLS' INDUSTRIAL HOME.

COLUMBUS, OHIO, December 11th, 1901.

Hon. A. W. Stiles, Superintendent Girls' Industrial Home, Delaware, Ohio:

DEAR SIR: — In examining the papers relating to the commitment of Alice DeWeese and Lillian Martin to the Industrial Home by the Probate Court of Licking County, a peculiar state of facts are found. Two sets of papers are furnished with each case, both certified to by the Probate Judge as being correct transcripts of the records and orders made in his court, and yet the two are so widely different that it is impossible that they could be a copy from the same record. Which of them is a correct copy of the records of that court, if either, or whether any record at all exists, is a question which I am not able to determine. I shall assume, however, that the set of papers in each case, marked "second set copies," is a correct transcript of the record, if either set are correct, and consider only this set of papers.

In the case of Alice DeWeese, the affidavit of David J. Jones alleges:

> "That Alice Deweese, late of said county is a child between the age of eight and six teen years, residing in the City of Newark, county of Licking and State of Ohio; that she is engaged in no regular employment; is an habitual truant from school, and is incorrigible, vicious and immoral in conduct, and habitually wanders about the streets and public places during school hours, having no busines or lawful occupation, and is, under the provisions of the truancy act, a juvenile disorderly person."

In the warrant issued to the Sheriff for the arrest of said Alice DeWeese, it further appears that said Alice DeWeese is of the age of fifteen years on the 6th day of November, 1901, though where the court obtains this information, does not appear. The finding of the court is:

> "That said defendant is guilty of truancy, vicious, incorrigible and immoral in conduct, and a juvenile disorderly person,

> as charged in the affidavit. That she is of the age of fifteen years on the 6th day of November, 1901, and is a suitable person to be committed to the discipline and instruction of the Girls' Industrial School of the State of Ohio. And it appearing that H. C. Bostwick, one of the Board of Visitors appeared as a committee, it is therefore the sentence of the court that she be committed to said Girl's Industrial School, there to remain until she arrives at full age, unless sooner reformed, or she be discharged in due course of law."

The affidavit in this case was evidently intended to be drawn under the provisions of the act relating to compulsory education. A complaint under this act can only be filed by a truant officer. There is no authority in law for any one else to file a complaint against a child as a juvenile disorderly person, and the truant officer is only authorized to file such complaint after proceedings have been instituted against the parents, guardian or other person having charge of such child. It does not appear in this affidavit that the affiant, David J. Jones, is a truant officer, or that any proceedings were ever had against the parents or guardian of said Alice DeWeese. I am of the opinion, therefore, that no legal complaint was ever filed in the Probate Court. If this be correct, then the entire proceedings of the Probate Court were a nullity. The court can only acquire jurisdiction of the person of Alice DeWeese by the filing of a legal complaint and issuing a legal warrant for the arrest of the accused. The finding of the court that the defendant is guilty of "truancy, vicious, incorrigible and immoral conduct," amounts to nothing. The court might as well have found her guilty of reading a dime novel. There is no statute authorizing the commitment of girls to the Girls' Industrial Home for these things.

But the court further finds that the defendant was a "juvenile disorderly person." This possibly would be a sufficient finding to warrant her commitment to the Girls' Industrial Home, but instead of committing her to the Girls' Industrial Home, the sentence of the court is that she be committed to the Girls' Industrial School. There is no such institution in the State. The institution over which you have charge as Superintendent is the Girls' Industrial Home, so denominated in the statute, and a sentence to the Girls' Industrial School cannot apply to your institution.

Further than that, it is the sentence of the court that said girl remain at said school "until she arrives at full age." A girl sentenced to your institution under the provisions of the compulsory education law, can only be detained until she arrives at the age of sixteen years. There is no authority in the court to make a sentence until she arrives at full age.

These may be regarded as technical objections, but when the fact is considered that the Probate Judge of this county claims to have practiced law for forty years and been six years Probate Judge, we must assume that he knew what he was doing, and in sentencing the girl to the Girls' Industrial School, there to remain until she arrives at full age, he must have had in mind some institution of that name where such a sentence could be executed, and he could not have meant your institution, for it has neither the name, nor the power to execute the sentence.

The further fact should be taken into consideration that you are dealing with the rights and liberties of this girl, and she ought not to be detained in your institution, or any other, unless committed thereto by due legal process.

I am of he opinion that the papers in this case show such a want of jurisdiction in the Probate Court originally as that the girl might be released from custody on a writ of habeas corpus. This being true, it is plainly the duty of the management of said Home to refuse to receive or detain said girl. While you cannot correct the errors committed by the trial court, you can, at least, refuse to commit the error of receiving and detaining a girl at your institution who has not been legally committed thereto.

The same criticism can be made of the affidavit in the case of Lillian Martin. The finding of the court in that case is that the defendant

> "Is guilty as charged in the complaint; that she is of the age of fourteen years on the 4th day of December, 1901, and is a suitable person to be committed to the discipline and instruction of Reform School of the State of Ohio."

I am unable to locate this institution. Certainly the institution under your charge is not and never was known as the Reform School. Hence, said Lillian Martin has not been committed to your institution.

For a full discussion of the law relating to commitment to your institution and your powers and duties in respect to receiving girls committed by the Probate Courts of the State, see the opinion of this office under this date.

Very truly yours,
J. E. Todd,
Assistant Attorney General.

MATTERS RELATING TO COMMITMENT TO THE GIRLS' INDUSTRIAL HOME.

Columbus, Ohio, December 11th, 1901.

A. W. Stiles, Superintendent Girls' Iudustrial Home, Delaware, Ohio:

Dear Sir: — I have before me your communication enclosing a copy of proceedings in the Probate Court of Licking County, in the matter of the commitment of Lillian Martin and Alice DeWeese to the institution under your charge, and also the letter of Waldo Taylor, Probate Judge of Licking county, addressed to you under date of November 6th, 1901.

The various questions presented upon these letters and records can be classified and discussed under the following heads:

1. For what offenses, or upon what charges may girls be committed to the Industrial Home?

2. What proceedings in court are essential to a valid commitment?

3. What are the powers and duties of the Superintendent of said Home in relation to receiving girls committed to the institution by the Probate Court?

And of these in their order:

1. The Girls' Industrial Home is classed among the benevolent institutions of the State. At the same time, it is in many respects reformatory and penal in character. It is declared in Section 765, R. S., that:

> The Girls' Industrial Home shall be for the instruction, employment and reformation of evil disposed, incorrigible and vicious girls."

It thus appears that both the class of persons who are to be committed to this institution and also the purpose of their commitment gives to the institution something of a penal character. In so far as the institution is penal, the laws relating thereto should receive that strict construction which is accorded to all penal statutes. While I would not contend that such laws should be construed with that strictness which is applied to statutes relating to the higher crimes, yet they should receive the construction which would be given to the statutes relating to misdemeanors and offenses of lesser grade.

The general provisions of the statutes relating to commitment to the Home are found in Section 769, R. S., and are as follows:

> "Whenever a resident citizen shall file with the Probate Judge of hiscounty, his affidavit charging that a girl above the age of nine years and under the age of fifteen years who resides in such county, has committed an offense punishable by fine or imprisonment other than imprisonment for life, or that she is leading a vicious or criminal life, it shall be the duty of the judge, etc,."

At least two distinct charges are authorized by this section.

(a) That the girl has committed an offense punishable by fine or imprisonment, other than imprisonment for life. An affidavit charging this offense should distinctly state the offense committed, with such circumstances of time and place as are necessary to show venue. In short, should be in the usual form of an affidavit for a warrant in criminal cases. In this connection, Section 774, R. S., might be referred to, which provides that when a girl between the ages of nine and fifteen years is brought before a court of criminal jurisdiction charged with having committed an offense punishable by fine or imprisonment, it is the duty of such court to cause such girl to be taken before the Probate Judge, who shall proceed in the same manner as if the complaint had been originally filed before him.

(b) Section 769, R. S., also authorizes the commitment of girls who are "leading a vicious or criminal life." Whether this can be subdivided into two distinct charges, to-wit: That of leading a vicious life, and that of leading a criminal life, is not entirely clear from the reading of the statute. I am inclined to think, however, that such division might be made, and that a charge that a girl is leading a vicious life would be sufficient to authorize her commitment to the Home. It is not easy to see how a charge could be made that a girl was leading a criminal life without some specific offense had been committed, in which case the affidavit should properly charge her with such offense. An affidavit charging a girl with leading a vicious or criminal life, should set out the acts and vicious conduct relied upon to establish such charge. It is very doubtful whether an affidavit in the mere language of the statute, to-wit: That the accused is leading a vicious or criminal life," would be sufficient, if taken advantage of by the accused at the trial. There is no statutory definition of this offense, but in order to give the accused an opportunity to meet the complaint, the affidavit should set forth the particular acts of immorality, or criminal, or vicious conduct relied upon to sustain the charge.

Girls may also be committed to the Home under the statute relating to compulsory education. Section 4022-1, et seq. The charge under this act is that of being a "juvenile, disorderly person." A statutory definition of "juvenile, disorderly person," is contained in Section 4022-4, R. S., as follows:

> "Every child between the ages of eight and fourteen years, and every child between the ages of fourteen and sixteen years

> unable to read and write the English language, or not engaged in some regular employment, who is an habitual truant from school, or who absents itself habitually from school, or who, while in attendance at any public, private or parochial school, is incorrigible, vicious or immoral in conduct, or who habitually wanders about the streets and public places during school hours, having no business or lawful occupation, shall be deemed a juvenile disorderly person, and be subject to the provisions of this act."

It is to be observed, however, that the purpose of the compulsory education law is to secure the attendance of children at school, and not to fill up the reformatory institutions of the State. Hence, it is provided by Section 7 of this act (Section 4022-7, R. S.), that in cases of truancy, proceedings shall be instituted against the parent or guardian, to compel such parent or guardian to cause such child to attend some recognized school, and it is only upon proof of inability on the part of such parent or guardian to cause such child to attend school, or upon failure of such parent or guardian to so cause such child to attend school after ordered so to do by the court in which such proceedings are had, that any proceedings can be instituted against the child as a "juvenile disorderly person." The complaint under the compulsory education law against a girl to commit her to the Industrial Home, must be made by the truant officer, and only after proceedings have been instituted against the parent or guardian, and such proceedings have failed to procure the attendance of such girl at school. The compulsory education law applies to all children between the ages of eight and fourteen years, and also to every child between the ages of fourteen and sixteen years who is unable to read and write the English language, or not engaged in some regular employment. The affidavit filed by the truant officer under this statute should set out the facts constituting the offense in conformity with the usual rules of criminal pleading. That a child is a "juvenile disorderly person" is a legal conclusion, and is not a sufficient allegation of fact in a complaint upon which to issue a warrant for the arrest of the accused.

2. In all cases where a proper complaint is filed with the Probate Judge, a warrant should issue to the Sheriff of the county or some other suitable person commanding him to bring such girl before such judge, at his office at the time fixed for the hearing of said complaint.

If the complaint is based on Section 769, R. S., the Probate Judge should also issue,

> "An order in writing, addressed to the father of such girl if living and resident of the county, and if not living and and so resident, then to her mother if living and so resident, and if there is no father or mother so resident, then to her guardian, if so resident, and if not, then to the person with whom the girl resides, requiring such father, mother, guardian or other person to appear before such Probate Judge at such hearing."

No order to the parent, guardian or other person is required, however, in cases where the complaint is made under the compulsory education law. This would be a serious defect in said law, were it not for the fact that proceedings against a girl as a "juvenile disorderly person" cannot be instituted until after proceedings have been had against the parent, guardian or other person having charge of such girl, as above pointed out.

It is further the duty of the Probate Judge, in all cases, to give notice of such proceedings to the Board of County Visitors of his county, whose duty it is to attend such proceedings either as a body or by committee, and protect the interests of such child. (See Section 633-18, R. S.) In cases under the compulsory education law, Section 4022-11 requires that the warrant of commitment should show that such Board of County Visitors attended such hearing. The record in all cases should affirmatively show that all these requirements of the statute have been complied with. I apprehend, however, that the issuing of notice to the parent, guardian, or Board of County Visitors, is not jurisdictional. That the Court acquires jurisdiction by the filing of the complaint and the issuing of the warrant for the arrest of the accused, and that this jurisdiction is not affected by a failure to issue the notices above referred to. Such failure might be taken advantage of by the accused in a proceeding in error, and would probably be sufficient ground for a reversal of the order of commitment. They would not be sufficient, however, in my judgment, to procure the release of a girl committed to the Home, in proceedings in habeas corpus.

After hearing the testimony in the case, if it appear to the satisfaction of the Probate Judge

> "That the girl before him is a suitable subject for the Industrial Home, he shall commit her to that institution and issue his warrant to the Sheriff of the proper county or to some suitable person to be appointed by him, commanding him to take charge of the girl and deliver her without delay to the superintendent of the Home."

An exception to this procedure before the Probate Judge is provided by Section 771 in cases where a girl is arrested for a crime which entitles her to a trial by jury. In such cases

> "When such a demand is made by or on behalf of such girl, the Probate Judge is authorized after an examination of the case, to either discharge her, or cause her to enter into a recognizance for her appearance before the court of Commont Pleas of the county forthwith, if said court is in session, and if not in session, then on the first day of the next term thereof, to answer to such charge, and in default of such bail, to commit her to the jail of the county until the first day of said next term of Common Pleas Court, or until discharged by due course of law, and he shall forward to the Clerk of the Common Pleas Court a transcript of his proceedings in the case."

A girl committed to the Home under the provisions of Section 769, et seq.,

> "Shall be kept there, disciplined, instructed, employed and governed under the direction of the Trustees, until she is either reformed or discharged, or bound out by them according to their by-laws, or has attained the age of eighteen years."

But a girl committed to said Home under the provisions of the compulsory education law, can only be detained at said Home until she arrives at the age of sixteen years.

3. The Superintendent of the Girls' Industrial Home is required to receive all girls who are legally committed to said institution. This does not mean, however, that he is required to receive every girl who may be brought there by the Sheriff or other officer appointed for that purpose by the Probate Court.

The warrant or mittimus from a Probate Court which is regular on its face, and discloses no want of jurisdiction in the court issuing the same, would doubtless be a protection to the superintendent of said Home in receiving and detaining the person named in said warrant in said institution. But this rule of law is for the protection of the officer and does not compel him to accept every person who may be brought to his institution accompanied by a warrant issued by a Probate Court. If the Superintendent knew that the court issuing the warrant of commitment was without jurisdiction, he would be under no obligation to obey such warrant. It is true, as stated in the letter of the Probate Judge above referred to, that the Superintendent of this institution is without "authority in law to sit as a reviewing court." He cannot correct errors that may be committed by the Probate Court. He certainly has a right, however, to exercise his own judgment as to whether a girl brought to his institution, is legally committed, and if she is not legally committed, to refuse to receive her. In doing this, however, he, of course, acts at his peril and would be liable for a mistake in judgment. A safe plan, doubtless, for the Superintendent to pursue, would be to receive all girls who are accompanied by a warrant of commitment, which is regular on its face. However, cases might arise in which he would be justified in acting otherwise.

It is to be remembered that this is a state institution, supported and maintained by the State, and it is not within the power of a Probate Court to compel this institution to receive girls except in the cases provided by statute. By Section 639, R. S., the Trustees of the various benevolent institutions of the State are authorized to

> "Establish such rules and regulations as may be deemed expedient for the government and management of their several institutions."

By Section 780, R. S., the Superintendent of the Girls' Industrial Home is required to

> "Keep a register containing the name and age of each girl, and, as far as possible, the circumstances connected with her history prior to the time of her admission to the Home, and he shall add thereto such facts as come to his knowledge relating to her history while at the institution, and after leaving it."

As above pointed out, a girl committed to the institution under the provisions of Section 769, R. S., can be detained at said institution until she arrives at the age of eighteen years, while a girl committed under the provisions of the compulsory education law, can only be detained until she arrives at the age of sixteen years. In view of all these statutory provisions, it would seem to be a reasonable requirement on the part of the Board of Trustees of this institution, that the superintendent should be furnished with a transcript of the record of the proceedings in the Probate Court. I have no doubt, therefore, that it is within the power of the Board to make such a regulation, and that it is the duty of Probate Courts to furnish such a transcript. By means of this transcript, the Superintendent of the Home, or the Board of Trustees may determine for themselves whether or not the girl has been legally committed, and may also be informed as to the age of the girl, and the length of time which they may lawfully detain her (this latter fact depending upon the offense for which she is committed), and possibly other facts connected with her history, which it would be proper for the Superintendent to incorporate in the register which he is required to keep.

A good illustration of the importance of having a full transcript of the record, is furnished in the papers before me. In the case of the commitment of Alice DeWeese, the warrant to the Sheriff is simply to take charge of said Alice DeWeese and convey her to the Girls' Industrial Home. Nothing in the warrant would inform the Superintendent of the Home of the offense for which she was committed, her age, or any other fact necessary for him to know. The finding of the court is

> "That she is of the age of fifteen years on the —— day of ——, 188; that she is leading a vicious or criminal life; has committed the offense of being vicious, incorrigible and immoral life and juvenile disorderly person."

It is impossible to tell from this finding whether the proceedings were had under Section 769, R. S., or under the compulsory education statute. It is not until we get back to the affidavit originally filed in the case that we are able to determine the age of the girl and the offense with which she was actually charged before the court. I have no doubt, therefore, that the Superintendent, under the rules of the Board of Trustees, may require a transcript of the record in each case before receiving any girl into the Home.

As the matters discussed in this opinion are of a general nature, while the particular questions relating to the two cases referred to me are not of general importance, I shall give you my views in relation to the two cases in a separate opinion. I am, Very truly yours,

J. E. Todd,
Assistant Attorney General.

RIGHT OF PUPIL TO ATTEND SCHOOL OUTSIDE OF HIS OWN DISTRICT.

Columbus, Ohio, December 16th, 1901.

Patrick E. Kenney, Prosecuting Attorney, Celina, Ohio:

Dear Sir: — Yours of December 13th at hand and contents noted. The question submitted is whether where pupils live more than one and a half miles from the school house of their district, they are then privileged to attend any other school that from the condition of the roads or other cause may be more convenient of access, even though the school building may be a greater distance from their home than the school building of their own district.

The answer to this question depends upon the proper construction to be placed on Section 4022a of the Revised Statutes. This section provides that:

> "The Board of Education * * * * shall permit children of school age who reside farther than one and one-half miles from the school where they have a legal residence under the school laws of Ohio, to attend the nearest sub-district or joint sub-district school."

It seems to me that this question should be answered in the negative. The statute seems to be based on the idea that a pupil should not be compelled to travel more than one and one-half miles to school, and it seems to me that it is unambiguous. If it had been the purpose of the Legislature to permit a pupil to attend the most convenient school the one and one-half

mile limit should have been omitted from the statute. If bad roads are sufficient to warrant a pupil's going to another school even though the distance will be greater than to his own school then why should not a pupil have a right to select a school on an electric line, out of his own district, because of the much greater convenience of travel to and from school on an electric car? I am inclined to the view that such a construction would have a tendency to overcrowd some schools and very much reduce the attendance of others.

As to the meaning of the phrase "the nearest sub-district or joint sub-district" in Section 4022a, I fully agree with you that it means the nearest sub-district or joint sub-district other than that in which the pupil is located.

Very truly,

J. M. SHEETS,

Attorney General.