COLUMBUS, OHIO, April 19, 1930.

HON. W. S. PAXSON, *Prosecuting Attorney, Washington C. H., Ohio.*

DEAR SIR:—Your letter of recent date reads as follows:

> "I would appreciate receiving a ruling from you on this question: 'Is it lawful for the same individual to hold at the same time the offices of township trustee and trustee of the County Children's Home?' "

Public offices and public employments are said to be incompatible when they are made so by statute or when by reason of the common law rule of incompatibility they are rendered incompatible. The common law rule of incompatibility as stated by the court in the case of *State ex rel.* vs. *Gebert*, 12 O. C. C. (N. S.) 274, is as follows:

> "Offices are considered incompatible when one is subordinate to or in any way a check upon the other; or when it is physically impossible for one person to discharge the duties of both."

There are no statutory inhibitions upon one and the same person holding the office of township trustee and being a member of the board of trustees of a county children's home. It remains to be determined, therefore, whether or not the two offices are incompatible by reason of the common law test above set forth.

The statutes controlling children's homes are to be found in Sections 3077 to 3087, 3089 to 3100 and 3103 to 3108, General Code. It is unnecessary for the purposes of this opinion to state in detail the various provisions embodied in those statutes as well as in the many statutes governing township trustees.

Suffice it to say that after careful examination of the statutes I find no reasonable grounds for holding the one office to be a check on the other, either on account of the poor laws or any other laws.

There is no doubt but that it is physically possible for the same person to hold these two offices, since neither is a full time position.

Without further discussion, I am of the opinion that the offices of township trustee and trustee of a county children's home may be held by the same individual simultaneously.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1800.

MUNICIPALITY—FIFTY PER CENT OF ITS PROCEEDS FROM GAS AND MOTOR VEHICLE LICENSE TAXES APPLICABLE FOR CONSTRUCTING AND RE-PAVING STREETS BY CONTRACT ONLY—COMPETITIVE BIDDING UNNECESSARY WHEN COST OF IMPROVEMENT UNDER $50.

SYLLABUS:

Any proportion up to fifty per cent (50%) of the funds available to municipalities from the gasoline tax and motor vehicle license tax, under Sections 5537 and 6309-2, General Code, as amended by the 88th General Assembly, may be expended for the purpose of construction and repaving of public streets, but the same may be expended only pursuant to contract. If the amount involved for a given improvement is less than five hundred

dollars ($500.00) a contract is nevertheless required but it may be entered into withou competitive bidding.

COLUMBUS, OHIO, April 21, 1930.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Your recent communication, which relates to the use of the motor vehicle and gasoline tax by municipalities, reads:

> "Section 5537 as amended 113 O. L., page 279, in part provides that 'not more than 50% of the total funds available during any year from such source, including the unexpended balance of such funds from any previous year, shall be used by any municipal corporation in such construction and repaving, which shall be done by contract let after the taking of competitive bids as provided by law, or in a manner provided by the charter of any such municipal corporation.'
>
> Section 6309-2 G. C., 113 O. L., page 208, provides in part that 'not more than 50% of the total funds available during any year from such source, including the unexpended balance of such funds from any previous year, shall be used in such construction and repaving, which shall be done by contract let after the taking of competitive bids as provided by law, or in the manner provided in the charter of any such municipal corporation.'
>
> Provisions for competitive bids by municipalities is found in Sections 4221 and 4328 G. C., when any expenditure exceeds $500; in Opinion No. 1024, dated October 14th, 1929, the Bureau is advised, in the third branch of the syllabus, as follows:
>
> '3. It is not necessary to let contracts for projects which are to be paid with said money by competitive bidding, unless such contracts are required to be so let by the provisions of Section 4221, General Code, or by the provisions of the charter in cities having a charter form of government.'
>
> Question 1. When a street, alley or roadway in a municipal corporation is to be constructed and the cost thereof will be less than $500, may a city use its employes and buy the material and construct such street or must all construction be made the subject of a contract for all labor and material?"

In examining my former opinion to which you refer it will be observed that it was decided that it was not necessary to advertise for competitive bids in the expenditure of the funds under consideration unless the project involved an expenditure of more than five hundred dollars ($500.00). In other words, it was concluded that the language of the sections under consideration adopted the provisions of Sections 4221 and 4328 of the General Code with reference to the requirement as to competitive bids, in so far as fifty per cent (50%) of the funds which are required to be used for construction and repaving is concerned, and the specific question as to whether the fifty per cent (50%) to be used for construction and repaving could be used in any other manner than by contract when the expenditure was less than five hundred dollars ($500.00) was not considered.

However, your inquiry presents the question as to whether it is mandatory that all of the expenditures of fifty per cent (50%) of said funds be made by contract or whether the sums less than five hundred dollars ($500.00) may be expended for material and the construction made by the regular force of employes of the municipality. Without undertaking to discuss the wisdom of the provisions of the statutes, it is believed that it is expressly provided that such funds shall be used in payment of the contract price, which precludes the use of the same in any other manner, irrespective of the amount involved. If the amount is less than five hundred dollars ($500.00), although a contract is required, it need not be entered into pursuant to the receipt

of competitive bids. The statute says the work "shall be done by contract let after the taking of competitive bids as provided by law". If in certain instances the law does not provide for the taking of competitive bids as a condition precedent to entering into a contract, it does not follow that the requirement of a contract shall be nullified.

It follows therefore that under Sections 5537 and 6309-2, General Code, as amended by the 88th General Assembly, a municipality may expend its portion of the gasoline and motor vehicle license tax, as therein provided, only pursuant to contract.

Based upon the foregoing and in specific answer to the inquiry propounded, it is my opinion that any proportion up to fifty per cent (50%) of the funds available to municipalities from the gasoline tax and motor vehicle license tax, as amended by the 88th General Assembly, may be expended for the purpose of construction and repaving of public streets, but the same may be expended only pursuant to contract. If the amount involved for a given improvement is less than five hundred dollars ($500.00) a contract is nevertheless required but it may be entered into without competitive bidding.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1801.

EXAMINATION OF DEED TO LAND OF IDA AND PETER SARNO IN CITY OF CANTON, STARK COUNTY, WHERE REQUEST IS MADE FOR EXECUTION OF DEED BY GOVERNOR TO CORRECT DEFECT.

COLUMBUS, OHIO, April 21, 1930.

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

DEAR SIR:—A communication has been received by me from Lynch, Day, Pontius & Lynch, attorneys at Canton, Ohio, enclosing an abstract of title relating to lot No. 14804 in J. R. Mathews subdivision of Out Lots No. 173 and 174 in the City of Canton, Ohio, as the same is recorded in Volume 7, page 78, in the office of the Recorder of Stark County, Ohio, which property is now owned of record by Ida Sarno and Peter Sarno, of said city.

In the communication of the attorneys above named, a request is made for the execution of a deed by the Governor, under authority of the provisions of Section 8528, General Code, for the purpose of correcting a defect in a deed executed by Governor Lucas, coveying to one Adam Kimmell and to one Joseph Kimmell, a tract of 74.80 acres of land which included the land now owned and held of record by said Ida Sarno and Peter Sarno as lot No. 14804 in the subdivision above mentioned.

The land here in question, was originally a part of Section No. 16, school lands in Township No. 10, Range No. 8; and it appears that on November 20, 1830, the trustees of said section leased to Benjamin Jones and Adam Kimmell, "The West division of the North West Quarter of Section No. 16, Township No. 10, Range No. 8, containing 74.80 acres, for 99 years, renewable forever." Therefore, said Benjamin Jones assigned his interest in said lease to one James Gaff, Jr., after which said James Gaff, Jr., assigned said interest to Joseph Kimmell.

Thereafter, said Adam Kimmell and Joseph Kimmell, being the owners and holders of the lease for said school lands, obtained the deed for said lands from Robert Lucas, then Governor of Ohio. This deed which was dated January 16, 1836, was so executed under the authority of the provisions of Section 16 of the Act of January 29,