Without rendering any opnion concerning the validity of the second of such arguments, I am unable to find any statutory authority for such contract, and if no such authority exists the contract would be beyond the powers of the board of township trustees and void to the extent it was so ultra vires.

Specifically answering your inquiry it is my opinion that a board of township trustees has no legal authority under the provisions of Section 3320 to Section 3326, General Code, to enter into a contract for a township depository which provides that the depository shall pay 2% interest per annum on the average daily balance of township deposits but contains a proviso that such contract shall become void if the legislature shall amend the statute in such manner as to authorize the acceptance of a bid for a depository at a lesser rate of interest, or in the event of such change by the legislature requiring the payment of a lesser rate by the depository after the effective date of such amendment.

Respectfully,
JOHN W. BRICKER,
Attorney General.

2311.

VILLAGE—MAYOR AND MARSHAL RE-ELECTED TO SECOND TERM MAY NOT LEGALLY REFUSE TO QUALIFY AND THEREBY CONTINUE IN OFFICE UNDER FIRST TERM.

SYLLABUS:

1. *A village mayor and marshal cannot legally refuse to qualify for a second term to which they have been elected, and thereby hold office under a continuation of their first term of office.*

COLUMBUS, OHIO, February 23, 1934.

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

GENTLEMEN:—I am in receipt of your recent communication as follows:

> "We are inclosing a letter received from Frederick W. Green, Solicitor of the Village of Brooklyn, containing a question which we have been asked to submit to you for an opinion.
>
> It is our thought that the provisions of section 4242, G. C., might have some bearing on the question submitted."

The letter enclosed with your communication reads as follows:

> "A question has arisen in Brooklyn Village involving the construction of the provisions forbidding changes in salaries within the period of existing terms of office of certain village officials, which, in my opinion, ought to be submitted to the Attorney General for decision.
>
> The facts are as follows: Late in 1933, the council adopted an ordinance reducing the salaries of the Mayor and Marshal. This ordinance became effective before January 1, 1934. The incumbents of both offices have been re-elected. They have not qualified for the new term, but

are serving by force of their prior election. This presents the question whether they are entitled to the *old* salary or whether they are subject to the revised schedule.

Section 20 of Article II of the Constitution provides that the legislature in cases not otherwise provided for in the constitution, shall fix the term of office and the compensation of all officers, but that no change therein shall affect the salary of any officer during his *'existing term.'* It has been our theory that this provision has reference only to officers whose salary is directly fixed by the legislature, although the reasoning in *Board of Education* vs. *Juergens,* 110 O. S. 667, and *Board of Education* vs. *Featherstone,* 110 O. S. 669, seems to suggest that its provisions might be held to apply to school officers. However, the situation with respect to *municipal* officers is directly dealt with in Section 4219, which provides that the compensation shall not be increased or diminished *'during the term'* for which any officer, clerk, or employe may have been elected or appointed.

In case of villages, Section 4255 provides that the mayor shall be elected for a term of two years 'and shall serve until his successor is elected and qualified,' and Section 4384 contains the same formula with respect to the marshal. Having been re-elected, but having failed to qualify under such re-election, does the prior term of office cover the period after December 31, 1933, so as to entitle them to the old salary?

While the case of *State ex rel* vs. *Wright,* 56 O. S. 540, did not deal with any specific question of salary, it did deal with the question of the duration of the *term* of office of the mayor of a village. Under the statutes then in effect, it was provided that the mayor should 'serve' until his successor should qualify. It was held by the court that in case of failure to elect, there was no vacancy in the office of the mayor and that the prior incumbent continued in office, Williams, J., saying (Page 553):

'His lawful term, expressly fixed by statute, is not only for two years, but also until his successor shall be qualified. His right to serve, after the expiration of the designated period, until the qualification of his successor, being conferred by statute at the time of his election, is not less a part of his statutory term of office, than vacancy in the office, in any proper sense of the term, for there is an actual incumbent of the office legally entitled to hold the same.'

The same proposition had been affirmed in case of an appointive state officer in the earlier case of *State ex rel.* vs. *Howe,* 25 O. S. 568, and the like theory has been applied by the court in cases subsequent to the Wright case. See *State ex rel.* vs. *Speidel,* 62 O. S. 156; which case deals with the term of office of a sheriff, and *State ex rel.* vs. *Metcalfe,* 80 O. S. 244, dealing with the term of office of judge of the circuit court. In both these cases the decision in the Wright case is cited with approval.

Under these decisions, it would seem to be entirely clear that if the other candidates for the office of mayor and marshal had been successful at the November election in 1933, *but had failed to qualify,* the mayor and marshal elected at the prior municipal election would have continued to hold office after December 31, 1933, and *until* their successors should be elected and qualified, and that their continuance in office would then necessarily be regarded as a part of the term for which they had been elected in 1931, and that they would be entitled, in such event to the

salary provided in the ordinance effective at the commencement of that term. The same conclusion would seem to follow under the existing situation unless affected by the fact that each of them were elected as their own successors. However, failing to qualify for the new term, they certainly are not holding office by force of their re-election and must therefore be deemed to be holding office by force of their election in 1931, and *in continuance of* that term.

It is my opinion therefore that they are entitled to the old salary, but as this is a matter upon which your Department will be required to rule at some time in the future, it has seemed to me that it was advisable to obtain the opinion of the Attorney General before any payment of salary for any period subsequent to December 31, 1933."

Sections 4255, 4384, 4242, 7, 8, 4666, 4219, 4669 and 2, General Code, and Article XV, Section 7, Ohio Constitution, provide, so far as pertinent:

Sec. 4255. "The mayor (village) shall be elected for a term of two years, commencing on the first day of January, next after his election, and shall serve until his successor is elected and qualified. * * *"

Sec. 4384. "The marshal shall be elected for a term of two years, commencing on the first day of January next after his election, and shall serve until his successor is elected and qualified. * * *"

Sec. 4242. "The council may declare vacant the office of any person elected or apopinted to an office who fails to take the required official oath or to give any bond required of him, within ten days after he has been notified of his appointment or election, or obligation to give a new or additional bond, as the case may be."

Sec. 7. "A person elected or appointed to an office who is required by law to give a bond or security previous to the performance of the duties imposed on him by his office, who refuses or neglects to give such bond or furnish such security, within the time and in the manner 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 such office shall be considered vacant and be filled as provided by law."

Sec. 8. "A person holding an office of public trust shall continue therein until his successor is elected or appointed and qualified, unless otherwise provided in the constitution or laws."

Sec. 4666. "Each officer of the corporation, (city or village) * * * before entering upon his official duties shall take an oath to support the constitution of the United States and the constitution of Ohio, and an oath that he will faithfully, honestly and impartially discharge the duties of the office. * * *"

Sec. 4219. "Council shall fix the * * * bonds of all officers, clerks and employes in the village government, except as otherwise provided by law. * * *"

Sec. 4669. "Each officer required by law or ordinance to give bond shall do so before entering upon the duties of the office, except as otherwise provided in this title. * * *"

Sec. 2. "Each person chosen or appointed to an office under the constitution or laws of the state, and each deputy or clerk of such officer,

shall take an oath of office before entering upon the discharge of his duties. The failure to take such oath shall not affect his liability or the liability of his sureties."

Art. XV, Sec. 7. "Every person chosen or appointed to any office under this state, before entering upon the discharge of its duties, shall take an oath or affirmation, to support the Constitution of the United States, and of this state, and also an oath of office."

In 46 Corpus Juris, 970, it is stated:

"One who has accepted an office under a new election, or a new appointment, cannot claim that his tenure is a continuation of that under his original election or appointment, and that he holds over by virtue of his former election or appointment. *Nor can an incumbent, reelected to an office, elect to retain the office under his hold-over term by refusing to quality for the new term.*" (Italics mine.)

The foregoing text cites the cases of *Sweeney* vs. *State,* 23 Ariz., 435; 204 Pac., 1025, and *State* vs. *Gormley,* 53 Wash., 543; 103 Pac., 435; 104 Pac., 620, in support of the italicized language, supra.

An examination of the said cases supports the statement of the law announced. In the first mentioned case, decided on March 10, 1922, the court held in the fourth paragraph of the syllabus:

"Under Civil Code of 1913, paragraph 221, subdivision 9, making a vacancy when the duly elected officer refuses or neglects to file his official bond within the time prescribed by law, the incumbent of an office who was elected to succeed himself cannot refuse to qualify as his own successor and retain the office under his holdover term."

The facts of the foregoing case disclose that a person who has held the office of justice of the peace of a precinct was re-elected for another term, but died shortly after his re-election. Paragraph 221 of the Arizona Revised Statutes, 1913, Civil Code, provided in part:

"An office shall be deemed vacant from and after the happening of either of the following events before the expiration of the term: * * * 9. The failure, refusal, or neglect of the person elected or appointed to such office, to file his official oath or bond within the time prescribed by law, whether such failure, refusal or neglect shall have been caused by his death, or from any other cause."

After quoting subdivision 9 of paragraph 265 of the Arizona Revised Statutes of 1901 (later subdivision 9 of paragraph 221 of the Arizona Revised Statutes, 1913, Civil Code), which statutory provision was similar to those of sections 7 and 4242, General Code of Ohio, the court stated at page 444:

"Referring as such subdivision did, to the acts of qualification required of an incumbent, as such, during his term, that subdivision was effective to create a vacancy in the office of an incumbent elected to succeed himself, upon his failure to qualify, had he lived to do so. This

construction of a similar statute was made in *State* vs. *Gormley, supra* (53. Wash. 543); the court saying of an incumbent elected to succeed himself:

'He cannot decline to qualify, and continue in office under his former tenure. One in this situation must hold under his new term or not at all. The term of office will not expire until the successor, though it be himself, is elected and qualified under the decision in the Tallman case (24 Wash. 426, 64 Pac. 759), but, unless he qualifies under his new tenure he forfeits the right to hold under either' and there is no reason why it should not be held that paragraph 221, subdivision 9, is a lawful and constitutional provision, so far as it requires the incumbent re-elected to an office to qualify as prescribed by law for the new term, *or suffer the loss of the office.*"

It should be stated that in the foregoing case the court also considered and quoted the paragraph 381 of the Arizona Revised Statutes, 1913, Civil Code, which provides that there shall be elected in each precinct "at the general election to be held in the year 1914, and biennially thereafter, one justice of the peace, who shall hold his office for the term of two years from the first day of January following his election, and *until his successor is elected and qualified.*" Obviously, the foregoing italicized provision is identical to the provision in sections 4255 and 4384 of the Ohio General Code.

In other words, the court concluded that even though the additional term (until his successor is elected and qualified) is, while it exists, ordinarily as much a part of the term of the incumbent as is his regular term, and no vacancy is created when the successor fails to qualify, such does not follow when the successor who is elected and who fails to qualify is the incumbent of the office.

Hence, it seems clear that, under the foregoing authorities, the mayor and marshal here under consideration may not now continue in office under their old term and thus receive their former salary.

The facts submitted by the solicitor clear'y authorize a distinction between the legal question predicated thereon and the questions under consideration by the court in the Ohio cases cited by him. These Ohio cases are accordingly not controlling in a determination of the question here under consideration and should be distinguished therefrom.

Specifically answering your inquiry, it is my opinion that incumbents in the office of mayor and marshal of a village who were reelected to the same offices may not refuse to qualify for their new terms and retain office under their old terms for the purpose of avoiding a salary reduction made by council before the time for the commencement of such officers' new terms.

Respectfully,
JOHN W. BRICKER,
Attorney General.

2312.

CHAUFFEUR—INTERPRETATION OF SECTION 6290, GENERAL CODE—PERSON EMPLOYED FOR PRIMARY PURPOSE OF OPERATING MOTOR VEHICLE AND SO OPERATES MOTOR VEHICLE MUST BE REGISTERED AS CHAUFFEUR.

SYLLABUS:

1. *An employe who operates his employer's motor vehicle is not a "chauffeur" within the contemplation of Section* 6290 *of the General Code, if the operation of*