I am inclined to the view that under the provisions of Section 13562 of the General Code, an attorney appointed to assist the prosecuting attorney in the trial of a case may be compensated for services rendered in the preparation of said case for trial.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1422.

JUSTICE OF THE PEACE—WHO MUST ADMINISTER HIS OATH OF OFFICE—FAILURE TO TAKE PROPER OATH QUESTIONED ONLY BY QUO WARRANTO—DE FACTO AND DE JURE OFFICERS DISCUSSED.

SYLLABUS:

1. *A notary public is not authorized to administer the oath of office to a justice of the peace, said oath being required to be administered by another justice of the peace or the clerk of courts.*

2. *Where a duly elected justice of the peace erroneously takes the oath of office before a notary public and assumes the duties of his office, he becomes a de facto officer and the title to his office can only be questioned by a proceeding in quo warranto. The actions of such officer are valid in so far as the status of his office is concerned.*

3. *If such justice of the peace, during the time he is acting in the capacity of such a de facto officer, within the term for which he was elected, takes the oath of office before a justice of the peace or the clerk of courts, as required by law, he then becomes a de jure officer.*

COLUMBUS, OHIO, January 16, 1930.

HON. EARL D. PARKER, *Prosecuting Attorney, Waverly, Ohio.*

DEAR SIR:—This acknowledges receipt of your recent letter which reads as follows:

> "I request your opinion on the following statement of facts:
>
> At the November election, 1923, one B. F. B. was duly elected a justice of the peace in and for Mifflin township, Pike county, Ohio, for a term of four years, and received his commission from the Governor. Thereafter, in January, 1924, he attempted to qualify by executing a proper bond but took the oath before a notary public instead of the clerk of the Common Pleas Court, or a justice of the peace as required by Section 1720, G. C. Mr. B. served the full four years and was re-elected in November, 1927, and again received his commission from the Governor, and also attempted to qualify by giving the necessary bond, but the second time he took the oath before a notary public in January, 1928. The matter was brought to his attention that he had not complied with Section 1720, G. C., and he thereupon went before the clerk of the Court of Common Pleas in December, 1929, and took the oath of office.
>
> Question 1. Is Mr. B. an officer de jure?
>
> Question 2. If not, is he a de facto justice of the peace?
>
> Question 3. If he is a de facto officer, are his judgments void or voidable?
>
> Question 4. Under the authority of Section 7, G. C., should the office be

declared vacant and be filled by appointment pursuant to the provisions of 1714, G. C.?"

Section 1720 of the General Code, to which you refer, provides:

> "When a person elected justice of the peace receives a commission from the governor, he shall forthwith take and subscribe the oath of office before the clerk of the court of common pleas or before a justice of the peace of his county. Such officer is authorized to administer such oath and shall file and make a record thereof in a book provided for that purpose. Such justice of the peace within ten days shall transmit such oath to the clerk of the court."

In analyzing the provisions of the above section, it would appear that a notary public would not be qualified to administer the oath referred to in said section. While Section 126 of the General Code authorizes notaries public "to administer oaths required or authorized by law," it would not seem to have application to the case you present, for the reason that Section 1720, supra, is a special provision relating to the manner of subscribing an oath by a justice of the peace.

In the case of *State* vs. *Jackson,* 36 O. S. 281, it was held that Section 126, General Code, is subordinate to specific statutes which provide before what officers oaths may be taken in certain designated proceedings and transactions.

Of course, it could be argued that Section 126 authorized the notary public to administer such an oath, but I am inclined to the view that Section 1720, being a special provision, will control, and that the oath is properly administered only by a clerk of the court or a justice of the peace. However, the fact that the oath was not properly taken would in nowise disturb the actions that were taken by such officer while he was undertaking to exercise the duties of the office. Unnquestionably, he entered the office under color of title and would be a *de facto* officer.

In the *Matter of Conley,* 25 O. App. 339, it was held, as disclosed by the first branch of the headnotes, that:

> "Where a prisoner, convicted of crime and sentenced, alleged that the person who pronounced sentence was not a justice of the peace as claimed, *held,* that the sentence would be valid if the alleged justice was either a *de jure* or *de facto* officer."

The title to an office in Ohio can only be questioned by an action in *quo warranto,* and it follows from the foregoing that the actions of such an officer could not be challenged otherwise, even though an action in *quo warranto* might lie in the event that same was instituted.

Section 7 of the General Code, to which you refer, provides:

> "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."

In construing this section, it was held in the case of *State ex rel.* vs. *Bimeler,* 15 O. App. 365, as disclosed by the headnote, that:

"One elected to the office of mayor, who fails to take the oath of office before some official authorized to administer oaths, and fails to present his bond to council for approval, as required by statute, but instead thereof appears before the incumbent mayor, who refuses to administer the oath or receive the bond, must be regarded as having refused to accept the office, and a petition in *quo warranto,* praying that the incumbent mayor whose term of office has in the meantime expired be ousted, does not lie and will not be dismissed."

Undoubtedly, under the decision above referred to, if the justice to which you refer had not eventually taken the oath before a proper officer, he could have been ousted. In other words, if the question had been raised by *quo warranto* proceedings before he had properly become qualified, undoubtedly the courts would have declared his office to be vacant. However, the case you present is somewhat distinguished from the Bimeler case above mentioned, for the reason that the justice you mention had undertaken to take an oath, but the officer administering it was not, under the statute, authorized so to do. In the Bimeler case no oath had been taken, and before the error had been corrected, action was instituted to question his title. It has frequently been held that technical defects in qualification at the time office is taken will not disqualify the officer if later the legal requirements are fully met.

Therefore, it would appear that the justice to whom you refer, having undertaken to qualify, and later, upon the discovery of his error as to the authority of a notary to administer oaths, having taken the proper oath of office before a proper officer, he would now be regarded as a *de jure* officer, and there would be no vacancy which could now be filled by appointment.

Based upon the foregoing, it is my opinion that:

1. A notary public is not authorized to administer the oath of office to a justice of the peace, said oath being required to be administered by another justice of the peace or the clerk of courts.

2. Where a duly elected justice erroneously takes the oath of office before a notary public and assumes the duties of his office, he becomes a *de facto* officer and the title to his office can only be questioned by a proceeding in *quo warranto.* The actions of such officer are valid in so far as the status of his office is concerned.

3. If such justice, during the time he is acting in the capacity of such a *de facto* officer, within the term for which he was elected, takes the oath of office before a justice, or the clerk of courts, as required by law, he then becomes a *de jure* officer.

It is believed that a more specific answer to your inquiry is not required.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1423.

ELECTION LAW—AUTHORITY OF SECRETARY OF STATE TO PREPARE RULES AND INSTRUCTIONS FOR CONDUCT OF ELECTIONS—DUTY OF SAID OFFIFCIAL TO PRESCRIBE FORM OF REGISTRATION CARDS, BLANKS AND RECORDS.

SYLLABUS:

1. *Under the provision of Section* 4785-7, *General Code, as enacted by the* 88*th General Assembly, effective January* 1, 1930, *whereby the Secretary of State, as chief election officer, is charged with the duty "to prepare rules, regulations and instructions*