who has established, by previous unlawful acts, a criminal character, that if he perpetrates further crimes, the penalty denounced by the law will be heavier than upon one less hardened in crime. In such case the party is informed before he commits the subsequent offense of the full measure of the liability he will incur by its perpetration, and therefore does not fall within the class that is entitled to the protection afforded by the constitutional guaranty against the enactment of ex post facto, or retroactive laws, *for the object sought by those guaranties, in respect to this kind of legislation, is that no transgressor of a penal statute, shall be subjected by subsequent legislation, to any penalty, liability or consequence, that was not attached to the transgression when it occurred.*" (Italics the writer's.)

It is apparent from a reading of the authorities cited above that if House Bill No. 8, passed by the 88th General Assembly, should be so construed that persons could be adjudged habitual criminals under the terms of the act who had been convicted of two or more felonies specified in the act prior to the effective date of the act, and are convicted of third and fourth felonies after the effective date of the act, for offenses committed prior to the date that the act went into effect, then this act would violate the constitutional guaranties afforded these defendants. However, all statutes are to be so construed if possible as to be valid. Sutherland, in his work on Statutory Construction, Vol. II, p. 1161, says as follows:

"The principle that all statutes are to be construed, if possible, as to be valid requires that a statute shall never be given a retrospective operation, when to do so would render it unconstitutional, and the words of the statute admit of any other construction. It is always presumed that statutes were intended to operate prospectively and all doubts are resolved in favor of such construction."

In view of the authorities cited herein, I am of the opinion that House Bill No. 8, generally known as the Habitual Criminal Act, passed by the 88th General Assembly, which became effective July 2, 1929, should be so construed that persons who had been separately prosecuted, tried and convicted two or more times for felonies specified in the act should not be adjudged as habitual criminals and punished under the provisions of the act, unless their third or fourth convictions were for offenses committed after the act became effective.

Respectfully,
GILBERT BETTMAN,
Attorney General.

805.

MERGER—CLERK OF COUNCIL AND CITY AUDITOR—RIGHT OF LATTER TO FEE ALLOWED FORMER FOR SERVING NOTICES, DISCUSSED.

SYLLABUS:

When the council of a city has provided by ordinance that the clerk of council may receive a fee of twenty-five cents for serving each notice required by law, and thereafter the duties of the clerk of council and the city auditor are merged, by authority of Section 4276, General Code, the said city auditor, as clerk of council after such

merger of offices, is not ipso facto entitled to the said fee in addition to his salary as said auditor. Legislation, however, may thereafter be enacted allowing to the auditor the same fee that had before the merger been allowed for the clerk and the same may be made effective during the term of the auditor then in office.

COLUMBUS, OHIO, August 28, 1929.

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

GENTLEMEN:—This will acknowledge receipt of your request for my opinion, which reads as follows:

"Section 3818, G. C., provides in part that the clerk of council shall serve notice of the passage of a resolution of necessity for an improvement to be assessed.

The syllabus of Opinion No. 1443, page 597, year 1916, reads:

'When a city council, under the provisions of Section 4276, G. C., as amended, 106 O. L. 483, merges the duties of clerk of council with the duties of city auditor, the duties of said clerk thereby become and are the duties of said city auditor, and the latter, as such auditor, authenticates and verifies all matters and things required by law to be authenticated by the former.

During the term of office within which said merger is made no increase of salary or compensation may be allowed said auditor for the performance of said additional duties, Section 4213, G. C. Council, however, may provide additional assistants for said auditor and fix and pay their compensation.'

The first branch of the syllabus of Opinion No. 1256, page 775, year 1918, reads:

'1. Council may provide that the clerk shall serve notice on members of special meetings of council and also serve copies of all notices and notices of all resolutions that may be ordered by council, and shall receive as compensation therefor the sum of twenty-five cents for each service, and said clerk is entitled to such compensation in addition to his regular compensation as clerk of the council.'

QUESTION: When the duties of clerk of council have been merged with those of the city auditor (Sec. 4276, G. C.), and council, by ordinance, has provided that the clerk of council shall receive a fee of twenty-five cents for serving each notice required by law, is such city auditor, as clerk of council, entitled to such fee in addition to his salary as city auditor?"

You will note, upon examination of the 1916 opinion referred to by you, that the situation upon which the Attorney General passed in that opinion was that in a certain city the two positions of city auditor and clerk of council had not been merged but were separate and distinct positions. The same person had been elected to the two positions and he received a salary of $800.00 per year as auditor and $250.00 per year as clerk. The question submitted to the Attorney General in response to which the opinion was rendered was:

"If the council now passes an ordinance which merely provides that the duties of the offices of auditor and clerk of the council shall be merged, that the auditor, by virtue of his office as such, shall be clerk of the council, saying nothing about salary, what would be your opinion on the following points:

* * * * * * * * * * * *

Would he be entitled to receive a salary as auditor, and also the salary paid him as clerk of council?"

The gist of the opinion is that, if such a merger of positions, by authority of Section 4276, General Code, should take place, the auditor as such would continue to be the auditor and the effect of the merger would be to impose on the auditor as such the additional duties of clerk of council. To allow him the salary provided for the clerk of council in addition to that provided for him as auditor would be increasing his salary as auditor during his term of office which lawfully could not be done by reason of the provisions of Section 4213, General Code.

It will be noted that the syllabus of the 1916 opinion states that:

"No increase of salary or compensation may be allowed said auditor, * * * . Section 4213, General Code."

The statute says nothing about increase of "compensation." It does prohibit increase of "salary" during the terms of office of municipal officers. The distinction between "compensation" and "salary" is pointed out in the 1918 opinion referred to in your letter.

The language of Judge Spear in the case of *Gobrecht* vs. *Cincinnati,* 51 O. S. 68, at p. 72, is referred to in the opinion. It is said in that case that a general definition of "salary" includes "compensation," and while salary is compensation, compensation is not in every instance salary. The twenty-five cent fee allowed to a clerk of council for serving notices was held to be compensation and not salary and therefore the allowance of this fee in addition to the salary provided for the clerk did not amount to an increase of salary and was not prohibited under the statute.

A city auditor, after the merger of the duties of clerk of council with those of auditor, is still city auditor, and not clerk of council. This is pointed out in the 1916 Opinion referred to above. He is required to perform the duties of clerk of council because those duties have been merged with those of auditor. The merger, however, does not affect his status as auditor and he can draw the salary and receive the compensation only that is provided by ordinance for the auditor. For that reason he would not ipso facto, upon a merger of the office, become entitled to any fees that had previously been provided for the clerk of council, but following the principles of the 1918 Opinion referred to in your letter, it seems clear that if proper legislation is enacted after the merger of the positions becomes effective the same allowance may be made therein to the auditor for serving notices as had previously been allowed to the clerk, and such action would not amount to increasing his salary during his term of office, in violation of Section 4213, General Code.

You are therefore advised, in specific answer to your question, that when the council of a city has provided by ordinance that the clerk of council may receive a fee of twenty-five cents for serving each notice required by law, and thereafter the duties of the clerk of council and the city auditor are merged by authority of Section 4276, General Code, the said city auditor, as clerk of council after such merger of offices, is not ipso facto entitled to the said fee in addition to his salary as said auditor. Legislation, however, may thereafter be enacted allowing to the auditor the same fee that had before the merger been allowed for the clerk and the same may be made effective during the term of the auditor then in office.

Respectfully,
GILBERT BETTMAN,
Attorney General.