The irregularities complained of at the 1927 election could be presented to the court in such quo warranto proceeding.

Volume 20 of Corpus Juris, Section 347, citing *South* vs. *Rauh*, 32 O. C. C. 515, says it may always be shown that the person to whom a certificate was issued was not entitled to the office.

It should be understood that in reaching these conclusions, I am not attempting in any way to express a final opinion upon the validity of this election. It is not my province to anticipate the considered judgment of a court or other tribunal having before it all the pertinent facts.

By way of specific answer to your inquiry, I am of the opinion that:

1. Where the voters of two of three twonships constituting a rural school district were deprived of the right to vote for members of a board of education, the canvassing authority, possessing only ministerial power, must issue certificates of election to the persons who appear elected on the face of the returns, unless enjoined from so doing by a court of competent jurisdiction.

2. The general rule is that an election is invalid if enough persons were unlawfully deprived of an opportunity to vote to change the result.

3. There being no statutory provision for a recount or an election contest with respect to members of a board of education, quo warranto may be invoked.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1364.

WORKMEN'S COMPENSATION LAW—TEST FOR DETERMINING WHETHER INSURANCE AGENTS ARE EMPLOYES WITHIN MEANING OF SUCH LAW.

SYLLABUS:

Insurance agents who enter into a contract with an insurance company to do certain things required by said contract are not employes of the company within the meaning of the Workmen's Compensation Law, unless all the terms and conditions are such as to constitute a relationship of master and servant.

If, by the terms of such agreement, the agent is authorized to carry out the requirements of the contract without being controlled therein by the company, such agent would be an independent contractor.

Opinion of the Attorney General 1919, *Volume I, page* 699, *followed and approved.*

COLUMBUS, OHIO, January 4, 1930.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Permit me to acknowledge receipt of your receipt for my opinion as follows:

> "The Industrial Commission of Ohio desires to submit to you for an opinion the question of the coverage of the managers, superintendents and agents of the National Life and Accident Insurance Co. We are submitting herewith a blank form of the contract entered into between the National Life and Accident Insurance Company and the agents.
>
> The Commission further desires your opinion on the question of the

coverage of the special agents of the Northwestern Mutual Life Insurance Company of Milwaukee, Wisconsin, who are under contract with M. W. M. of Cincinnati, who is the general agent of this company in that city. We are enclosing herewith blank form of the special agents' contract entered into by the special agents with the general agent in Cincinnati.

The Commission will greatly appreciate an early opinion in the two questions submitted."

The question of coverage depends upon whether or not the insurance company is an employer within the meaning of the Workmen's Compensation Law and whether or not the persons in question are employes within the meaning of that act.

An employer who is subject to the act is defined in Section 1465-60, General Code, which section, insofar as it relates to this question, reads as follows:

"The following shall constitute employers subject to the provisions of this act:

1. * * *

2. Every person, firm and private corporation, including any public service corporation, that has in its service three or more workmen or operatives regularly in the same business, or in or about the same establishment under any contract of hire, express or implied, oral or written."

The section just quoted refers to "workmen" and "operatives" and those terms, together with the term "employe", are defined in Section 1465-61, General Code, which section, insofar as it relates to this question, reads as follows:

"The term 'employe', 'workman' and 'operative' as used in this act, shall be construed to mean:

1. * * *

2. Every person in the service of any person, firm or private corporation, including any public service corporation, employing three or more workmen or operatives regularly in the same business, or in or about the same establishment under any contract of hire, express or implied, oral or written, including aliens and minors, but not including any person whose employment is but casual and not in the usual course of trade, business, profession or occupation of his employer.

3. * * * "

In one of the briefs submitted in connection with this question it is argued that the companies in question are not employers within the meaning of the act because they do not have in their employ any workman or operatives. To sustain this contention they quote from definitions found in dictionaries and from decisions of courts of other jurisdictions. Those definitions and decisions have no application to the question before us because the terms "workman" and "operatives" are defined by the Legislature in the Workmen's Compensation Act; if that definition conflicts with the definitions used by the lexicographers the definition given in the statute must prevail.

The same question was before this department for consideration and an opinion rendered thereon, found in the Opinions of the Attorney General for 1919, Volume I, page 699. That opinion is directed to the question of whether or not life insurance companies are amenable to the act and whether or not certain agents are employes within the meaning of the act. The syllabus is as follows:

"The officers of a private corporation are not, as such, its employes, within

the meaning of the workmen's compensation act; but the fact that a person is an officer of such corporation does not preclude his acting for the company in some additional capacity which may make him an employe.

"The general agents of the Union Central Life Insurance Company are not its employes within the meaning of the workmen's compensation act.

"The special agents of such company are not its employes within the meaning of that act.

"All these are questions of fact, to be answered ultimately by the Industrial Commission upon such evidence as may be available."

The question considered in that opinion is almost identical with the question now submitted by you and a very thorough discussion of the subject is contained therein. I am in full accord with the discussion and conclusions of that opinion.

As pointed out in the opinion above quoted, an officer of the company, such a member of the board of directors, the president or secretary, while performing the duties incident to such position is not an employe within the meaning of the Workmen's Compensation Act. However, if such person, in addition thereto, is in the service of the company under a contract of hire, as distinguished from his work under an independent contract, while so engaged he is an employe within the meaning of the Workmen's Compensation Act.

The question which you ask relative to the agents of these companies is not a question which can be decided simply upon the contract but all other circumstances must be taken into consideration in connection therewith. To determine whether or not the agents are engaged under a contract of hire depends upon whether or not their employment is such as to permit the employer at all times to direct and control the performance of the duties required by the contracts. These contracts require the agents to give their full time and attention to the business of the company, and in one of the contracts the agent agrees to abide by the orders of the company which are set forth in its rules, but these facts are not sufficient to permit a conclusive determination of their status.

There is not placed before me any facts as to whether or not the company has authority to fix definite office hours and definite hours of employment, or has authority to direct and control the activities of such agents by directing where they shall go and where they shall solicit business within a district upon a particular day. All of these things are important in the determination of whether or not the contract is one of hire or merely an independent contract. If it is an independent contract, the agents are not employes within the meaning of the Workmen's Compensation Act.

Our Workmen's Compensation Law was not enacted for the purpose of changing, at least to any great extent, the general rule of employer and employe. The purpose of the act was to provide compensation for employes of an employer. That is demonstrated by the language of the statute which refers to those in the service of an employer "under a contract of hire."

The rule relative to this is well stated in *Honnold on Workmen's Compensation*, Vol. I, page 208, section 66:

> "The Compensation Law does not apply where the injured person is an independent contractor, and the relation of employer and employe does not exist. It is not possible to lay down a hard and fast general rule or state definite facts by which the status of men working and contracting together can be definitely defined in all cases as employe or independent contractor. Each case must depend upon its own facts. Ordinarily, no one feature of the relation is determinative, but all must be considered together. A contractor is ordinarily one who carries on an independent employment and is responsible for the

results of his work, one whose contract relates to a given piece of work for a given price. These characteristics, however, though very suggestive, are not necessarily controlling. Generally speaking, an 'independent contractor' is one who exercises an independent employment and contracts to do a piece of work according to his own method, without being subject to the control of the employer, save as to the results of his work. One test, sometimes said to be decisive, is as to who has the right to direct what shall be done, and when and how it shall be done, who has the right to the general control."

In the case of *Tuttle* vs. *Embury-Martin Lumber Company*, 158 N. W., 875, the Supreme Court of Michigan pointed out that the test of relationship of employer and employe is the right to control, and stated that it is not the fact of actual interference with the control, but the right to interfere, that makes the difference between an independent contractor and a servant or agent.

As is pointed out in the 1919 opinion, all of these questions are questions of fact which must be determined by you after all of the facts are placed before you, and are not questions of law to be determined by this office. If you find that these various persons are independent contractors and are performing the duties required of them by virtue of the contracts in their own way and in their own manner, limited only by the provisions of the contracts, and that the company has no right to control their activities in these respects, then these agents are not employes within the meaning of the act. On the other hand, if the company has a right to direct and control their services and activities in performing the duties contemplated by the contract, then they are employes of the company regardless of whether or not the company exercises that right.

It is therefore my opinion that the question of whether or not agents, managers and superintendents of a life insurance company are employes, is a question of fact to be determined by you after considering not only the contract appointing such agent but all the other facts which would assist in a determination of whether or not the contract was a contract of hire or an independent contract.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1365.

PARTITION FENCE—LEGALITY OF TOWNSHIP TRUSTEES AWARDING CONTRACT FOR ITS CONSTRUCTION TO ONLY BIDDER WHEN PROPOSAL RECEIVED AFTER ADVERTISED DATE.

SYLLABUS:

Where, under Section 5913, *General Code, township trustees have advertised for a period of ten days for bids to build or repair a line fence, and no bids have been received during that period, the contract may be awarded to a satisfactory contractor whose bid is received after such period of advertising.*

COLUMBUS, OHIO, January 6, 1930.

HON. C. G. L. YEARICK, *Prosecuting Attorney, Newark, Ohio.*

DEAR SIR:—I am in receipt of your request for my opinion, which reads as follows: