

of departments." Of such a director this section in part provides that he "shall be responsible for the conduct of the officers and employes of his department, for the performance of its business and for the custody and preservation of the books, records, papers and property under its control."

By this section it would appear that the director of the department of finance is legally responsible for the conduct of the employes in the divisions of his department and for the custody and preservation of the city property under the control of his department.

This department has not been advised of any amendment to the charter and the conclusion reached in this department is based on the charter as published in the Supplement, referred to.

The effect of section 53, above quoted, cannot be overlooked, although even without this very clear statement of responsibility it is believed that the common law liability of an officer entrusted with the public money would hold the head of the department responsible for the acts of his assistants unless the law, either by statute or charter provision, vested in the assistant or deputy certain powers and responsibilities independent of and free from the control of the superior officer.

In *State ex rel. vs. Harper*, 6 O. S., 607, it was held where public funds in the custody of the county treasurer were feloniously taken away without any fault or negligence on his part, that the sureties on the treasurer's bond were liable for the loss. No other provisions are found in the charter of the city of Dayton clothing or investing the head of the division of disbursements with independent responsibility, and in view of the plain provisions of section 53, it is believed that the finding for recovery, as suggested in your letter, should be jointly against the director and paymaster.

Respectfully,  
JOHN G. PRICE,  
*Attorney-General.*

1676.

#### OPTOMETRY—WHEN USE AND EMPLOYMENT OF MECHANICAL DEVICE CONSTITUTES PRACTICE OF OPTOMETRY.

*The use and employment of a mechanical device operated on optical principles in the examination of human eyes for the purpose of ascertaining departures from the normal, measuring their functional powers and adapting optical accessories for the aid thereof, in connection with the sale and fitting of eye glasses, constitutes the practice of optometry as defined in section 1295-21, subject to the exceptions found in section 1295-34 G. C.*

COLUMBUS, OHIO, December 3, 1920.

*The State Board of Optometry, Columbus, Ohio.*

GENTLEMEN:—The second question of your request for the opinion of this department, dated September 23, 1920, which was reserved for further consideration, involves the interpretation of section 1295-21 G. C. of the optometry law, found in 108 O. L., p. 73.

By reference to the letter of your correspondent, enclosed with your request, you inquire if the use of a mechanical device, which you describe as a "cabinet \* \* \* with eye cup and a disk of revolving lenses, behind which is a simplified skioptometer," constitutes the practice of optometry.

From the facts stated, it appears that the measurement of vision is obtained

by the patient's use and adjustment of the device, which mechanically registers the functional power of the patient's eyes and at the same time indicates what optical accessories should be used to correct any indicated departures from the normal; that no person, act, diagnosis or express representation of the owner or proprietor of the device enters into such examination or the adaptation of the optical accessories, or, as stated by your correspondent, "from that point on it is a case of merchandising. They choose their glasses and complete the transaction."

The question is whether the use of such a device in the manner and for the purposes stated constitutes the practice of optometry within section 1295-21 G. C., which defines such practice to be "the *application* of optical principles, through technical *methods and devices* in the *examination* of human eyes for the purpose of ascertaining departures from the normal, *measuring* their functional powers and *adapting* optical accessories for the aid thereof."

Your correspondent states that the supreme court of New York has passed upon a similar question under the New York law. No report of such decision has been found by this department, and in a recent letter the attorney general of New York states that he has no knowledge of such a decision. No decision of any court on this question has been found, and it is therefore one largely of first impression.

The object of the law under consideration must be held to be to protect the public from injury at the hands of incompetent or unscrupulous practitioners of optometry. In short, the state has set up a standard of qualification for such persons and has said that no persons, except those so qualifying, may practice optometry in this state.

The result of the operation of this device is certainly within the terms of section 1295-21, being an "application of optical principles through technical \* \* \* devices in the examination of human eyes \* \* \* measuring \* \* \* functional powers and adapting optical accessories." But it may be urged that, admitting this, it is the device that is practicing and not any person; not the owner or proprietor of the device. It is a sufficient answer to this to say that such owner or proprietor is responsible for the agency thus employed by him and that he adopts its acts, so-called, as his own.

Furthermore, considering the purpose of the law, it may be asked, who passes upon the qualification or scientific correctness of this device? An examination of and a license to this inanimate thing is not provided for in the law.

Again, it may be urged that the patient or user is himself measuring his vision, applying corrective accessories and determining optical principles. This seems fallacious; the optical principles have been previously determined and the condition and accessories are mechanically indicated and communicated to the user, who then purchases his glasses in accordance with this result. It may also be said that the tacit approval or recommendation of the person having such device and selling such glasses is back of the mechanical operations.

On the whole it would seem, and until the question is judicially determined it is the opinion of this department, that the use of such a device, as above stated, constitutes the practice of optometry.

Respectfully,  
JOHN G. PRICE,  
*Attorney-General.*