

the construction and completion of contract for Shelter Lodge at Serpent Mound, Adams County, Ohio, for the Archaeological and Historical Society, and calls for an expenditure of four thousand four hundred and thirty-two dollars (\$4,432.00).

You have submitted the certificate of the Director of Finance to the effect that there are unencumbered balances legally appropriated in a sum sufficient to cover the obligations of the contract. You have also furnished evidence to the effect that the consent and approval of the Controlling Board has been obtained as required by Section 2 of House Bill 513, and Section XI of House Bill 510 of the 88th General Assembly. In addition, you have submitted a contract bond upon which the Globe Indemnity Company of New York appears as surety, sufficient to cover the amount of the contract.

You have further submitted evidence indicating that plans were properly prepared and approved, notice to bidders was properly given, bids tabulated as required by law and the contract duly awarded. Also it appears that the laws relating to the status of surety companies and the workmen's compensation act have been complied with.

Finding said contract and bond in proper legal form, I have this day noted my approval thereon and return the same herewith to you, together with all other data submitted in this connection.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1334.

CITY SOLICITOR—PERSON ELECTED TO THE OFFICE ALTHOUGH NOT
AN ATTORNEY—INELIGIBLE TO SERVE.

SYLLABUS:

Under the provisions of Section 4304 of the General Code of Ohio, no person who has been elected to the office of solicitor of a municipal corporation is eligible to assume such office unless he is an attorney and counsellor at law duly admitted to practice in this state.

COLUMBUS, OHIO, December 26, 1929.

HON. HARRY B. REESE, *Prosecuting Attorney, Wellston, Ohio.*

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

“An unusual situation exists in the City of Wellston, Ohio. At the recent election, one not admitted to the bar defeated an attorney in the election for city solicitor. A certificate of election was issued to him and it is my understanding that he has already given bond.

In view of the situation the city auditor has asked me rather than the city solicitor to get an opinion from you as to whether or not he should approve the salary of the person elected to the office, in view of the fact that he is not an attorney at law and in view of the statute which expressly provides that the incumbent of this office shall be an attorney at law.”

Although the Ohio Constitution does not state that city solicitors shall be attorneys-at-law, the Legislature has wisely so provided.

Section 4304 of the General Code, providing that "no person shall be eligible to the office of solicitor of a municipal corporation who is not an attorney and counsellor at law duly admitted to practice in this state," has been on the statute books since 1896.

The language of the above statute is plain and unambiguous and it is, therefore, my opinion that if the person elected solicitor of the city of Wellston is not an attorney and counsellor at law, duly admitted to practice in this state at the time his term of office begins on January 1, 1930, he will be ineligible to take such office.

Section 4305 of the General Code, governing the election of city solicitors reads as follows:

"The solicitor 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. He shall be an elector of the city."

There having been, in the present case, no successor elected who can qualify, the term of the present incumbent continues. *State, ex rel. vs. Governor*, 7 O. S., 372. The lawful term expressly fixed by statute, is not only for two years, but also until his successor is "elected and qualified." His right to serve after the expiration of the designated period, until the qualification of his successor, is no less a part of his statutory term of office than is the fixed period itself. *State, ex rel. vs. Wright*, 56 O. S., 540, at 553.

In a Kentucky case, *Speed vs. Crawford*, 3 Met. (Ky.) 207, it was held:

"The right to hold over is not defeated or terminated by the election of a successor. The successor must have been elected and qualified."

In the Wright case, supra, it was further stated in the opinion (p. 553) that an office is vacant when there is no person in possession of the office legally qualified to perform its duties. The present city solicitor being an attorney-at-law, duly admitted to practice in Ohio, it could not be argued that he is not qualified to perform the duties of the office.

If the present city solicitor refuses to yield his office to the solicitor-elect, the latter, if he feels he is entitled to the office, may institute an action in quo warranto, as provided in Section 12303 of the General Code, in which, to successfully maintain, he would be required to show "not only that he is entitled to the public office, but also that the identical office is unlawfully held and exercised by another." *State, ex rel. vs. Butterfield*, 92 O. S. 428 at 432; *Klick vs. Snavely*, 119 O. S., 308 at 309.

It may be stated, however, that the weight of authority is to the effect that if payment is made to a party incumbent in office, the disbursing authority is protected, because it is not his duty to hunt around and see who is the *de jure* officer. *State vs. Newark*, 6 N. P. 523; 8 O. D., 344 at 349. Thus in 68 N. Y., 274, the syllabus says:

"Disbursing officers charged with the duty of paying official salaries have, in the discharge of that duty, the right to rely upon the apparent title of an officer *de facto*, and to treat him as an officer *de jure* without inquiring whether another has the better right."

The ordinary conception of the duties of an auditor contemplate some inquiry into claims against the municipality, and if he has any actual knowledge of a claim which is questionable, it would be his duty to refuse to pay such claim.

By way of specific answer to your question, I am of the opinion that the city

auditor should not approve the salary of the person elected to the office of city solicitor of Wellston unless he is duly admitted to the bar of this state prior to January 1, 1930.

Respectfully,

GILBERT BETTMAN,
Attorney General.

1335.

TRANSPORTATION—FURNISHED BY COUNTY BOARD FOR PUPILS IN
TOWNSHIP SCHOOL DISTRICT SEVERAL YEARS AGO—HOW CLAIM
FOR SUCH SERVICES, HELD UP BY LITIGATION, DISCHARGED.

SYLLABUS:

Where a claim for the transportation of school pupils, incurred by a county board of education, during its school year of 1921-22, under and by authority of Section 7610-1, General Code, has been held up by litigation in court, which litigation has been dismissed without prejudice, the claim may now lawfully be paid in the same manner it might have been paid originally.

COLUMBUS, OHIO, December 27, 1929.

HON. DANIEL P. BINNING, *Prosecuting Attorney, Coshocton, Ohio.*

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

“On behalf of the Boards of Education of the village school districts of Warsaw and Nellie, I beg to cite the following facts for your consideration and opinion:

In the school year of 1921 and 1922, the Jefferson Township School District of Coshocton County had certain pupils so situated that they were entitled to transportation to school. The township board of education failed to provide for the same and on application the County Board of Education proceeded to and did let a contract to one M. F. for the transportation of said pupils to and from school. He transported said pupils to school for a period of 105 days.

The Township Board of Education in the meantime filed injunction proceedings in the Court of Common Pleas against the County Board of Education, seeking to enjoin the County Board from having any of the funds due said Township Board appropriated for the payment of said transportation. Mr. F., however, was not made a party to the suit. The case has never been heard and Mr. F. has never been compensated for his services. Since the above happenings, the Jefferson Township School District has ceased to exist, it being absorbed by the Warsaw Village School District and the Nellie School District. The Boards of Education of these school districts are financially able to pay and have expressed a willingness that Mr. F. be compensated for the services rendered in transporting the school children of Jefferson Township School District and that the injunction proceedings brought against the County Board of Education be dismissed.

The Boards of Education of the districts that absorbed said school district are desirous of knowing if Mr. F. can be legally paid. If so, should he be paid out of funds now under the control of said boards, or should the County Board of Education authorize the County Auditor to withhold from distri-