

"Each member of the county board of education shall be paid three dollars a day and mileage at the rate of ten cents a mile one way, to cover his actual and necessary *expenses incurred* during his attendance upon any meeting of the board. *Such expenses*, and the expenses of the county superintendent, itemized and verified shall be paid from the county board of education fund upon vouchers signed by the president of the board."

It would appear therefore that there has been no material change in the language of section 4734 G. C., except that the necessary expenses incurred had a limitation put upon them after September 22, 1919; that is, three dollars per day, and nowhere in such section is there any indication that such three dollars is to be considered as compensation.

Since the section provides for the expenses of the member of the county board of education, and not for his compensation, it must be held that the office of member of the county board of education is not a lucrative office and therefore is not one of those offices which fall within those named in Article II, section 4 of the constitution of Ohio, which latter offices, where they are lucrative ones, are prohibited from being held by a member of the general assembly.

It is therefore the opinion of the attorney-general that there are no provisions in the constitution of Ohio prohibiting a member of the general assembly from serving as member of the county board of education.

Respectfully,

JOHN G. PRICE,

Attorney-General.

1119.

TAXES AND TAXATION—SECTION 5387 G. C. DOES NOT REQUIRE LISTING FOR TAXATION—CORPORATIONS REQUIRED TO MAKE REPORT COVERING SUCH PART OF TAX YEAR AS REMAINS BETWEEN TIME OF COMMENCING BUSINESS AND NEXT SUCCEEDING DAY PRECEDING SECOND MONDAY OF APRIL—CORPORATIONS REQUIRED TO MAKE TAX RETURNS AS OF FIRST DAY OF JANUARY.

Section 5387 G. C. does not require a listing for taxation.

Said section as applied to corporations still requires a report to be made covering such part of the tax year as remains between the time of commencing business and the next succeeding day preceding the second Monday of April, whether the business is commenced after January 1 and before the day preceding the second Monday of April or after the second Monday of April, although corporations are required to make their tax returns as of the first day of January.

COLUMBUS, OHIO, April 1, 1920.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Receipt is acknowledged of your letter of recent date requesting the opinion of this department as follows:

"If an incorporated company commences business as a merchant or manufacturer after the first day of January and before the day preceding the second Monday in April is such company required to list its property appertaining to such business for taxation as provided by section 5387 of the General Code?"

If such business is commenced after the day preceding the second Monday in April is the company required to list its property for taxation as provided in said section?"

The section to which you refer provides as follows:

"Section 5387. When a person commences business as a merchant or manufacturer after the day preceding the second Monday of April in any year, the average value of whose personal property employed in such business has not been previously entered on the proper assessor's list for taxation, such person shall report to the auditor of the county the probable average value of the personal property by him intended to be employed in such business until the day preceding the second Monday of April thereafter."

This section does not on its face purport to require the listing of anything for taxation purposes. Machinery is lacking to authorize the county auditor to do anything with the information which is thus supplied to him. No liability for taxes is imposed by the section upon the person who is required to give such information to the auditor.

However, the history of this section discloses some rather surprising facts. It was originally section 13 of the taxation act of 1859, and provided as follows:

"When any person shall commence any business in any county after the day preceding the second Monday of April in any year, the average value of whose personal property employed in such business shall not have been previously entered on the assessor's list for taxation, in said county, such person shall report to the auditor of the county the probable average value of the personal property by him intended to be employed in such business until the day preceding the second Monday of April thereafter; and shall pay into the treasury of such county a sum which shall bear such proportion to the levy for all purposes, on the average, so employed, as the time from the day on which he shall commence such business, as aforesaid, to the day preceding the second Monday of April next succeeding, shall bear to one year. Provided, that if the person so listing his capital, shall present a bona fide receipt to the treasurer of any county in this state, in which such capital had been previously listed and taxed for the amount of the taxes assessed, and by him paid on the same capital for the same year, then and in that case it shall be a receipt from paying taxes again on such capital."

There could be no doubt as to the intention of the legislature under this provision. The report was to be followed up by a payment into the treasury, and the amount of that payment was regulated by law. Provision was made for avoiding double taxation in the case of removal of a merchant or manufacturer from one place to another.

In the revision of 1878, immediately preceding the codification of 1880, the latter part of this section disappeared (See 75 O. L., 444, sec. 10). It may have been the thought of the general assembly that the omitted matter was merely superfluous and that the section would have the same or a substantially equivalent meaning without it as it would if it were included in it. It is true, too, that when engaged in pure codification the legislature is presumed to have no intention to change the law. This presumption has somewhat weaker application to what happened in 1878 and 1880, however, than it otherwise would have, because the legis-

lature did take the trouble to revise the law in 1878 before it codified it in 1880, and the omission occurred in the process of revision; so that the presumption against an intentional change in the law is somewhat weaker than it otherwise would be.

I am informed by a member of the commission that at least in some places this section has been administratively construed and applied as requiring a listing for taxation purposes. I regret, however, to be compelled to advise that such administrative interpretation is palpably erroneous. A statutory scheme for the taxation of "property * * * intended to be employed in * * * business," i. e., property which the person required to list does not have at the present time and may never have, is a most unusual thing to begin with. It is hardly property taxation in any proper sense. But whether it is or not, it fails to fit in with the scheme of things embraced in the other statutes found in the chapter relating to the listing of personal property and will not articulate with those sections. Therefore, in order to be effective it should and must carry with it its own machinery. We find, however, that no machinery is in the present statute, although there was ample machinery in the original section. Lacking any machinery or substantive provisions imposing liability for taxation as a result of compliance with the section, the section itself must be limited to its precise terms. It is fully complied with, therefore, when persons subject to it have made the report required by it. This makes the statute virtually worthless as an administrative measure, it must be admitted. However, it still has enough practical value to serve as a means of information to the county auditor in connection with the succeeding assessment.

Your questions may therefore be answered in a sense by saying that section 5387 G. C. does not provide for any listing of property by anybody; it merely requires a report to be made. However, your question is asked no doubt with special reference to the fact that the time as of which a corporation is required to return its personal property for taxation has been changed from the day preceding the second Monday of April to the first day of January. Coming now to deal with this aspect of the question, it seems clear that section 5387 was intended to and does apply to corporations just as to natural persons. This is clear from the definition in section 5320 G. C. The change, however, effected by the enactment of section 5404-1 G. C. is not enough to work an implied amendment of section 5387. It follows that a corporation commencing business as a merchant or manufacturer after the first day of January and before the day preceding the second Monday of April, if required at all to make a report under section 5387 G. C., is required to include in its report only the probable average value of the personal property by it intended to be employed in such business until the succeeding day preceding the second Monday of April; while if a corporation commences business after the day preceding the second Monday of April in any year, its report of property intended to be employed in the business must extend over until the day preceding the second Monday of April of the succeeding year. This result is incongruous, of course. But inasmuch as section 5387 G. C. is of such slight practical importance as the conclusions previously reached in this opinion have shown it to be, the incongruity which exists may not be fraught with serious consequences.

Respectfully,

JOHN G. PRICE,
Attorney-General.