his opinion on the premise that the combination among bidders be established by competent evidence. I am clearly of the same opinion, but feel that from a practical standpoint it would be almost impossible in any case to establish the combination by competent evidence at the time the bids were received. We are therefore confronted with the further question of whether or not the commissioners are justified in determining whether or not an agreement among the banks to stifle competition had existed without positive proof thereof.

From the very nature of things, bidders who do enter into a combination to stifle bidding are not going to make it public or permit the commissioners to obtain positive proof of it at the time the bids are made. There is no way to compel them at that time, at least, to disclose an agreement of that kind among themselves, and for that reason the commissioners in practically all cases can only judge from the circumstances. The mere fact, perhaps, that all the bidders bid exactly the same is not conclusive. It is a strong circumstance, however, and especially where the bids are much lower than bids previously submitted by the same bidders for the same purpose, and no real economic reason exists for the banks paying a lower rate of interest than had previously been paid.

If, after bids had been received and contracts let, it should later develop that a combination had existed among the bidders to the disadvantage of the county, the commissioners would, no doubt, be criticized for permitting such a thing to happen, and there is no doubt the courts in a proper action would declare depositary contracts, let under those circumstances, illegal. In that event, there is little doubt but that the court would hold that a bank receiving deposits in pursuance of such illegal contract would be liable to the county for whatever profits had accrued to the bank, by reason of receiving the deposits, in accordance with the doctrine of *Bank* vs. *Newark,* 96 O. S. 453, instead of depositary interest at the rate specified in the illegal contract.

The commissioners, therefore, should exercise considerable care in determining whether or not a combination exists among the bidders, and they must necessarily make that determination at the time of, or soon after, bids are received, and without the advantage of securing testimony on the subject as a court would have in a proper action instituted therein. The commissioners are limited in their investigation to the circumstances and what reasonably may be inferred therefrom.

It is my opinion that the commissioners may exercise their honest judgment with respect to the matter and, if it reasonably may be concluded from the circumstances that a combination to stifle bidding had existed among the bidders, the commissioners lawfully may reject all the bids and readvertise.

Respectfully,
GILBERT BETTMAN,
Attorney General.

497.

FINGER PRINTS—SUSPECTED PERSONS—MAY BE MADE AFTER ARREST ONLY UNDER SECTIONS 1841-13 TO 1841-21, GENERAL CODE—RIGHTS OF OFFICERS GENERALLY.

SYLLABUS:

Sections 1841-13 *to* 1841-21, *inclusive, of the General Code, do not confer any right upon sheriffs of the several counties of the state, chiefs of police of cities and marshals of villages to take finger prints before arrest of a person suspected of committing a crime. However, officers have the right, generally, to subject persons whom they have*

reasonable grounds to believe have committed a felony, to a compulsory physical examination, which includes the taking of finger prints for the purpose of ascertaining their identity.

COLUMBUS, OHIO, June 10, 1929.

HON. C. A. MYERS, *Superintendent, Criminal Identification and Investigation, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of April 12, 1929, which is in part as follows:

> "This bureau would be grateful for a ruling from the Attorney General on the following, affected by Sections 1841-13 to 1841-21 of the General Code, relative to a State Bureau of Criminal Identification:
>
> Have the sheriffs, police or other law-enforcing agencies the right under this act to finger print suspected persons without actually placing them under arrest?"

Sections 1841-13 to 1841-21, inclusive, of the General Code, are an act providing for the creating of a state bureau of criminal identification and investigation, and defining its powers and duties. The section of the act pertinent to your inquiry is Section 1841-18, which is in part as follows:

> "It is hereby made the duty of the sheriffs of the several counties of the state, the chiefs of police of cities and marshals of villages therein immediately upon the arrest of any person for any felony, to take his finger prints according to the finger print system of identification.
>
> * * * * *
>
> The provisions of this section shall not apply to violators of city ordinances or those arrested for misdemeanors, unless the officers have reason to believe that he is an old offender, or where it is deemed advisable for the purpose of subsequent identification."

You will observe from a reading of this section that it is the duty of the sheriffs of the several counties of the state, the chiefs of police of cities and marshals of villages to take the finger prints of any person arrested for any felony, and any person arrested for violation of city ordinances or for misdemeanors, where the officer has reason to believe that they are old offenders or where the officer deems it advisable for the purpose of subsequent identification. In each instance where this statute imposes a duty upon the officers mentioned therein, it is *after arrest,* and nowhere in the statute is such a duty imposed before arrest.

> "An arrest is made by an actual restraint of the person of the defendant by his submission to the custody of the officer making the arrest under authority of a warrant or otherwise."
>
> —Words and Phrases, Vol. I, 1st Series, p. 502.

In Webster's New International Dictionary, "arrest" is defined as follows:

> "The taking or detaining of a person by authority of law; legal restraint of the person; custody, imprisonment. An arrest may be made by seizing or touching the body; but it is sufficient if the party be unequivocally within the power of the officer and submit to the arrest."

Arrest may be made without a warrant under Sections 13492 and 13493 of the General Code of Ohio. Section 13492 of the General Code provides as follows:

> "A sheriff, deputy sheriff, constable, marshal, deputy marshal, watchman or police officer, shall arrest and detain a person found violating a law of this state, or an ordinance of a city or village, until a warrant can be obtained."

Section 13493 of the General Code provides as follows:

> "When a felony has been committed, any person without warrant, may arrest another whom he has reasonable cause to believe is guilty of the offense, and detain him until a warrant can be obtained. If such warrant directs the removal of the accused to the county in which the offense was committed, the officer holding the warrant shall deliver the accused to a magistrate of such county, to be dealt with according to law. The necessary expense of such removal, and reasonable compensation for his time and trouble, shall be paid to such officer, out of the treasury of such county, upon the allowance and order of the county auditor."

An officer has a right to take a person in custody where he has reasonable grounds to believe he has committed a felony and immediately thereafter take his finger prints, whether such custody is only temporary, but the person must be in lawful custody of the officer before he has the right to take his finger prints, under Sections 1841-18 to 1841-21 of the General Code. It is the duty of an officer to immediately release a person whom he has arrested when he discovers that the accused has not committed an offense, and it is probably that in a number of cases an officer, after taking a person into custody and taking his finger prints, may learn thereby that he is mistaken and release the person taken into custody, but the right to take finger prints existed by reason of the fact that the person was under arrest. Section 1841-18 imposes the duty upon sheriffs of the several counties of the state, the chiefs of police of cities and marshals of villages to take finger prints after a person is arrested, and by reason of the fact that it imposes a duty, it also confers a right.

> "As used in statute 1855 c 152 declaring it to be the duty of the jury to try according to established principles of law, all causes which shall be committed to them, the word duty includes 'power and right.' What is a man's 'duty' to do he has the rightful power to do."
>
> *Commonwealth* vs. *Anthes,* 71 Mass. (5 Gray) 185.

But since Section 1841-18 does not impose a duty upon the officers mentioned therein to take finger prints before arrest, the statute, therefore, does not confer any such right.

It must be borne in mind that the foregoing discussion is based on such right of officers to take finger prints as is conferred by Section 1841-15, et seq., of the General Code. Finger prints taken under authority of the foregoing sections are for the purpose of filing them for record with the bureau of criminal identification. However, officers have the right, generally, to subject persons whom they have reasonable grounds to believe have committed a felony to a compulsory physical examination, which includes the taking of finger prints for the purpose of ascertaining their identity.

> "When arrested the accused may be subjected to a compulsory physical examination to ascertain his identity."
>
> 12 Cyc. page 401.

In the case of *Shaffer* vs. *United States,* 24 Appeal Cases, D. C., at page 426, the court says:

> "In other words, that the government had no right to photograph the accused while holding him in custody for the purpose of using that photograph to have him identified at the trial. This objection is founded upon the theory that the use of the photograph so obtained is in violation of the principle that a party cannot be required to testify against himself, or to furnish evidence to be so used. But we think there is no foundation for this objection. In taking and using the photographic pictures there was no violation of any constitutional right. There is no pretense that there was any excessive force or illegal duress employed by the officer in taking the picture. We know that it is the daily practice of the police officers and detectives of crime to use photographic pictures for the discovery and identification of criminals, and that, without such means, many criminals would escape detection or identification. It could as well be contended that a prisoner could lawfully refuse to allow himself to be seen, while in prison, by a witness brought to identify him, or that he could rightfully refuse to uncover himself, or to remove a mark, in court, to enable witnesses to identify him as the party accused as that he could rightfully refuse to allow an officer, in whose custody he remained, to set an instrument and take his likeness for purposes of proof and identification. It is one of the usual means employed in the police service of the country, and it would be matter of regret to have its use unduly restricted upon any fanciful theory or constitutional privilege."

Answering your inquiry specifically, I am of the opinion that Sections 1841-13 to 1841-21, inclusive, of the General Code, do not confer any right upon the sheriffs of the several counties of the state, chiefs of police of cities and marshals of villages, to take finger prints before arrest of a person suspected of committing a crime. However, officers have the right, generally, to subject persons whom they have reasonable grounds to believe have committed a felony, to a compulsory physical examination, which includes the taking of finer prints for the purpose of ascertaining their identity.

Respectfully,
GILBERT BETTMAN,
Attorney General.

498.

DISTRICT BOARD OF HEALTH—WHEN PURCHASE OF MOTOR VEHICLE FOR HEALTH COMMISSIONER AUTHORIZED.

SYLLABUS:

A district board of health may purchase a motor vehicle for the use of the district health commissioner of such district when conditions are such that the successful, economical and efficient performance of the board's duties which are expressly imposed by statute may require such a purchase. Affirming Opinion No. 2995, Opinions of Attorney General, 1925, p. 761.

COLUMBUS, OHIO, June 10, 1929.

HON. L. M. SOLIDAY, *Prosecuting Attorney, Zanesville, Ohio.*

DEAR SIR:—Your letter of recent date is as follows:

"The Board of Health of Muskingum County, Ohio, has requested an