1839.

COUNTY TREASURER—MAY BE CANDIDATE FOR COUNTY AUDITOR AT PRIMARY WITHOUT RESIGNING TREASURER'S OFFICE.

SYLLABUS:

A county treasurer may be a candidate for county auditor at the primaries, and also at the following election if he should receive the nomination, without resigning the office of treasurer.

COLUMBUS, OHIO, May 9, 1930.

HON R. H. BOSTWICK, *Prosecuting Attorney, Chardon, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion in answer to the following question:

> "May a county treasurer be a candidate at the primaries, for county auditor, without resigning the office of treasurer?"

The statutes which bear somewhat upon your question are Sections 11 and 2565 of the General Code, which read as follows:

> Sec. 11. "No person shall hold at the same time by appointment or election more than one of the following offices: sheriff, county auditor, county treasurer, clerk of the court of common pleas, county recorder, prosecuting attorney, probate judge, and justice of the peace."
>
> Sec. 2565. "No judge or clerk of a court, county commissioner, county recorder, county surveyor, county treasurer or sheriff shall be eligible to the office of county auditor."

Section 11, General Code, supra, relates to the holding of office, and forbids by its terms a person holding the office of county auditor and county treasurer at the same time. There is nothing in the statute, however, to forbid a person who is holding one of those offices from being a candidate for the other one.

The construction of Section 2565, General Code, however, presents a more difficult question. It will be observed that the statute, by its terms, relates to eligibility to office, and provides that a person holding one of certain offices is not "eligible", to the office of county auditor. The difficult question is whether the word "eligible", as used in the statute, refers to the time of election or the time when the person, if elected, would take office. It is not difficult to see that the Legislature intended by the terms of the statute to render the office of county auditor incompatible with that of other offices named in the statute, but it is difficult, from the context of the statute, to know whether it was meant to extend the prohibition in the statute not only to the holding of the office but to candidacy for the office. This difficulty arises largely by reason of the fact that the courts are widely at variance as to the meaning of the word "eligible" when used in this connection, and there is nothing in the context of the statute by which we may be guided in determining the intention of the Legislature. After diligent search, I am unable to find any direct authority that is helpful. There is no opinion of this office on record construing this statute or any analogous statute with respect to the meaning of the word "eligible" as used in the statute, nor have the courts of Ohio directly passed upon the question.

In Corpus Juris, Volume 46, page 938, it is said:

> "In some jurisdictions it is held that the term 'eligible' as used in a con-

stitution or statute means capacity to be chosen and that therefore the qualification must exist at the time of election or appointment. In other jurisdictions it is held that such word applies to one's fitness or qualifications present at the time of entering upon the duties of the office."

Under a note to which reference is made as applying to the first sentence of the above quotation, there are cases cited from eleven states, including Ohio, as well as from English and Canadian courts, in support of the text. The only case cited from Ohio is that of *State* vs. *Collister*, 6 O. C. C., N. S., 33. Cases from a number of states are cited in support of the second sentence of the above citation.

The above case of *State* vs. *Collister* is cited in a note on this subject in 124 A. S. R., 218, as authority for the doctrine that the word "eligible" when used in a statute such as Section 2565, General Code, here under consideration, refers to the time of the election to office rather than the time of the commencement of the term of office, thus placing Ohio in the list of states in which the word "eligible" in this connection is construed as referring to the time of election. Quoting from the note referred to above, which was written in 1907, it is said:

"Under statutes and constitutions declaring ineligibility to office, doubt has always existed, and must be regarded as still continuing whether the eligibility must exist at the time of election or at the time of the commencement of the term of office. On the one hand, it is maintained that the word 'eligible', in effect, means eligible to be chosen, and hence, if at the time votes are cast, he for whom they were cast is designated by statute or constitution as ineligible, they cannot have the effect of entitling him to the office. * * * *State* vs. *Collister*, 6 O. C. C., N. S., 529 * * *. On the other hand, it is said eligibility must be considered as referring to capacity to hold the office when it is claimed or when the official term begins, and hence, though ineligibility existed at the time of the election its termination or removal subsequently may entitle a person to the office, though the result must have been otherwise if his eligibility could be understood as referring to the time when the votes were cast or the appointment made. * * * (Here, a large number of cases from a number of states are cited.)

Perhaps it may be affirmed that this latter view is growing in favor."

Although the above commentaries, to wit, Corpus Juris, and the note found in A. S. R., Volume 124, at page 218, cite the case of *State* vs. *Collister*, supra, as being dispositive of the prevailing doctrine in Ohio with reference to the construction of statutes such as Section 2565, General Code, here under consideration, I am unable, upon examination of the said case of *State* vs. *Collister*, to agree with the commentators.

The Collister case was a suit in quo warranto, brought on relation of the Prosecuting Attorney of Cuyahoga County. It appeared that the defendant was a resident of the village of South Brooklyn in Cuyahoga County, and had at a general election held on the sixth day of April 1903 in said village received the largest number of votes for the office of marshal of said village and was duly declared elected to the said office. He entered upon the duties of the office on the fourth day of May following, and was at the time of the institution of the suit performing the duties of the office which he claimed to hold. It appeared that at the time he claimed to have been elected he was not a citizen of the United States nor had he become such when he assumed the duties of the office, he having been born on the Isle of Man within the Kingdom of Great Britain, and had never been naturalized in the United States although he had at some time previous to this time taken out what are known as "first papers." In other words, he had made oath in a court of record that it was his bona fide intention to become a citizen of the United States and to renounce forever all allegiance and

fidelity to any foreign prince, potentate, state or sovereignty whatsoever, and particularly to Victoria, Queen of Great Britain, whose subject he then was, but he had not then received what are commonly called his "second papers."

It does appear, however, from the decision of the court, that he had become completely naturalized before the case was finally decided and that he was at that time eligible to the office, the case having not been decided until February 9, 1905. The court, however, apparently gave this fact no consideration, so far as the final determination of the case was concerned, and dismissed it with the remark, "these disqualifications were not removed until many months after he assumed to act in the official position which he claims the right to hold."

The above case should not, in my opinion, be taken as authority for the proposition that the word "eligible" as used in a statute such as Section 2565, General Code, relates to a qualification which must exist at the time of an election to an office. Neither this statute nor any similar statute is referred to by the court, and the court itself distinguishes the case from cases construing statutes such as we have here under consideration, by the following language:

> "We were cited in argument to Morse's Citizenship by Birth and by Naturalization, Appendix 228. We find nothing applicable to either of the cases here being considered, in this authority. We *do* find that where one is chosen to an office which by reason of some disqualification existing at the time of the election he can not hold but which disqualification can be and is removed before the term of office begins, may hold the office. This is held in *State* vs. *Murray*, 28 Wis., 96, and other authorities cited, but we have no such case here."

The court does not indicate what the decision would have been had they had such a case before them. The case of *State* vs. *Murray*, 28 Wis., 96, referred to by the court, is a case cited by text writers and commentators as authority in Wisconsin for holding that the word "eligible" when used in statutes in connection with certain qualifications or disqualifications for office relates to the time of taking office instead of the election or appointment to the office. Corpus Juris, Volume 46, page 938 note.

I find upon examination of the many authorities cited on both sides of the proposition here under consideration the weight of authority to be, and especially among the later cases, that the word "eligible" when used in relation to the qualification for holding an office refers to the time of taking the office, or rather to the holding of the office, instead of the eligibility to candidacy for the office, and inasmuch as neither the courts nor this office have ever passed directly on the question, I am constrained to hold in line with what impresses me as not only being the reasonable and proper construction of the statute, but to be, as well, in line with the weight of authority, that the ineligibility of certain officers to the office of county auditor, as fixed by Section 2565, General Code, relates to the holding of the office of county auditor and not to the candidacy for the office.

Moreover, upon an examination of Section 2910, General Code, which was originally enacted but a few years before the terms of Section 2565, General Code, were enacted into law, it seems clear that the Legislature felt the necessity, when placing inhibitions on the candidacy for office, to use language about which there could be no misunderstanding. It provided with reference to the candidacy and election of a prosecuting attorney:

> "No county treasurer, county auditor, county recorder, county surveyor or sheriff shall be eligible as a candidate for, or elected to said office of prosecuting attorney."

It would seem that we should not construe the language of Section 2565, General

Code, wherein it is provided that certain officers shall not "be eligible to the office of county auditor" the same as we would the language of Section 2910, General Code, which provides that certain officers shall not "be eligible as a candidate for or elected to the office of prosecuting attorney," the two statutes having originally been passed within a few years of each other.

To hold that the word "eligible" as used in Section 2565, General Code, means eligible to be chosen, or relates to the time of election or appointment, would be to hold that the language of Section 2565, General Code, "be eligible to the office of" means the same as the language of Section 2910, General Code, "be eligible as a candidate for, or elected to the office of" when clearly the Legislature meant the two expressions to mean something different.

In specific answer to your question, I am of the opinion that a county treasurer may be a candidate for county auditor, at the primaries, and also at the following election, if he should receive the nomination, without resigning the office of treasurer.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1840.

APPROVAL, ARTICLES OF INCORPORATION OF LOYAL MATRONS OF AMERICA, OF LORAIN, OHIO.

COLUMBUS, OHIO, May 9, 1930.

HON. CLARENCE J. BROWN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I am returning herewith, approved, Articles of Incorporation of Loyal Matrons of America, of Lorain, Ohio.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1841.

APPROVAL, ARTICLES OF INCORPORATION OF THE GENERAL MUTUAL LIFE INSURANCE COMPANY OF VAN WERT, OHIO.

COLUMBUS, OHIO, May 9, 1930.

HON. CLARENCE J. BROWN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I am returning herewith, approved, Articles of Incorporation of the General Mutual Life Insurance Company of Van Wert, Ohio.

Respectfully,
GILBERT BETTMAN,
Attorney General.