By the above grants there is conveyed to the State of Ohio, certain lands described therein, for the sole purpose of using said lands for public fishing grounds, and to that end to improve the waters or water courses passing through and over said lands.

Upon examination of the above instruments, I find that the same have been executed and acknowledged by the respective grantors in the manner provided by law and am accordingly approving the same as to legality and form, as is evidenced by my approval endorsed thereon, all of which are herewith returned.

Respectfully,
HERBERT S. DUFFY,
*Attorney General.*

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2057.

UNEMPLOYMENT COMPENSATION ACT—EMPLOYER—EMPLOYE—SECTIONS 1345-1(b)—1345-1c (E) (4) GENERAL CODE—INTERPRETATION WORDS AND PHRASES—"AT ANY ONE TIME"—HAD IN EMPLOYMENT "THREE OR MORE INDIVIDUALS AT ANY ONE TIME"—"PURELY GOVERNMENTAL FUNCTIONS"—"MASTER OF HIS OWN TIME AND EFFORTS"—BARBERS AND BEAUTICIANS, SALESMEN, INSURANCE, REAL ESTATE, STOCKS AND BONDS.

*SYLLABUS:*

1. *The phrase "at any one time" as used in Section* 1345-1 (*b*) *to qualify "had in employment three or more individuals" means—at any one moment; the determination of whether an employer had in employment "three or more individuals at any one time" is not dependent on whether the individuals are engaged in the rendition of services at the same moment for the word "employment" is used in Section* 13451-1 (b) *in a general sense and does not merely refer to actual rendition of services.*

2. *The word "purely" appearing as part of the phrase "purely governmental functions" in Section* 1345-1 (C) (E) (4) *means—exclusively or wholly.*

3. *The question of whether an individual "is master of his own time and efforts" and whether his remuneration "is wholly dependent on the amount of effort he chooses to expend", within the meaning of Section*

1345-1 (c) (E) (7), *is a factual one. Whether a person is "master of his own time and efforts" depends upon the extent to which he is subject to the control and regulation of his superior.*

COLUMBUS, OHIO, March 10, 1938.

*The Unemployment Compensation Commission of Ohio, 33 N. Third Street, Columbus, Ohio.*

GENTLEMEN:

I am in receipt of your communication requesting my opinion on several questions which I am taking the liberty of restating, as follows:

1. What is the meaning of the phrase "at any one time" as used in Section 1345-1 (b) (1)?

2. What is meant by the phrase "in the exercise of purely governmental functions" as used in Section 1345-1 (c) (E) (4)?

3. What is meant by the phrase "who in the performance of the work is master of his own time and efforts and whose remuneration is wholly dependent on the amount of effort he chooses to expend" as this quoted matter is used in Section 1345-1 (c) (E) (7)?

As illustrations of problems under this provision, you cite the cases of:

(A) Journeyman barbers and beauticians operating chairs in barber shops or beauty parlors on a commission basis.

(B) Fire insurance salesmen.

(C) Real estate salesmen.

(D) Stock and bond salesmen.

I will consider the questions in the order stated above.

The portion of Section 1345-1 (b) pertaining to this discussion reads as follows:

"'Employer' means any individual or type of organization including any partnership, association, trust, estate, joint stock company, insurance company, or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee, or the successor thereof, or the local representative of a deceased person who (which) has, or subsequent to December 31, 1936, had in employment three or more individuals *at any one time* within the current calendar year: * * *" (Italics the writer's.)

I believe there can be little doubt as to the meaning of the phrase "at any one time". There being no ambiguity, there is no occasion for statutory construction. The phrase clearly connotes—at any moment or instant. This is not to say that the three persons referred to in this section must be actively engaged in the performance of their duties at the same instant for the phrase refers to "in employment". If a person is under contract, express or implied, to render services for another, he is in the employment of such other person without regard to whether he is engaged at the moment in the rendition of services for the other. *Cox* vs. *Brown,* 50 S. W. 2nd. 763, 764 (Missouri). Also see *Fitcher* vs. *Rollman & Sons Company,* 31 O. App. 347, 351.

The portion of Section 1345-1 (c) (E) relating to your second question provides as follows:

> "The term employment shall not include: (4) Service performed in the employ of any governmental unit, municipal or public corporation, political subdivision, or instrumentality of the United States or of one or more states or political subdivisions *in the exercise of purely governmental functions;* ** * " (Italics the writers'.)

I have had occasion to consider this portion of the Unemployment Compensation Act in two of my recent opinions rendered for you, being Opinions No. 1341 and No. 1769. In the first one it was held that employment by municipal water works or municipal cemeteries was not employment by municipal instrumentalities "in the exercise of purely governmental functions". As therein pointed out, the use of the word "purely" indicates, in my opinion, an intention by the Legislature that the exemption only applies to those employments by governmental agencies which perform functions which are clearly governmental. The word "purely" has been involved in the determination of many cases and it has been quite generally defined as meaning exclusively or wholly. *White* vs. *Smith,* 189 Pa. 222, 223; *Memphis Chamber of Commerce* vs. *City of Memphis,* 144 Tenn. 291, 292; *Trustees Kentucky Female Orphan School* vs. *City of Louisville,* 100 Ky. 470, 472; *Distilling and Cattle Feeding Company,* 161 *Ill.* 100. *Also see Watterson* vs. *Holliday,* 77 O. S. 150, 173.

In the case of *Cleveland Library Association* vs. *Felton,* 36 O. S. 253 the Court interpreted the phrase "purely charitable purposes" in accordance with this line of decisions. On page 259 the Court said:

> "The words 'institutions of purely public charity,' are substituted in the act of 1864, for the societies specifically named

> in the act of 1846, and embrace all societies without enumeration, where the object is a *purely* public charity. If such an institution embraces other objects, and uses its buildings for other purposes, as for instance, renting with a view to profit, it is not an institution of purely public charity. In short, its buildings must, under the act of 1864, as well as under that of 1846, be used *exclusively* for that object, in order to be exempt."

It is obvious that the Court was here considering the word "purely" as used in another connection. Nevertheless, the case is helpful as it indicates a disposition on the part of the Court to construe "purely" as meaning "exclusively." These considerations, as well as others not here pertinent, inclined me to hold, as I did in Opinion No. 1769, that building and loan associations which are members of the Federal Home Loan Bank and state banks which are members of the Federal Reserve System do not come within the terms of the exemption as institutions of these classes perform many functions which are clearly non-governmental in nature.

There remains for consideration the question of what constitutes a governmental function. This problem has plagued the courts for a long time. The courts have avoided a definition of the term wherever possible and have preferred to decide each case on the particular facts. It must, of course, be kept in mind that we are here considering, as was pointed out in my Opinion No. 1769, a taxation measure. As indicated in *Brush* vs. *Commission,* 300 U. S. 352 at page 362, the decisions of the courts in regard to what constitutes a governmental function as distinguished from a proprietary function in other fields of the law are not authoritative in the taxation field.

Illustrative of the attitude of the courts when confronted with this problem is the following quotation from page 365 of the Brush case, supra:

> "We have thus come to a situation which the courts have frequently been called upon to meet, where the issue cannot be decided in accordance with an established formula, but where points along the line 'are fixed by decisions that this or that concrete case falls on the nearer or farther side'. *Hudson Water Company* vs. *McCarter,* 209 U. S. 349, 355; 52 L. Ed. 828, 831; 28 Supreme Court, 529· 14 Ann. Cas. 560.
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> "We are, of course, quite able to say that certain functions exercised by a city are clearly governmental—that is, lie upon the near side of the line—while others are just as clearly private or corporate in character, and lie upon the farther side. But

between these two opposite classes, there is a zone of debatable ground within which the cases must be put on one side or the other of the line by what this court has called the gradual process of historical and judicial 'inclusion and exclusion'. *Continental Illinois National Bank & Trust Company* vs. *Chicago, R. I. & P. Railroad Company,* 294 U. S. 648, 670; 79 L. Ed. 1110, 1125 55 Supreme Court, 595; 27 American Bankruptcy Reports (NS) 715 and cases cited.

We think, therefore, that it will be wise to confine, as strictly as possible the present inquiry to the necessities of the immediate issue here involved, and not, by an attempt to formulate any general test, risk embarrassing the decision of cases in respect of municipal activities of a different kind which may arise in the future. (Citations) "

The refusal by the Supreme Court of the United States to lay down a general test prompts me to refrain from attempting to spell out a definition. In the future I shall attempt to resolve the issue as it arises in connection with a particular class of instrumentalities.

In your third question you refer to Section 1345-1 (c) (E), of which section the following is pertinent:

"The term employment shall not include: (7) Service performed by an individual for one or more principals who is compensated on a commission basis, and who in the performance of the work is master of his own time and efforts, and whose remuneration is wholly dependent on the amount of effort he chooses to expend."

The language used clearly indicates an intention by the Legislature to distinguish between employments in which the master-servant relationship exists and all other relationships created when one person performs services at the request of another. The guidepost in the determination of this problem is the use of the word "master." It is generally said that the relationship of master and servant exists where the person for whom the work is done has a right to control not only what work shall be done, but *how* it is to be done. This proposition is stated in 26 O. J. at page 152 in the following language:

"The relationship of master and servant is primarily dependent upon the employer's right to direct *the manner* in which the work shall be done." (Italics the writer's.)

I believe that is what the Legislature is attempting to indicate in the use of the clause "and who in the performance of the work is master of his own time and efforts". As I read this provision, in order for particular services to be exempt, the party rendering same must not only be "master of his own time and efforts" but in addition his remuneration must be "wholly dependent on the amount of effort he chooses to expend". I am aware of the provision of Section 27 of the General Code which in part provides that the word "and" in the first two parts of the General Code may be interpreted as "or", but there is a qualification and that is that this juxtaposition of meanings shall only be applied "if the sense requires it". I know of nothing to indicate that the sense of this section does require such an interpretation and I am of the opinion that both conditions must be true in order for the services to be exempt under Section 1345-1 (c) (E) (7).

Perhaps the consideration of the particular cases will throw more light on the problem. Consider first the case of the journeyman barber referred to in your communication. Inasmuch as he is on a commission basis, it could be argued that his remuneration is "wholly dependent on the amount of effort he chooses to expend" (although I imagine there are a lot of journeyman barbers who would contend that it also depends upon the number of customers that entered the barber shop). Can it be said he is the master of his own time and efforts? Is it not true that in most barber shops the proprietor requires that the barber, whether he be regular or merely a journeyman barber, be in attendance at certain hours and that he perform his work in accordance with the general practices employed in that shop? I believe the answer must be in the affirmative and while I do not have personal experience, I believe the same would be true of beauticians whom you describe in your letter as working under the same conditions as those of the journeyman barber.

In respect to fire insurance salesmen, I do not believe the question can categorically be answered because it is not possible for me to say whether fire insurance salesmen are "masters of their own time and efforts" as that would depend upon the facts in the particular case.

In your letter you indicate that there is some statutory restriction prohibiting a solicitor of insurance from acting for more than one principal. (The only basis for such a construction, to my knowledge, is the portion of Section 644-1 which provides that an insurance solicitor shall be considered as of three classes and that no solicitor "shall be licensed for the same kind of insurance by more than one agent"). As I see it, the mere fact that a salesman may, according to law, only be employed by one principal does not determine the question whether his employment is exempt by reason of the provisions of Section 1345-1 (c) (E) (7). The question simply involves the determination of whether such sales-

men, as a matter of fact, are masters of their own time and efforts. If the salesman must report for work at a certain time, must spend a certain number of hours per day, must make a certain number of calls per day or is subject to considerable regulation by the agent for whom he works, then such salesman is not master of his own time and efforts and his employment would not be, in my opinion, exempt from the Unemployment Compensation Act. On the other hand, if the salesman is not subject to regulation and control, his employment would be, in my opinion, exempt from the provisions of the Unemployment Compensation Act by reason of Section 1345-1 (c) (E) (7).

The determination of the problem as it affects the remaining two categories, namely, real estate salesmen and stock and bond salesmen likewise depends upon the factual situation. If the particular facts surrounding the employment are made known, the question of whether or not they are masters of their own time and efforts can be determined. However, I see no reason for saying that merely because such salesmen can only work for one principal would be determinative of the question. If a salesman can work or not, as he pleases, and put in such hours as he desires, call on such customers as he chooses and employ whatever methods of salesmanship he prefers, I do not believe that the mere fact that he may only be employed by one principal in his particular line of work would in any way affect the situation.

Respectfully,

HERBERT S. DUFFY,

*Attorney General.*

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2058.

APPROVAL—BONDS CLEVELAND HEIGHTS VILLAGE SCHOOL DISTRICT, CUYAHOGA COUNTY, OHIO, $20,000.00, PART OF TWO ISSUES DATED JULY 15, 1920.

COLUMBUS, OHIO, March 10, 1938.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*

GENTLEMEN:

RE: Bonds of Cleveland Heights Village School Dist., Cuyahoga County, Ohio, $20,000.00.

The above purchase of bonds appears to be part of two issues of bonds of the above school district dated July 15, 1920. The transcripts