

Commissioner of Railroads and Telegraphs; Charging Fees for Services Required by Law—Appointment by Governor; Consent of Senate; Reconsideration After Commission Issued.

COMMISSIONER OF RAILROADS AND TELE-
GRAPHS; CHARGING FEES FOR SERVICES RE-
QUIRED BY LAW.

Office of the Attorney General,
Columbus, Ohio, January 11, 1896.

*Hon. William Kirkby, Commissioner of Railroads and Tele-
graphs:*

DEAR SIR:—You have requested my opinion upon the point whether you can charge a moderate fee for a permit for an overhead structure over a railroad track, issued in accordance with the provisions of the act of May 21, 1894, (91 O. L., 365), regulating the height of bridges, viaducts, overhead roadways and foot bridges over railroad tracks.

In reply I beg to say, that it is my understanding you are without authority to charge fees for services prescribed by law, unless specially authorized by the law itself, and I can find no language in this statute warranting any exaction on your part.

Very respectfully,
J. K. RICHARDS,
Attorney General.

APPOINTMENT BY GOVERNOR; CONSENT OF
SENATE; RECONSIDERATION AFTER COM-
MISSION ISSUED.

Office of the Attorney General,
Columbus, Ohio, January 11, 1896.

Hon. A. L. Harris, Lieutenant Governor of Ohio:

DEAR SIR:—In your favor of the 10th inst., you submit to me the following question:

Section 4215 R. S.; Application.

"Can the senate reconsider its vote confirming an appointee of the governor, after the commission has been delivered and the official qualified?"

I answer unhesitatingly in the negative. After the senate has by a vote advised and consented to an appointment made by the governor and by message has notified the governor of such advice and consent, and in accordance with such action, the governor has commissioned his appointee, and the appointee has qualified, the vote of the senate can no more be reconsidered and its consent withdrawn, than could the vote of the General Assembly for senator, after a commission had been issued upon such action, or the vote for a bill which had been enrolled and signed and filed with the secretary of state. In each instance the action becomes final. In the case you mention, the appointee becomes vested with the title to the office and cannot be divested of it except in the manner and through the process provided by law.

Very respectfully,

J. K. RICHARDS,

Attorney General.

SECTION 4215 R. S.; APPLICATION.

Office of the Attorney General,
Columbus, Ohio, January 28, 1896.

Mr. Ross W. Funck, Prosecuting Attorney, Wooster, Ohio:

DEAR SIR:—Your favor of the 25th inst., directed to the department, asking for a construction of section 4215, R. S., and making inquiry whether the said section would apply to the experimental station in Wayne County, duly received.

The statute, as amended (91 O. L., 198) provides for the township trustees to pass first upon this class of claims. It is my opinion that, for the purposes of this section, the state of Ohio, or its tenant or lessee as provided in said act,

Section 4215 R. S.; Application.

would fairly be included as a "person." Constructing the whole act together, together with section 4215a, removes the difficulty suggested by your very ingenious reasoning, as to it being a tax. I take it to be the exercise of the police power of the State which has perhaps, not the primary object of raising money, so much as to prevent this destruction of property, at least intended to prohibit by laying a penalty upon the owners of dogs as in the act provided. While it may work a hardship upon people who do not own dogs to have to pay for loss when the owner of the dog is unable to be found, it is not more so than the State bearing the expense of any other prosecution under its police powers.

You ask for the official opinions given in similar questions in this department. There is none of record directly in point.

The State has as much interest in having public order preserved in Wayne County by imposing some burdens upon the owners of sheep-killing dogs, as in any other part of the domain. Any other construction would permit the adjacent dwellers to the experimental station to allow their dogs to destroy State property without suffering any penalty therefor.

Yours respectfully,
F. S. MONNETT,
Attorney General.

Managers of Institutions; Payment of Traveling Expenses.MANAGERS OF INSTITUTIONS; PAYMENT OF
TRAVELING EXPENSES.

Office of the Attorney General,
Columbus, Ohio, January 29, 1896.

Hon. F. M. Marriott, Delaware, Ohio:

DEAR SIR:—Your favor of the 3d ult., addressed to the department in reference to the board of managers of the Ohio State Reformatory has, as I understand from the assistant, not yet been answered. A similar inquiry from Newark from another member of the board through their attorney, Mr. Kibler, called my attention to your inquiry, which I shall briefly answer as follows:

The original section 7388-18 was amended in 87 O. L., 226; again amended 87 O. L., 241; repealed 88 O. L., 388; new law enacted 88 O. L., 418, 420, which you designate in your letter as senate bill No. 482, was repealed 89 O. L., 388, leaving as I understand but one act now in force (88 O. L., 382), which is designated by you as senate bill No. 440. Since this is the only act in force, and under it you appointed six members and have recognized this act as the act under which you are acting, your question as to harmonizing the two statutes then falls, leaving but the one inquiry to be answered, to-wit: "But they shall be allowed their reasonable traveling and other official expenses, not exceeding \$500 a year, each payable monthly." I do not understand that this gives the board authority to each draw \$500 per year, regardless of their expenses, in view of the present status of the law on this subject. The modifying word "traveling" could perhaps have been as well included in the word "official." I take it that the word "official" is synonymous with "legitimate" in this connection, or the word "necessary," but not to include what would properly come within the definition of a salary. As I understand from Mr. Kibler, of Newark, he seemed to have been laboring under the same mistake, that your board is acting under the repealed

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law known as senate bill 482, and is proceeding to complete the building. This must be done by some implied authority as there is no statutory authority that I am aware of authorizing the board to do other than as provided in senate bill 440, save and except the brief reference in 91 O. L., 251, 326, where in a general appropriation bill, appropriations were made for this building. It is that peculiar confusion in legislation that sometimes happens that your board should at once call the proper committee's attention to and have some suitable statute enacted covering this subject matter; in other words, give you legal authority to use that appropriation; and when that is done, no doubt they will be willing to give you compensation for said extra services.

Very respectfully,

F. S. MONNETT,
Attorney General.

LLOYDS INSURANCE ASSOCIATION.

Office of the Attorney General,
Columbus, Ohio, January 30, 1896.

In the matter of the application of S. E. Kemp, to the attorney general to act as relator in quo warranto proceedings, to oust from doing insurance business in Ohio, certain Lloyds associations, recently licensed by the superintendent of insurance.

After hearing arguments on behalf of the application, by Hon. S. E. Kemp, president of the Dayton Insurance Company, and O. F. Davison, general counsel for said company, and in opposition to the application by Mr. C. B. Squire, agent of the Lloyds Associations, and Hon. J. K. Richards, counsel, and after examination of the printed briefs filed, and careful consideration of the action of the superintendent of insurance, in the light of the statutory

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provisions upon the subject, I have reached the following conclusions:

Section 3656, Revised Statutes, contemplates the admission to do insurance business in Ohio, not simply of foreign corporations, but also of foreign associations or partnerships. A combination of individuals doing insurance business under the name of the Lloyds may properly, in my estimation, be regarded as an association within the meaning of this section.

The superintendent of insurance having carefully examined these associations and having ascertained them to be solvent, and the associations after such examination, having complied with the laws of Ohio regulating the admission to do business in this State, of foreign corporations, associations and partnerships, I am not disposed, in the light of the facts and arguments presented, to overrule his decision, or question the correctness of his action, in admitting these Lloyds Associations to do business in Ohio.

Very respectfully,

F. S. MONNETT,

Attorney General.

Schools; School Boards; Contracts With Publishers.

SCHOOLS; SCHOOL BOARDS CONTRACTS WITH
PUBLISHERS.

Office of the Attorney General,
Columbus, Ohio, February 11, 1896.

*Hon. O. T. Corson, State Commissioner of Common
Schools:*

DEAR SIR:—In your favor of the 10th inst., you ask for an official opinion as to the construction of the act of May 4, 1891, (88 O. L., 568), in reference to supplying school books, etc.

In answer to your first proposition, "Is the school board created by this act a perpetual body or a limited commission?" my opinion is that it is a commission limited to a period of five years.

As to your second inquiry, "Will contracts, which have been made or will yet be made by boards of education with publishers of school books, be valid for five years from date of contract, or only until the expiration of the five years named in the law?" If all other conditions have been complied with in the act when the contract was entered into, such contract will be good for five years from the date thereof.

Your third inquiry is: "What action, if any, on the part of the Legislature will be necessary to continue the operation of the present act in its present form?" I would suggest that you appear before the proper committees of the general assembly and call their attention to this limitation, have the law so amended as to make the commission a permanent board, and the whole act constructed to harmonize with this change.

Very respectfully,
F. S. MONNETT,
Attorney General.

Extradition; Evidence.

EXTRADITION; EVIDENCE.

Office of the Attorney General,
Columbus, Ohio, February 25, 1896.

Hon. Asa S. Bushnell, Governor of Ohio:

SIR:—I hereby certify that I have examined the within requisition of the governor of Pennsylvania, for the extradition of Lena Flora, alias Lena Flora Straw, alias Lena Johann, and one Joseph Salvestro, alleged fugitives from said state of Pennsylvania.

And in compliance with section 96, R. S., I have investigated the grounds thereof, so far as the facts and testimony have been submitted to me, and which have come to my knowledge. I submit an abstract of the evidence herewith, with an opinion as to the legality and necessity of complying with the demand or application.

Section 95, of the Revised Statutes of Ohio, provides that such demand or application must be accompanied by sworn evidence that the party charged is a fugitive from justice, and that the demand or application is made in good faith for the punishment of the crime. * * * And also by a duly attested copy of the indictment or information, or a duly attested copy of a complaint made before a court or magistrate authorized to take the same; such complaint to be accompanied by an affidavit to the facts constituting the crime charged, by persons having actual knowledge thereof.

Section 905, of the Revised Statutes of the United States, provides:

“The records of judicial proceedings of the courts of any state or territory shall be proved or admitted in any other court within the United States, by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice or presiding magistrate, that said attestation is in *due* form.”

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From the above federal statute it appears that the affidavit of Carmen Straw is sworn to before the clerk of the court of quarter sessions, but there is no certificate of the judge of that court that the attestation is in due form. So as to the affidavit made before John P. Anthony, alderman, the clerk of the Orphan's Court certifies as to the genuineness of the signature, but there is no certificate from any judge that the attestation is in due form.

These objections appear on the face of the papers as to both defendants.

In the case of the first named defendant, Lena Flora Straw, I herewith enclose her affidavit setting forth that she is the wife of the complainant among other allegations. There is also an affidavit of L. C. Gates, of Lycoming County, which I herewith transmit, that in part corroborates her affidavit. If these affidavits are not contradicted, and if it be true that she was his wife at the time of the alleged larceny, as to her there would be no crime.

I would therefore recommend that the requisition be refused as to both defendants for the reason of the above informalities, and as to the defendant, Lena Flora Straw, from the evidence offered that she did not commit any crime.

I would hold that a stricter compliance with the rules of your department should be observed when an extradition is sought for upon an affidavit and not upon an indictment.

Respectfully submitted,

F. S. MONNETT,
Attorney General.

Dow Liquor Law.

DOW LIQUOR LAW.

Office of the Attorney General,
Columbus, Ohio, February 29, 1896.

Hon. W. D. Guilbert, Auditor of State:

SIR:—Your esteemed favor of the 29th inst., asking for an opinion in writing upon the application of the amendment to the Revised Statutes, bearing date of February 20, 1896, section 1, of the Dow Law, duly received.

You ask for construction of the following language: "Said amendment shall take effect on and after its passage." "While the general act fixes the fourth Monday of May as the beginning of the tax year. And whether dealers or those who desire to traffic in intoxicating liquors, commencing after the 20th day of February, 1896, shall be subject to the amendment of that date, or shall the law fixing the amount in the general act on the fourth Monday of May, prevail?"

First, the amendment takes effect the first day beginning after the day of its passage, to-wit: the 21st day of February, 1896.

As to all parties commencing business at any date after the 20th of February, 1896, until the fourth Monday of May following, said law as amended shall apply.

And section 3, of the Dow Law, as passed March 26, 1888, (85 O. L., 117), in all other respects would apply. Said section 3, provides that when any such business shall be commenced in any year after the fourth Monday in May, said assessment shall be proportionate in amount to the remainder of the assessment year, except that it shall be in no case less than \$25.00, and the same shall attach and operate as a lien as aforesaid.

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The proportion will be hereafter based upon \$350.00, instead of \$250.00, as to all new business begun after February 20, 1896.

Respectfully submitted,
F. S. MONNETT,
Attorney General.

PROSECUTING ATTORNEY; COLLECTION OF
JUDGMENTS AND COSTS; FEES.

Office of the Attorney General,
Columbus, Ohio, March 3, 1896.

*Hon. R. M. Wanamaker, Prosecuting Attorney, Akron,
Ohio:*

MY DEAR SIR:—YOUR esteemed favor of 29th ult., was received at this office Monday, March 2, in which you ask for a construction of section 1273, R. S., of Ohio, as to certain points in your favor named.

1273 as now composed, is made up of the old section that passed and took effect March 7, 1835, and an act passed April 3, 1852. The former of these two acts provided exclusively for the prosecuting attorney to collect judgments and cost rendered against defendants in criminal cases. While section 2 of the act of 1852, provided for his duties in collecting claims that were civilly due the county. Our codifying commission evidently united these two acts of section 1273, so that so much of section 1273 as is thrown in between the two semi-colons, which begins, "and in every case of conviction, etc.," ending at the next semi-colon, is evidently abbreviated or epitomized from the long and cumbersome language of 1835. And the Legislature and the codifying committee have thus condensed in the one act 1273, all that they originally included in the two statutes re-

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referring to civil and criminal cases. And by reading section 1273, omitting the matter between the two semi-colons, you get the substance of the original statute referring purely to civil suits. So that I think it a fair interpretation of the word "prosecute" as used in 1273, in its generic sense. It seems to be the most comprehensive word the Legislature could use to include both civil and criminal action. In fact the old act used the same term "prosecute" when it referred to civil actions in the parent section.

In section 3977, referring to prosecuting attorneys and city solicitors, in reference to civil actions under chapter 7, it uses the term "prosecute." The primary definition as given by the Century dictionary is, (a), "To seek to obtain by legal process; as, to prosecute a claim in court of law. (b). To arraign before a court of justice for some crime or wrong."

The distinctions seem to be, a person instituting civil proceedings is said to prosecute his *action or suit*. A person instituting criminal proceedings, or civil proceedings for damages for a wrong, is said to prosecute *the party* charged.

Therefore, in answer to your first proposition of inquiry, the word "prosecute" in 1273 applies to all actions, criminal and civil.

Your second inquiry is as to the phrase, "In which the State is a party." Whether this includes the State *ex rel.*, as a party.

There are many cases under our statutes of the State, on relation, in which the county, the county commissioners or other county officers, and school boards may not be directly or indirectly interested, and for that reason I take it that the prosecuting attorney is not required, under 1273, or 1274, to take a part officially in the prosecution or defense of such a case.

I would make it a test in each case, whether it is actually in behalf of the State the suit, complaint or controversy is being prosecuted or defended, and not for the purposes of private ends or benefits.

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Fees.*

Third, you ask for the limitation of section 1273 to the Probate, Common Pleas and Circuit Courts, and for statistics on these matters.

I think, and so construe the phrase to mean the original jurisdiction in those three courts. Or, jurisdiction in error or appeal from a lower court into any one of these three courts, it then becomes his duty, when the State is a necessary party, to take care of the case and costs. It excludes the necessity of his attending to prosecutions on behalf of the State in original actions before a justice of the peace or mayor's court; neither would he perhaps be compelled to appear in the Supreme Court in any action of original jurisdiction in the Supreme Court in which the State is made a party. But I do not think the Legislature intends to exclude him from following a case from these lower courts on error or appeal, to the court of last resort, where the case originated, or passed through the Probate, Common Pleas or Circuit Courts. Under the old act of 30 O. L., 13, which has traces of 1273, it provided that the prosecuting attorney should prosecute for and on behalf of the State * * * within the county for which the prosecuting attorney shall have been elected, both in the *Supreme Court* and the *Court of Common Pleas*.

This act remained in force, relating to prosecuting attorneys, until the act of 1846, 45 O. L., in which the office of attorney general was created, and certain powers heretofore given to the respective prosecuting attorneys were abridged by transferring them to the attorney general. The boundary line between the two as to criminal business has never been very distinctly defined, but the practice has been when a criminal case is brought into Supreme Court, on error from the counties, for the prosecuting attorneys to *pro forma* have the attorney general associate his name in the Supreme Court proceedings. But my predecessor informed me when I came into office that during his term of office he was not required to prepare for hearing any criminal case on

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error, but that they were always taken care of by the prosecuting attorney. It is not clearly defined whether prosecuting attorneys should receive compensation for their special services in criminal cases in Supreme Court or not. The state auditor and the county auditors who are in the office with him as deputies and employees, when appealed to for statistics in this matter, were all of the opinion that the practice in the counties where cases went on error, from the Circuit Court to the Supreme Court, in which the State is a party, the commissioners allowed the prosecuting attorney his costs and expenses, and a small attorney fee. I believe there is no fair construction of statute warranting this as a matter of right, and that prosecuting attorneys being rightfully engaged in the cases in the Probate, Common Pleas or Circuit Courts, are bound to carry the case through to Supreme Court if the interests of their county require it, and without extra compensation. But I say this, as a matter of right the commissioners are not perhaps compelled to pay extra. And yet I believe they are justified under their discretionary powers, and should in many instances pay extra for this class of work.

I have given this as thorough a research as time permits me, as we are very crowded at present in the office; and as the statute now stands, section 208 amended 88 O. L., 11, it does not come strictly within my duties to make the constructions you ask for. But you are the legal adviser of the commissioners in these matters.

Very respectfully,

F. S. MONNETT,

Attorney General.

Jury Duty; Militiamen.

JURY DUTY; MILITIAMEN.

Office of the Attorney General,
Columbus, Ohio, March 16, 1896.

Gen. H. A. Axline, Adjutant General:

DEAR SIR:—Your favor of March 7, enclosing a communication from M. L. Wilson, lieutenant of the 14th infantry duly received, together with the return request from this department, and the reply of your department of March 13, 1896, requesting an official opinion to be given you as to the power of the "Pugh Videttes" to issue honorary membership certificates to exempt the holder of such certificates from jury duty. Section 51891, as amended March 29, 1881, provides:

"Acting and contributing members of all military companies and batteries * * * shall be exempt from serving on juries." Sections 3033 and 3034 define military companies as applied to the Ohio National Guard. Section 3039 provides "that officers commanding companies, troops and batteries may enlist contributing members not to exceed one hundred and fifty and when such contributing members comply with the terms of that statute, they shall be exempt from jury duty.

Section 3040 provides for independent military companies. The first class must be organized twenty years, or any independent infantry battalion the organization of which has been continuous for at least three years last past, all of whom have been and shall continue to be fully armed and equipped at their own expense and agree to be subject to all calls of the governor for troops, and at least forty of the members of such company or of the several companies of such infantry battalion together with the field and staff officers sign an agreement to that effect and file such agreement with the governor, the acting and contributing members thereof, not exceeding the number allowed infantry

Jury Duty; Militiamen.

companies of the organized militia, shall be entitled to all the privileges and exemptions allowed members of the National Guard.

I asked for further data in reference to the Pugh Videttes. This was not furnished, further than the statement that they were not members of the Ohio National Guard, unless they come within the provisions of section 3040, as an independent military company with an organization continuous for at least twenty years last past, or unless they are an independent infantry battalion with an organization for at least three years last past, having complied with all the other requirements of said section. I hold that they have no authority to enlist contributing members to such an organization for the purpose of exempting such contributing members from jury duties.

I might further add that this is not a question that either your department or mine should be called upon to answer; but inasmuch as it is a question that will arise before a court of competent jurisdiction, where such inquiry is made in each instance, the presiding judge can readily determine whether the party seeking such exemption complies with the requirements of the statute.

Very respectfully yours,

F. S. MONNETT,
Attorney General.

Misdemeanors; Security for Costs; Health Laws.

MISDEMEANORS; SECURITY FOR COSTS;
HEALTH LAWS.

Office of the Attorney General,
Columbus, Ohio, March 20, 1896.

Dr. C. O. Probst, Secretary State Board of Health:

DEAR SIR:—Your communication from L. A. Wagner, just received. Section 7115 provides that:

“Whoever, in the presence of a magistrate makes an affray, or threatens to beat or kill another, or to commit an offense against the person or property of another, or contends with hot and angry words, to the disturbance of the peace, may be ordered without process or any other proof, to give security as provided in section 7109, and in default thereof, may be committed, etc.”

It is my opinion that inasmuch as this section provides specifically when a justice of the peace shall arrest without process, to-wit: For offenses against persons, and property, and disturbance of the peace, and does not provide specifically for the other divisions of statutory crime, to-wit: against *public justice*, against *public health*, against *public policy*, against *chastity and morality*, against *right of suffrage*, that as to all other general divisions of crime the accused is to be brought before the magistrate to be heard in his own defense; that witnesses may be produced and examined on oath, in accordance with section 7108.

As I understand your inquiry, the misdemeanors concerning which you inquire are practically those against public health, and do not come within the general statute 7115,

Cleveland Realty Company.

that permits a magistrate to arrest without process or any other proof.

Respectfully submitted,

F. S. MONNETT,

Attorney General.

CLEVELAND REALTY COMPANY.

Office of the Attorney General,

Columbus, Ohio, March 20, 1896.

Hon. S. M. Taylor, Secretary of State:

DEAR SIR:—Your department has referred to me certain articles of incorporation that have been applied for by a company to be known as "The Cleveland Realty Company."

My attention has been called to sections 3 and 4 thereof, with request for an opinion as to the policy or authority of your department to issue articles of incorporation in compliance with said application.

So far as said articles of corporation in sections 3 and 4 comply with the amended portion of section 3235, as amended April 6, 1894, referring to the powers that may be granted to a corporation for the purposes of improving, developing, and dealing in real estate, buying and selling the same, while the language referring to that branch of incorporations is perhaps broader than the statute literally construed would imply, yet I do not think it objectionable, and would pass favorably upon that part of the application. But so much of section 3 as relates to building roads, bridges, constructing and operating surface, underground or elevated railways, with electricity, steam or other motive power,

Cleveland Realty Company.

erecting water-works and electrical plants for the generation of power and heat, and so much thereof as provides for handling real estate upon commission, I cannot approve of the same.

The special statutes governing these various enterprises, treat of them as distinct organizations for the various purposes. It would lead to great confusion in making returns under the new excise tax laws just passed; it would make it possible for such a corporation to shift their salaries and running expenses to the different departments of such a corporation; their gross incomes in such manner that it would be almost impossible for the State to obtain proper reports under the various special statutes governing and controlling the multifarious industries attempted to be incorporated in one act.

Section 4 attempts to apply the provisions of the amendment referring to a realty company, to any or all the other companies or powers asked for in section 3. Not only do I believe it to be against the spirit of the statute, but it is against public policy to grant so many and so multifarious powers to any one corporation.

Respectfully submitted,

F. S. MONNETT,

Attorney General.

Incompatible Offices.

INCOMPATIBLE OFFICES.

Office of the Attorney General,
Columbus, Ohio, April 3, 1896.

Hon. O. T. Corson, State Commissioner of Common Schools:

DEAR SIR:—Your request of April 3d, for an opinion in writing, duly received.

Your question is, "Can a representative in the General Assembly of Ohio, be appointed to hold the office of county or city examiner of teachers?"

Sections 4069 and 4077, as well as all other sections of chapter 12, referring to county or city school examiners, name the place as an "office," they give the position all the functions of an office, provide for vacancies, expirations, terms and compensation. 4075 provides for the compensation of county boards; 4082 provides further compensation for city examiners. These are all incidents and functions of an office. An office is defined to be a public charge or employment, and the term seems to comprehend every charge or employment in which the public are interested, and an adjudicated definition is given in 71 N. Y., 243, in which the court say:

"It is that function by virtue whereof a person has some employment in the affairs of another; and it may be public or private, as exercised under public authority yet affecting only the affairs of particular individuals."

In the case of *Bowers vs. Bowers*, 26 Pa. S., 77, it is defined as follows: "An office is a right to exercise a public or private employment and to take the fees and emoluments thereunto belonging."

In the 32 N. Y., 726, it is defined as "a duty, a charge, a trust, exercised for public purpose."

Incompatible Offices.

The Supreme Court of the United States has given a comprehensive definition in 6 Wall., 393, and defines it as follows:

“An office is a public station or employment conferred by the appointment of the government. The term embraces the ideas of tenure, duration, emolument and duties.”

Applying these well known definitions and adjudicated findings, I am of the opinion that the position of county or city examiner of teachers is an office.

Section 4, Art. 2, of the Constitution provides: “No person holding office under the authority of the United States, or any lucrative office under the authority of this State, shall be eligible to or have a seat in the General Assembly; but this provision shall not extend to township officers, justices of the peace, notaries public or officers of the militia.”

If the above positions are lucrative offices under the authority of the State, and do not fairly come within the exceptions, then the person holding a position on the board of school examiners, I think it could fairly be construed, is ineligible to have a seat in the General Assembly.

The classifications of exceptions in the above constitutional provisions, elective offices and to appointive offices, to offices that are permanent and continuous in their compensation; to offices that are dependent upon fees as well as to offices of the militia. Using the exclusive clause or the exception as in interpretation or guide in the definition of “office” in the former part of the section, I am therefore of the opinion that such school examiner could not have a seat in the General Assembly.

Respectfully submitted,

F. S. MONNETT,

Attorney General.

Excise Tax Law.

EXCISE TAX LAW.

Office of the Attorney General,
Columbus, Ohio, April 18, 1896.

Hon. Asa S. Bushnell, Governor of Ohio:

DEAR SIR:—Your esteemed favor of the 18th inst., asking for opinions upon the following subjects, duly received. You ask:

1. "Does the recent law levying an excise tax upon the gross receipts of railroad corporations conflict with the act of April, 1894, which provides for the levying of an excise tax upon the gross receipts of the said corporations for the purpose of providing revenue to support the office of the Commissioner of Railroads?"

In reply I would say, that the Supreme Court declared the original act passed April 18, 1889, levying a fee of one dollar per mile on each mile of track as unconstitutional, in that it contravened section 2, article 12; also section 5 of article 12 of the Constitution. Said first section provides that "Laws shall be passed taxing by a uniform rule all moneys, credits, investments, * * * and also all real and personal property, according to its true value in money." Section 5 provides that "No tax shall be levied, except in pursuance of law; and every law imposing a tax, shall state distinctly the object of the same, to which only it shall be applied."

The act of April 19, 1894 provides for an assessment, instead of a tax, based upon the proportion of the gross earnings of the railroad companies, for the year next preceding, to be apportioned by the state board of equalization for railroads. The act further provides, that the money thus collected shall be covered into the state treasury as a special fund for the maintenance of the office of the commis-

Excise Tax Law.

sioner of railroads and telegraphs, and expenses incident thereto.

It is my opinion that this act corrects the unconstitutional features which I have referred to of the original act of April 15, 1889, and makes a valid assessment for the special purpose of supporting this department, which the State has created under the police power for the supervision of railroads in the interest of the public safety.

House Bill No. 293, known as the excise tax law, passed March 19, 1896, does not make an assessment for a special purpose, but levies a tax in the nature of an excise tax, for the purpose of raising revenue for the State generally. This law is based upon the principle that the State has a right to exact this contribution under the power it has to regulate corporations, for the privilege of doing business in Ohio. The two acts referred to are not based upon the same principle, and in no wise conflict.

2. As to your second inquiry, to-wit:

“Does the law creating and regulating the operation of the Working Home for the Blind at Iberia, Ohio, prevent vesting control of that institution with the board of trustees of the institution for the blind, in event of the Working Home for the Blind being inoperative owing to lack of funds for its support?”

The act to establish workshops for the blind, passed May 11, 1886, provides for the establishing of an institution for giving employment to the blind, to be known as “The Working Home for the Blind.” It provides that the governor shall appoint, with the advice and consent of the Senate, three trustees, who shall have the management of said institution. Said trustees are authorized to receive donations of land, buildings or money. It provides that the land shall be conveyed in fee simple to the State of Ohio. It

Excise Tax Law.

also provides that such trustees shall appoint a superintendent who shall be qualified in the managing of manufactories for such articles as are usually made at such institutions.

It is my opinion that your honor could not vest the control of this institution in the board of trustees of the institution for the blind, in as much as each board of trustees have special duties imposed upon them, must make different reports, and the whole act of 1886 intends that this is to be a trust independent of the general institution for the blind. It is my opinion that it would take a legislative act to vest the property of this institution in the hands of the trustees of the institution for the blind. Or, what would be a simpler solution would be a repealing of the act of May 11, 1886, and authorizing the governor to sell all of said property and pass it into the general revenue fund, and have the same re-appropriated for the institution for the blind. The Legislature might further empower the trustees of the institution for the blind to conduct workshops for the blind in connection with the present institution, or at other points, should a necessity demand such an institution.

Very respectfully,

F. S. MONNETT,

Attorney General.

Ohio Board of Pharmacy; Fees for Registration of Pharmacists.

OHIO BOARD OF PHARMACY; FEES FOR REGISTRATION OF PHARMACISTS.

Office of the Attorney General,
Columbus, Ohio, April 24, 1896.

To the Ohio Board of Pharmacy, Columbus, Ohio:

GENTLEMEN:—I have the honor to receive a communication from your board under date of April 21, 1896, requesting my opinion in writing as to what authority, if any, said board has for charging a fee to all applicants for examination, in addition to the fee prescribed in said section 4407.

After carefully examining said section, the language of the statute bearing upon this subject reads:

“The said board shall demand and receive for such registration from each and every person registered as a pharmacist, a fee not exceeding three dollars, and from each and every person registered as an assistant pharmacist, a fee not exceeding two dollars, to be applied to the payment of the expenses arising under the provisions of this chapter.”

It also provides for a registration fee not to exceed one dollar, triennially as set forth in said act, for those who desire to continue the practice.

“Said salaries, per diem and expenses, shall be paid after an itemized statement, etc., * * * from the fees and penalties received from said board under the provisions of this act.

It further says: “All moneys received in excess of said per diem amount and other expenses above provided for, shall be held by the secretary as a special fund for meeting the expenses of said board.”

Section 4408 makes it mandatory upon the board to examine every person who desires to carry on or engage in the business, on his complying with the provisions of this chapter.

Ohio Board of Pharmacy; Fees for Registration of Pharmacists.

It is my opinion that all expenses to the applicant that can be legally charged, are those especially set forth, and that there is no warrant under the fair construction of that statute for the board to construe the rules and by-laws and regulations into powers vested in them to make arbitrary charges for examination of applicants. Whatever expenses are necessary for carrying out the provisions of that chapter, must be paid for out of the fees especially provided. This act especially says, as above cited, that said salary, per diem and *expenses*, shall be paid from the fees and penalties received by said board under the provisions of this act. Section 4407 defines what fees are to be charged; 4412 defines the penalties.

Your sub-division five (5) of the inquiry, I suppose is only cited to this department for the purpose of assisting us in the construction of similar acts. While I do not care to pass upon section 558 until it is regularly before me, yet it is manifest that there is no expressed limitation placed upon that section as to what fees are to be charged or in what mode, and only what mode expenses are to be paid.

Experience may have shown this to be an unwise limitation, as to receipts to maintain the department, yet I am not permitted to legislate, but only interpret what has already been enacted into a statute.

Respectfully submitted,

F. S. MONNETT,

Attorney General.

Board of Health; Removal of Bodies From One Cemetery to Another; Penalties.

BOARD OF HEALTH; REMOVAL OF BODIES FROM ONE CEMETERY TO ANOTHER; PENALTIES.

Office of the Attorney General,
Columbus, Ohio, April 25, 1896.

To the Secretary of the Board of Health, Columbus, Ohio:

DEAR SIR:—Your esteemed favor of the 24th inst., asking for the construction of an act providing for the removal of bodies from one cemetery to another, passed May 14, 1894, duly received.

You ask what provision was made for the enforcement of said law in relation to the disinterment of bodies, especially those dead or those dying of a contagious or infectious disease.

Second, what are the penalties provided in case of violation?

Said act provides no penalties for the violation thereof. In the absence of such criminal penalty, upon a proper state of facts arising, the parties or persons damaged or injured, or perhaps the board of trustees of the association, could invoke the equity powers of a court and obtain an injunction as against the violation of the expressed provisions of the statute.

You further ask whether the health board should give its consent to such disinterment. It is my opinion since the reference to the local health department occurs only in the proviso to section 1, that it should be construed with reference to contagious and infectious diseases only; that all other bodies dying other than by contagious and infectious diseases, can be removed from the respective cemeteries upon a permit from the trustees or boards of such cemetery association, except in the months of April, May, June, July, August and September of any year.

*Board of Health; Removal of Bodies From One Cemetery
to Another; Penalties.*

To construe the proviso that persons dying with a contagious disease could never be removed, would by implication repeal the act passed March 15, 1876, (73 O. L., 33), or render it so inconsistent and nugatory as to render it inoperative, which latter act provides for the removal of all bodies where a cemetery has been abandoned. (7913-23).

Repeal by implication is never favored, and that construction should be given that will give the meaning to both statutes, if possible. Should an association determine to abandon a cemetery, and any other construction be given to the act of 1894, then after all bodies that had died of natural diseases had been removed a small per cent or those who had died of contagious or infectious diseases, would be compelled to remain. Then again section 3 of said act indicates that it is the trustees or other board of officers in charge of said cemetery, and not the health board, that should be mandamus'd, and for these reasons I am of the opinion that the local health department shall exercise its authority only over bodies of persons dying with contagious or infectious diseases, and when so granted by the health board, the trustees or cemetery association shall then issue a permit for disinterment, and deliver the body, etc.

Respectfully submitted,

F. S. MONNETT,

Attorney General.

State Institutions; Appointment of Female Physician.

STATE INSTITUTIONS; APPOINTMENT OF FEMALE PHYSICIAN.

Office of the Attorney General,
Columbus, April 25, 1896.

Hon. Asa S. Bushnell, Governor of Ohio:

DEAR SIR:—Your esteemed favor of recent date referring to this department a communication from the alumni association of the Laura Memorial Medical College, of Cincinnati, Ohio, duly received.

Such communication requests a construction of section 640, R. S., of Ohio. Said act as referred to in the communication, passed April 17, 1885, (82 O. L., 137), provides: "Upon the nomination of a superintendent, boards of trustees may appoint stewards, matrons, physicians, assistant physicians, one of which *may* be a female, and other needed officers, and may remove such appointees at pleasure."

This section occurs in the chapter referring to certain benevolent institutions, including the Boys' Industrial School, Girls' Industrial School, Industrial Home, etc. Subsequently said section was amended April 24, 1890, (87 O. L., 268), which amendment provides: "Upon the nomination of superintendents, boards of trustees may appoint * * * matrons, physicians, assistant physicians, one of which *may* be a female, and other needed officers, and *may* remove such appointees at pleasure."

Subsequent thereto, April 16, 1892, a supplemental section was added to the original section 640 (89 O. L., 347), which provides: "In all asylums for the insane there *shall* be employed at least one female physician."

It is my opinion that as to all benevolent institutions described in title 5, chapter 2, it is discretionary with the board in appointing the assistant physicians to name one female, except physicians for the insane asylum, and there it is mandatory for the board of trustees to appoint at least one female physician, and discretionary with the board to appoint

Extradition; Evidence.

more than one in each institution. It is my opinion that it would be proper for your honor, as chief executive of the State, to call said boards' attention to said supplementary section, and request compliance with such statute, as the boards are the immediate creatures of your appointment.

Qua warranto perhaps would lie against boards for willfully violating the statute, or mandamus might be brought by the proper parties.

Respectfully submitted,
F. S. MONNETT,
Attorney General.

EXTRADITION; EVIDENCE.

Office of the Attorney General,
Columbus, Ohio, April 30, 1896.

Hon. Asa S. Bushnell, Governor of Ohio:

DEAR SIR:—Your esteemed favor of the 30th inst., in reference to the matter of the revocation of an extradition warrant for the return of Dick Howard to the state of Illinois, heretofore granted under your hand and seal, dated February 26, 1896, duly received.

I have examined the authorities, cited by the Hon. C. S. Kumler, representing the state of Illinois, and the authorities cited by Hon. J. T. Patterson, representing Dick Howard, the defendant.

I find the agreed state of fact to be substantially that Dick Howard was indicted in the state of Illinois, charged with a felony; that the governor of Illinois made requisition upon the governor of Ohio for the defendant, Dick Howard. The evidence and official papers submitted by your honor, show that the defendant was a fugitive from justice of the state of Illinois; that he is charged with the crime aforesaid; that he was found in this State, being a state other than that

Extradition; Evidence.

in which the crime charged was committed.

The Supreme Court of the United States, in the case of *Laselles vs. Georgia*, decided April 3, 1893, held: "A fugitive from justice, who has been surrendered by one state of the union to another state, upon requisition charging him with the commission of a specific crime, has, under the constitution and laws of the United States, no right, privilege or immunity to be exempt from indictment and trial in the state to which he is returned for any other or different offense than that designated in the requisition, without first having an opportunity to return to the state from which he has been extradited."

For a still stronger reason should the authorities refuse to permit a defendant to escape obeying the mandates of the executive authority in requisition proceedings. In the case of *State vs. Sennott*, cited in 20 *Albany Law Journal*, page 230, the court held:

"Under the provisions of the Federal constitution relating to the rendition of fugitives from justice it is sufficient that the person charged with crime be found in the state from which he is demanded. He need not have fled there. The fact that he was held in the latter state against his will, under prior proceedings, would not preclude his rendition from that state."

It is my opinion, therefore, that there is not sufficient showing, either in the brief of facts or the law, to warrant your honor in revoking the extradition heretofore issued February 22, 1896, to the sheriff of Montgomery County, on the application of the state of Illinois for the defendant, Dick Howard.

Respectfully submitted,

F. S. MONNETT,

Attorney General.

Taxation; Listing of Property; Houses of Ill Fame; Liquor Selling.

TAXATION; LISTING OF PROPERTY; HOUSES OF
ILL FAME; LIQUOR SELLING.

Office of the Attorney General,
Columbus, Ohio, April 30, 1896.

Hon. W. D. Guilbert, Auditor of State:

DEAR SIR:—Your favor of the 30th inst., requiring an opinion upon the questions asked in the letter from John H. Lenhartz, assessor of the second ward, Tiffin, Ohio, duly received:

The assessor propounds these inquiries:

1. "There are a number of saloons in my ward which run houses of ill-fame in connection with the same; have I a right to list such keepers of houses of ill-fame for the payment of the Dow tax for the coming year?"
2. "Shall I refuse to certify them to the county auditor to be charged upon the liquor tax duplicate?"

The act known as the one defining a house of ill-fame, and providing a penalty for the sale of intoxicating liquors therein, and prescribing how such penalty may be recovered, as passed May 18, 1894, defines what a house of prostitution or ill-fame is. It makes it unlawful for any person to sell or give away in any house of ill-fame, as defined in that section, any spirituous, malt, vinous, or other intoxicating liquor or liquors; and the selling or giving away in any part of such building or place, or in any shed or addition thereto, or in any buildings or structures standing on the lot of land upon which such house of ill-fame is situated, or upon premises adjacent thereto, and which is in the control of the person or persons having control of such house of ill-fame, shall be deemed unlawful. Said act provides for a penalty of \$350 for a violation of the act.

Taxation; Listing of Property; Houses of Ill Fame; Liquor Selling.

Of course, the listing of such a house would be illegal, and would not give the proprietors any right under such listing, and on the part of the assessor or the county officers, to contravene that statute. But the inquiry is broader than that, and distinctly says there are a number of saloons in his ward. Every proprietor or owner of a saloon must list under the Dow Law, and the assessor cannot presume that such owner is going to run a saloon in an unlawful way. To illustrate: He could not anticipate that a saloon-keeper, after he had paid his \$350 tax, would violate the Sunday law; that he would sell to habitual drunkards; that he would sell to minors, or to a person intoxicated; or that he would run a house of prostitution on the same lot, or in connection with the building. In other words, he does not list the saloon for an unlawful purpose, neither does he list it as a house of ill-fame.

But it is the duty of the officers of the city and county to promptly enforce every infraction of the State law and city ordinances. And should such a saloon keeper, after having lawfully obtained his license to do a lawful business as a saloon-keeper, proceed to do an unlawful business, either on the ground named in the letter, or violate the liquor laws in any other respect, he should be prosecuted.

Therefore, it is my opinion that they should be listed as sellers of intoxicating liquors in a lawful way. Each separate and unlawful act of selling or giving away such intoxicating liquors, either in a house of ill-fame or any other unlawful purpose, constitutes an offense punishable by law. An assessor cannot determine this in advance, and should not list them as keepers of houses of ill-fame, but as sellers of intoxicating liquors.

Respectfully submitted,
F. S. MONNETT,
Attorney General.

Board of Charities; Relief of Poor.

BOARD OF CHARITIES; RELIEF OF POOR.

Office of the Attorney General,
Columbus, Ohio, May 8, 1896.

*Hon. Joseph P. Byers, Secretary State Board of Charities,
Columbus, Ohio:*

DEAR SIR:—Your esteemed favor of the 7th inst., in reference to the abolition of the statute heretofore establishing the Working Home for the Blind, duly received.

The statute governing the legal settlement in any county of a citizen of the State, for the purpose of construing what you call a residence, is different from the statutes for the purpose of obtaining a right to vote within the county.

It is my opinion that under section 1492, unless the inmates of the institution referred to, have continuously resided and supported themselves for twelve consecutive months without relief under the provisions of the law for the relief of the poor, except the provisions provided in the first and second sub-divisions thereof, then the inmates do not obtain a legal settlement in Morrow County, by reason of their acceptance of the charities and care of the State, in the manner indicated in your communication.

It is my further opinion that the proper treatment of these inmates, now that the institution has been abandoned by the Legislature, would be to return them to their original counties, in which places they have never lost their legal residence by reason of their being supported in Morrow County. Under the special act abandoning the institution, I suppose your board will be justified in temporarily maintaining them in the counties to which they are returned, as you are trustees of the funds for that purpose.

Respectfully submitted,

F. S. MONNETT,

Attorney General.

State Institutions; Employment of Religious Instructor.

STATE INSTITUTIONS; EMPLOYMENT OF RELIGIOUS INSTRUCTOR.

Office of the Attorney General,
Columbus, Ohio, May 18, 1896.

Hon. A. S. Bushnell, Governor of Ohio:

DEAR SIR:—Your esteemed favor of the 16th inst., asking whether the laws applying to the O. S. & S. O. Home at Xenia permit the trustees to employ a religious instructor, duly received. The chapter relating to benevolent institutions, being chapter 3, of title 5, in section 647, provides that superintendents of these institutions shall have control and be responsible to the trustees for the management and for the faithful services of all persons employed therein, and that the superintendent may appoint such *teachers, attendants and nurses*, servants and other persons as may be necessary for the proper management of the institution and assign them to their respective places and duties. Such appointees shall, however, be subject to the discharge of the trustees. Chapter 8 relating to the O. S. & S. O. Home, and section 695 as amended April 22, 1890, provide for such compensation of a superintendent, clerk, matron and physician, and matrons of cottages and *school teachers* \$30.00 per month for the latter, seamstresses and tailoresses with their salaries. This special statute under the chapter referring to the home so indicate the employes that the Legislature intended should be used in this institution. Applying the ordinary rule of statutory construction to the clause in section 647 authorizing the superintendent to employ such "other persons as may be necessary for the proper management," etc., must apply to the same class and not a higher grade of duties than those enumerated preceding the general clause.

The third section referring to this subject, as amended April 24, 1890, provides for the nomination by the superintendent, and upon such nomination the board of trustees

State Institutions; Employment of Religious Instructor.

may appoint stewards, matrons, physicians, assistant physicians, and other needed officers, and may remove such appointees at pleasure. They shall fix the compensation of each, not exceeding the maximum prescribed by law.

Construing these acts together, under section 695, it is my opinion it would not be the duty of the trustees without having first created the office as provided in section 640 to appoint a religious instructor. But if the board of trustees determine that such a department or office is needed, the superintendent may then nominate and the board of trustees may appoint such needed or additional officer.

Second: Independent of the board of trustees, the superintendent may appoint a teacher and assign him duties of the kind inquired about in your communication. And in the absence of the trustees having created an additional office, it would have to come within the title of a teacher, and the superintendent assign his duties as a religious instructor. If appointed under the last section and under the last powers, to-wit: Section 647, I suppose the salary should be limited to \$30.00 per month in accordance with the special limitations in the chapter pertaining to the Soldiers' and Sailors' Orphans' Home.

Very respectfully,

F. S. MONNETT,
Attorney General.

Insurance; Liability Policies to Owners of Vessels.

INSURANCE; LIABILITY POLICIES TO OWNERS
OF VESSELS.

Office of the Attorney General,
Columbus, Ohio, May 29, 1896.

Hon. William H. Hahn, Superintendent of Insurance:

DEAR SIR:—In your favor of the 14th inst., you submit the question whether an insurance company, not authorized to do an employers' liability business in this State, can issue employers' liability policies to the owner of vessels operated in the great lakes whose ports of registration are within Ohio, without violating the insurance law of this State; the company insisting that the jurisdiction of the State in the enforcement of its insurance laws, does not extend to and cover any part of the waters of Lake Erie.

In reply thereto I beg to say:

The jurisdiction of Ohio over that portion of the waters of Lake Erie embraced within its limits is complete, except wherein the same has been restricted by the federal constitution. If there be a restriction upon the power of a State to regulate the doing of insurance upon the class of property in question, it must be found in the commerce clause of the constitution. But as has been declared by the Supreme Court of the United States, the issuing of a policy of insurance is not a transaction of commerce. *Paul vs. Virginia*, 8 Wallace, 183.

The right to enforce the insurance law of this State, in its application to property engaged in inter-state commerce, is, therefore, not abridged by the federal constitution, and the enforcement thereof is not an interference with nor a regulation of, inter-state commerce.

The further question arises, is such a vessel property within Ohio, and would the issuing of a policy of insurance thereon, or an indemnity policy to the owner thereof, by a company not authorized to issue such a policy within Ohio, be a violation of the insurance law of this State?

Insurance; Liability Policies to Owners of Vessels.

Under the federal law, every vessel is required to register and designate some place as its port of entry. By the law of Ohio, the situs of a vessel navigating waters within and bordering upon the different states, is that of the home port or port of registration. *Pelton vs. Transportation Co.*, 37 O. S., 460.

As said by the court in *Smith vs. Bank*, 5 Peters, 524, to say "that personal property has no situs, seems rather a metaphysical position than a practical and legal truth." Such waters are simply channels of intercourse, the highways for vessels; but such vessels, whose ports of registration are within this State, are just as much property within Ohio, as are the cars or coaches owned within the State and running from points within to points without the State.

I am therefore of the opinion, that a company issuing a policy of insurance in the manner indicated, would violate the insurance law of Ohio.

Very respectfully,

JNO. L. LOTT,

Assistant Attorney General.

*Ohio State Reformatory; Employment of Convict Labor.*OHIO STATE REFORMATORY; EMPLOYMENT
OF CONVICT LABOR.

Office of the Attorney General,
Columbus, Ohio, May 23, 1896.

*Hon. L. F. Limbert, President Board of Managers, Ohio
State Reformatory, Greenville, Ohio:*

DEAR SIR:—Replying to your favor of the 13th inst., requesting an opinion as president of the board of managers of the Ohio State Reformatory, upon certain statutes, it is my opinion the fair construction of the act of April 24, 1891, (88 O. L., 382), and the acts amendatory thereto, would authorize and justify the managers in using all convict labor that it is profitable and convenient to use in the construction of the buildings and appurtenances to the reformatory. I do not think it would violate the statute governing the contract system of prison labor, when the labor is used under the direct statutory authority of the State itself in building its own structures, if in the discretion of the board it is for the best interests of the State to let the contract out to bids, providing in the bids or the contract that the contractors use convict labor, and that the terms of the bid as to who is the lowest bona fide bidder shall be determined by the amount the bidder is to pay for the services furnished by the State in the way of convict labor.

It is not a part of this opinion, but it has been suggested to this department that the managers should also take into consideration in letting their contracts, the fact that the State owns certain quarries and if anything can be saved to the State by using convict labor in the quarries in getting out the material, this should also be investigated before final bids are submitted.

Very respectfully,
F. S. MONNETT,
Attorney General.

Commissioner of Railroads and Telegraphs; Power of Municipal Corporation to Enforce Regulations.

COMMISSIONER OF RAILROADS AND TELE-
GRAPHS; POWER OF MUNICIPAL CORPORA-
TION TO ENFORCE REGULATIONS.

Office of the Attorney General,
Columbus, Ohio; June 22, 1896.

*Hon. William Kirkby, State Commissioner Railroads and
Telegraphs, Columbus, Ohio:*

DEAR SIR:—Your esteemed favor with enclosures in reference to the ordinance of the village of Barberton, duly received.

I have examined the ordinance submitted, but of course have not the minutes of the proceedings of the council to see if such ordinance was properly passed, and have only before me the sections of the ordinance referred to in your favor. Section 1692, granting general powers to municipal corporations, permits them to organize and maintain a police department, and gives them police powers. A municipal corporation acting in their public capacity, have only such powers as are expressly granted by statute, or such as may be fairly implied or inferred to carry into effect express provisions. In the Ravenna case, 45 O. S., 118, passing upon this section the court held that a municipal corporation had not the power by ordinance to compel a railroad company to maintain at a street crossing within the corporate limits, a watchman for the purpose of giving warning to passers by of an approaching train. But section 3336, as amended April 16, 1892, makes it compulsory for every railroad company to have attached to its engine a bell and steam whistle, with regulations compelling them to blow the whistle and ring the bell at the approach of every crossing in the act described, winding up with a proviso that this section shall not interfere with the proper observance of any ordinance passed by any city or village council regulating the management of railroads, locomotives or steam whistles

Dow Liquor Law.

thereon, within the limits of such city or village. It would appear from this expression of the Legislature that under the general powers granted to city and village councils, they have the right to pass reasonable ordinances regulating the speed of trains and the use of steam whistles, and that the exception was made in 3336 in accordance with that understanding.

I am therefore of the opinion that the village of Barberton has the right, under the statute, to pass such ordinance regulating the speed, and regulating the blowing of whistles within the limits of said village. So long as the council is not acting corruptly, I suppose the courts could not interfere with their legislative acts, unless the council should transgress or exceed their powers, or should attempt class legislation or legislation affecting one part of the city and not another, and be void for want of uniformity.

Respectfully submitted,
F. S. MONNETT,
Attorney General.

DOW LIQUOR LAW.

Office of the Attorney General,
Columbus, Ohio, June 13, 1896.

Hon. W. D. Guilbert, Auditor of State:

DEAR SIR:—I have the honor to receive a communication from your department of recent date, asking my opinion on five propositions as to the construction of section 8 of the statute commonly called the Dow Law. Your first proposition is:

1. Would a person or firm delivering beer to retail dealers, the beer being shipped to the distributive point whence it is delivered on orders taken by an agent day by day, be liable to the Dow tax?

Dow Liquor Law.

The statute provides that the phrase "trafficking in intoxicating liquors" as used in this act, means the buying or procuring and selling of intoxicating liquors otherwise than upon prescription issued in good faith by reputable physicians in active practice, or for exclusively known mechanical, pharmaceutical or sacramental purposes, but such phrase does not include the manufacture of intoxicating liquors from the raw material, and the sale thereof at the manufactory, by the manufacturer of the same in quantities of one gallon or more at any one time.

Your first inquiry is rather indefinite as determining whether you mean the word "delivering" to retail dealers, that the person or firm so doing, at the same time takes orders; in other words, makes sales to retail dealers. If the sale is made at the owner's establishment, and such owner pays the Dow tax, it is my opinion that a person or firm delivering on such sale is the agent, be it an express company, railroad or an individual and is not liable for the Dow tax. Wholesale dealers who are not manufacturers are liable for the tax, and I do not understand the spirit of the act to be that every firm or agent assisting in carrying out the wholesale dealer's business is individually liable for the Dow tax under said act, unless they have a separate "place" where sales are originally made.

But if the beer is shipped to the person or firm and kept in a warehouse, or other distributing point, and from that point orders are taken and sales and deliveries made without reference to the contract specifically having been made at the time the goods are shipped, I take it that the second firm become themselves wholesale dealers, and would then be liable. In other words, it would be a wholesale, or branch wholesale house trafficking in intoxicating liquors and should pay the tax.

2. Where a manufacturer of liquors sends out agents to solicit orders in quantities of more than one gallon at one time, in any part of the State, and all orders taken are filled and shipped direct from the manufactory, does the liquor

Dow Liquor Law.

tax act apply? and to whom? The manufacturer or the agent?

In reply I would say that such a manufacturer becomes a dealer and his actually selling and soliciting orders by agent away from his manufactory, makes himself a dealer and should pay the tax; the agent would be the same as any other wholesale agent under like circumstances.

3. Does the manufacturer or distiller, when sending out solicitors, become a wholesaler under the construction placed upon 8092-12, in 44 O. S., 661? That is, does he sell at the manufactory under the principle "*Qui facit per alium, facit per se?*" The sales being made on the road and not at the manufactory as expressed in said section. If determined to be subject to the tax as a wholesaler, what rule can apply to the foreign manufacturer to compel him to pay?

I would say that the manufacturer or distiller sending out agents and solicitors selling to dealers in various parts of the State and away from the manufactory becomes a wholesaler. The fact that he is acting in a double capacity, that of manufacturer and wholesaler, does not protect him from paying a wholesale dealer's tax.

4. If brewers, distillers and manufacturers of wine or cider establish agencies, shipping their goods to storage houses and from whence to be distributed to customers, on whom should the tax rest? If upon the maker, how would it apply to foreign makers?

The Supreme Court in the case of *Hanson vs. Luce*, treasurer, 50 O. S., 440, has laid down the rule that the traffic contemplated by this statute consists in the purchase and sale or barter of the liquors named therein, and the place of the traffic is the place where such sale, purchase or barter is had, and not the place where the liquors are stored for cooling or safe keeping. The delivery of beer made by the driver of a beer wagon must be referred to the place where his employer carries on the traffic, where the sale was actually made, and not the place of storage. Your inquiry is rather indefinite. If the brewer or distiller or

Dow Liquor Law.

manufacturer establish a storage where a bona fide sale was made at the brewery or place of manufacture and shipped to a storage house to be protected until the customer could take charge of his order so purchased and no sale or trafficking therein took place at the storage house, then under the rule the manufacturer would not be liable for the tax. If, on the other hand, such manufacturers ship their goods to said storage house before sales are actually made to customers and at the storage house the sales are made, they pass from the class of manufacturers to that of wholesale dealers, and of course should pay the tax.

5. If a person or firm, residing in a local option district, makes application to the county auditor to be listed and to pay the Dow tax, has the auditor discretionary power to refuse the person or firm to list? And, if the auditor refuses to place the party on the duplicate, the latter in defiance of the local option feature of the statute proceeds to open up and deal in liquor, does the penalty for evasion or neglect attach?

This proposition involves two questions. I take it that if a person or firm residing in a local option district, that is a district where local option legally exists, should make application to the county auditor to be listed, giving his location and class of business he was about to engage in, in violation of law, the auditor should make a record of the same, or at least preserve the evidence of his application and as an officer of the county and State assist the authorities in enforcing the law, and report such application at once to the sheriff or other police officers and to the court and refuse to list him.

As to the second question, I take it, it would not excuse a law breaker to take advantage of his own wrong. If he should attempt to sell in defiance of the local option feature, and did so sell he should be listed, the tax and penalty collected, and reported to the authorities to prevent any future or continuous violation of the law. And all other penalties under the local option statute should be enforced. A crime

Fish and Game Law.

once committed against the laws of the State could not be condoned by any acts of the criminal or auditor.

Respectfully submitted,
F. S. MONNETT,
Attorney General.

FISH AND GAME LAW.

Office of the Attorney General,
Columbus, Ohio, July 3, 1896.

Mr. W. H. McLain, Fish and Game Warden, Wilmington, Ohio:

DEAR SIR:—In your favor of the 1st inst., you submit the question whether, under the fish and game laws of this State, the shooting or spearing of fish is unlawful.

While there seems to have been a general re-drafting of section 6968, Revised Statutes, as recently amended, the statute seems to be sweeping in character. The first part of the section reads:

“No person shall draw, set, place, locate or maintain any pound net, seine, fish trap, trammel net, gill net, fyke or set net, or any device for catching fish in any of the waters, * * * lying in the State of Ohio, or part therein, *nor catch fish with any device*, in any of the waters of this state *except with hook and line, with bait or lure,*” etc.

There is a provision at the close of the section which excepts from the operation of this statute, the waters of Lake Erie, its inlets and bays, and private fish ponds. There is a further provision in section 6968-1, which permits the taking of German carp at any time and in any manner in certain waters. There are also other sections which relate to the taking or killing of fish.

Board of Equalization; Length of Session.

If the language above quoted, "Nor catch fish *with any device* in any of the waters of this State, *except with hook and line, with bait or lure,*" does not prohibit the shooting or spearing of fish, then there seems to be no prohibition against it.

But I take it that the language above quoted is intended to, and does absolutely prohibit the taking of fish in any manner, except with hook and line, with bait or lure; and that, therefore, the shooting or spearing of fish (except German carp in certain waters named in section 6968-1) is unlawful.

Very respectfully,

JNO. L. LOTT,

Assistant Attorney General.

BOARD OF EQUALIZATION; LENGTH OF
SESSION.

Office of the Attorney General,
Columbus, July 14, 1896.

Hon. W. D. Guilbert, Auditor of State:

DEAR SIR:—You have submitted to this department the question whether the board of equalization of the city of Hamilton is required by law to close its sessions on or before the fourth Monday of June, or whether the board may remain in session for a longer period.

In reply thereto, I beg to say that the act of February 6, 1894 (91 O. L., 14), amending section 1548, Revised Statutes, creates a new grade for cities of the second class. It is only necessary to quote the amendment involved in the determination of this question, which reads as follows:

"Those (cities) which on the first day of July, 1890, had more than 16,000 and less than 18,000 inhabitants shall, on and after the passage of this act, constitute and be," * * * "a city of the second class, third grade *b.*"

Board of Equalization; Length of Session.

In case no official state census had been taken on that date, as provided in sections 1582 *et seq.*, the population of the cities at that date was to be determined by a reference to the federal census taken as of the date of June 1, 1890, the result of which had been proclaimed in the manner provided in section 1617, and is on file in the office of the secretary of state as a part of the official records of the State.

By that census, the city of Hamilton on July 1, 1890, had a population of 17,565; and having a population of more than 16,000 and less than 18,000 by virtue of the amendment of February 16, 1894, to section 1548, upon the passage of that act became, and now is, a city of the second class, third grade *b*.

Section 2805 provides for boards of equalization in all cities of the first and second class. That section was last amended February 10, 1892, (89 O. L., 21). and equires the boards of all cities to meet annually at the auditor's office on the fourth Monday in May. Then follows the injunction that the board shall close its sessions in the cities of the different grades at the times stated therein.

It will be observed, however, that at the date of the last amendment to section 2805, the new grade in cities of the second class, designated as "third grade *b*," had not been created; and there being nothing in that section designating the time when the sessions of the board of equalization in a city of the second class, third grade *b*, shall close, the board is at liberty, and has the right to continue its sessions until it shall have finished its work; begin an annual board, its sessions must close within the year.

Very respectfully,

JNO. L. LOTT,

Assistant Attorney General.

Insurance Companies; Conditions in Policies.

INSURANCE COMPANIES; CONDITIONS IN POLICIES.

Office of the Attorney General,
Columbus, July 20, 1896.

Hon. Wm. S. Matthews, Superintendent of Insurances:

DEAR SIR:—An act to supplement section 3643 of the Revised Statutes of Ohio, passed March 30, 1896, (92 O. L., 107), makes it unlawful for any insurance company doing business in this State to insert, or cause to be inserted, any condition in any policy of insurance issued upon property in this State, prescribing that the insured shall carry any given per cent. of insurance upon the insured property, or in case of failure to do so that the insured shall be held to be a co-insurer to the amount of the difference between the insurance carried and the insurance required to be carried. The penalty for a violation of this provision is a revocation of the license of the company to do business in Ohio

You have submitted a number of clauses, which insurance companies desire to use, and requested an opinion whether they or any of them violate the law referred to above. I quote each of these clauses, and following each clause, give you my views with respect to its validity under the law.

Clause 1. "It is a part of the consideration of this policy, and the basis upon which the rate of premium is fixed, that the assured shall maintain insurance upon the property covered by this policy to the amount of \$——. and that failing so to do, the insured shall be a co-insurer and shall bear a share of any loss under this policy, in proportion as the amount of such deficit shall bear to \$——."

While the language of this clause uses the term, "the amount of \$——," it does not express affirmatively a per cent. clause, yet the only practical interpretation of such a clause in a policy of insurance compelling the insured to carry a given amount, which amount must necessarily be de-

Insurance Companies; Conditions in Policies.

terminated on the total value of the property, makes the insured a co-insurer for the difference between the amount of insurance carried and the amount required to be carried, and the amount required to be carried, and that difference is necessarily a per cent., whether it is so named or not.

It is my opinion that clause 1 is a substantial violation of section 3643a.

Clause 2. "It is a part of the consideration of this policy, and the basis upon which the rate of premium is fixed, that the liability of this company in case of loss under this policy, shall not exceed _____ of such loss, and shall in no case exceed the face of this policy. If this policy be divided into two or more items, this loss condition shall apply to each item separately."

I am disposed to think that this clause does not violate the law, although close to the line of infringement. It provides that the liability of the company shall not exceed a fixed per cent. of the loss under the policy. It may be said that to provide that the liability of a company shall not exceed ten per cent. of a loss, is to make the insured a co-insurer for the remaining ninety per cent. of the loss; but after all, it does not provide that the insured must carry a given per cent. of insurance upon the property, or be a co-insurer, but on the contrary simply provides that the company shall be liable for not more than a certain per cent. of the loss, a different provision. The liability of the company, and the rights of the insured under the policy, are fixed and certain.

Clause 3. "Reduced Rate Agreement. Full Value Insurance. In consideration of the reduced rate of premium charged for this policy, it is hereby mutually understood and agreed that this company shall, in case of loss or damage, be liable for such portion only of the loss or damage as the amount insured by this policy shall bear to the actual cash value of the property covered by this policy at the time of fire. Provided, however, that if the

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whole insurance shall be greater than the value of the property covered, this company shall not be liable for a greater portion of the loss or damage than the amount insured by this policy bears to the whole insurance covering the property at the time of fire."

This clause provides that in case of loss, the company shall be liable for such portion only of the loss as the amount insured shall be to the actual cash value of the property at the time of the fire. This in effect is a provision that the insured shall carry in insurance the full value of property at the time of the fire, or be treated as a co-insurer to the amount of the difference between the insurance carried and the actual cash value of the property at the time of the fire. I think this clause violates the letter and the spirit of the law referred to.

Clause 4. "Reduced Rate Agreement. Eighty per cent. In consideration of the reduced rate of premium charged for this policy, it is hereby mutually understood and agreed that this company shall, in case of loss or damage, be liable for such portion only of the loss or damage as the amount insured by this policy shall bear to eighty per cent. of the actual cash value of the property covered by this policy at the time of the fire. Provided, however, that if the whole insurance shall be greater than eighty per cent. of the value of the property covered, this company shall not be liable for a greater portion of the loss or damage than the amount insured by this policy bears to the whole insurance covering the property at the time of fire."

This clause is similar to clause 3 with the exception that in effect it provides that the insured must carry insurance to the amount of eighty per cent. of the actual cash value of the property at the time of the fire, or be held to be a co-insurer to the amount of the difference between the insurance carried and eighty per cent. of such actual cash value. What I have said with respect to clause 3 applies to clause 4; its insertion in a policy would constitute a violation of section 3643a.

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Clause 5. "It is agreed that this insurance shall be for its proportion, as the same bears to other insurance, for eighty per cent. of the loss, or losses, as same may occur."

The above clause is couched in vague and ambiguous language. It seems to provide that the company shall in no event be liable for more than eighty per cent. of the loss, and in case there be other insurance, for such proportion of eighty per cent. of the loss, as the amount of the policy bears to the entire insurance. I do not think that this violates the law.

Clause 6. "Percentage Value Clause. It is hereby stipulated and agreed that in case of loss amounting to less than ——— per cent. of the cash value of the property at the time of the fire, this company shall be liable for not exceeding such proportion thereof as the amount insured by this policy shall bear to said ——— per cent. of such cash value of such property.

"When this clause is attached to and made a part of a policy covering two or more items, this clause shall be considered to apply separately to each item of the policy."

What has been said with respect to clause 4 applies to this clause. It provides in effect that the assured shall carry a fixed per cent. of insurance based upon the cash value of the property at the time of the fire, and failing to do this, shall be regarded as a co-insurer for the deficiency. This is a violation of the act under consideration.

COUNTRY STORE CLAUSE.

Clause 7. "It is a part of the consideration of this policy, and the basis upon which the rate of premium is fixed, that in the event of loss, this company shall not be liable for an amount greater than three-fourths of the actual cash value of the property covered by this policy at the time of such loss, and in case of other insurance, whether poli-

Insurance Companies; Conditions in Policies.

cies are concurrent or not, then for only its pro rata proportion of such three-fourths value.

"The total insurance permitted is hereby limited to three-fourths of the cash value of the property hereby covered and to be concurrent herewith."

I am disposed to pass this clause as valid under the law. Its object evidently is to limit the insurance carried to three-fourths of the actual cash value of the property insured.

"TAILORS' FLOATER."

Clause 8. "In case of loss, this company shall contribute and pay in proportion as the whole amount of insurance upon the property covered by this policy bears to the whole value of said property within said radius of fifteen miles as heretofore mentioned, but in no event shall this company be liable for loss in any one building for a sum exceeding ten per cent. of the amount named by this policy."

This clause does not seem to come within the prohibition of the statute. It does not require the insured to carry any given per cent. or in any event to become a coinsurer, but contains certain restrictions and limitations, evidently growing out of the peculiar character of the property insured, especially with respect to its situation.

Very respectfully,

F. S. MONNETT,

Attorney General.

Advertisement; Newspaper of General Circulation; Weekly.

ADVERTISEMENT.—NEWSPAPER OF GENERAL
CIRCULATION—WEEKLY.

Office of the Attorney General,
Columbus, Ohio, July 22, 1896.

Hon. W. S. Matthews, Superintendent of Insurance:

DEAR SIR:—This department has the honor to receive a communication from the insurance department, requesting an opinion in writing, and for a construction of section 284, R. S. of Ohio. More especially inquiring what is the meaning, within the law, of "some newspaper of general circulation." And asking further whether a weekly newspaper, established in 1875, in a county that has a population of 39,000, with a bona fide subscription list of 450, reaching two-thirds of the postoffices in the county, can be considered to come within the meaning of the law as a newspaper of general circulation.

In reply I beg to state that few adjudicated cases can be found that have generalized this subject, or that may be of any value as a precedent, as each particular case requires so many elements of fact to enable a court to construe the meaning. But a fair interpretation of section 284, in my opinion, is that the patrons of insurance companies, or the communities in which such insurance agent is working, or likely to work, is entitled to have the knowledge that is contained in this publication; that such newspaper as reaches the greatest number, and the largest area of the commercial world in each given county, would be the one most desirable in which to have such certificate published. That a newspaper with so small a circulation as cited in your proposition, although, as you state, it reaches two-thirds of the postoffices, does not signify that it reaches two-thirds of the reading public that is entitled to such information, and on the contrary the subscribers are but little more than one per cent. of the entire population of the county. The number of postoffices would be the mere circumstance connected with the

Fire Insurance Company; Risks of Inland Transportation.

other facts to determine this question. The term "general" would not be fully satisfied by a single copy being sent to each township or postoffice in the county, when another newspaper in the same county is not only sending copies to each postoffice, but a sufficient number to each postoffice to be scattered well and evenly in each community. I do not anticipate that any one county may furnish an ideal definition of what the spirit of the law means, but it seems clear that it would be your duty to exercise your discretion under this section in favor of, at all times, giving the publication of the certificate to the largest number in the respective counties that the law designs to be benefited by the notice thereof.

If experience has shown the necessity of such a publication, too many patrons, or prospective patrons, cannot have the information.

Respectfully submitted,

F. S. MONNETT,

Attorney General.

FIRE INSURANCE COMPANY; RISKS OF INLAND
TRANSPORTATION.

Office of the Attorney General,

Columbus, Ohio, July 23, 1896.

Hon. Wm. S. Matthews, Superintendent of Insurance:

DEAR SIR:—I have the honor to receive a communication from your department, asking for an opinion in writing upon the following question:

"The United States British and Foreign Marine Insurance Company (limited), of England, holds a certificate of authority from the insurance department to transact the business of fire and marine insurance in the State of Ohio. Now, has this company, under the laws of Ohio, the right to transact within this State the business of insuring risks of inland transportation?"

Fire Insurance Company; Risks of Inland Transportation.

I have examined the company's charter and its articles of incorporation, together with letters and communications relative to this matter submitted to your department, and have examined the opinion furnished by the National Express Company, written by his honor, the attorney general of the State of New York, together with applying the facts to the statutes of Ohio governing the subject matter, and especially section 3641. Under our statute I cannot agree with the honorable attorney general of New York in his conclusions, and find:

That a fair construction of section 3641 authorizes and permits, in very broad terms, insurance companies to insure houses, buildings and all other kinds of property against loss or damage by fire and lightning, in and out of the State, and make *all kinds* of insurance on goods, merchandise and other property, in the course of transportation, whether on land or water, or any vessel or boat, wherever the same may be.

The charter of the British and Foreign Marine Insurance Company, as amended July 31, 1891, authorizes that company "to make or effect insurance on all objects of insurance, against, appertaining to, or connected with all risks of transit, whether partly by land or partly by water or wholly by land or wholly by water, including lakes, inland rivers or waters, and including all risks of transit by post, whether alone or in connection with any other mode of transit."

With the above charter expressly authorizing insurance of all kinds upon property of every class, in the course of transportation, whether on land or water, and the said company having charter rights to do such class of insurance, I think your department is fully justified in licensing such company under the laws of Ohio, to transact within this State the business on insuring risks of inland transportation.

Respectfully submitted,

F. S. MONNETT,

Attorney General.

*Election of Member of General Assembly to Fill Vacancy;
Compensation.*

ELECTION OF MEMBER OF GENERAL ASSEMBLY
TO FILL VACANCY; COMPENSATION.

Office of the Attorney General,

Columbus, Ohio, August 27, 1896.

Hon Asa S. Bushnell, Governor of Ohio:

DEAR SIR:—I have the honor to receive a communication asking for an opinion on the question of ordering an election for representatives in the General Assembly of the State of Ohio, where a vacancy happens in such office by resignation of such member, either during the session of the Legislature, or during the recess or adjournment thereof.

It is my opinion that, upon satisfactory information that such vacancy has duly occurred by resignation or otherwise, it is mandatory upon the governor to issue a writ of election, directing that a special election be held to fill such vacancy, in the territory entitled to fill the same, that your writ should specify the day on which you desire said election to be held, and direct the same to the sheriff of the proper county, or, if there be more than one county in the district, then to the sheriffs of such counties who shall give notice of the time and places of holding such elections, as in other cases made and provided by law. And such election shall be held and conducted, and returns thereof made as in case of a regular election.

Second—You further request a written opinion on the subject of the compensation of the newly elected incumbent. Now that the State has adopted biennial sessions of the Assembly, you inquire whether such newly elected member has means of qualifying in case the Assembly is not in session during the period of the term for which he is elected.

It is my opinion that his election, properly certified to, and the statutory oath of qualification having been administered to him by any one legally entitled to administer

Public Buildings; University—International Fraternal Alliance.

such oath, would entitle such newly elected member to compensation for the term so elected.

Respectfully submitted,
 F. S. MONNETT,
 Attorney General.

PUBLIC BUILDINGS; UNIVERSITY.

Office of the Attorney General,
 Columbus, Ohio, September 5, 1896.

Hon. Asa S. Bushnell, Governor of Ohio:

DEAR SIR:—This department has the honor to receive a communication from the building committee of the Ohio University, addressed to your office, making inquiry concerning the procedure under section 782 and other sections of that chapter, in reference to the erection of their new chapel building.

It is my opinion that this is clearly a public building and is ultimately paid for by the taxpayers of the State; that such buildings are not exceptions, and the board should comply strictly with the chapter governing public buildings.

Respectfully submitted,
 F. S. MONNETT,
 Attorney General.

INTERNATIONAL FRATERNAL ALLIANCE.

Office of the Attorney General,
 Columbus, Ohio, October 1, 1896.

Hon. W. S. Matthews, Superintendent of Insurance:

DEAR SIR:—You have referred to this department the application of The International Fraternal Alliance, of Baltimore, a corporation claiming to be a fraternal beneficiary association, and which desires permission to do business

International Fraternal Alliance.

within Ohio. Accompanying the application is a copy of the charter of the company, a copy of its constitution and by-laws, and other information bearing upon its true character. You desire to know whether, under the law of this State, this company may be properly authorized to do business in Ohio.

A fraternal beneficiary society is an association of persons organized for the sole benefit of its members, which has a lodge system, and may make provision for the payment of benefits to the members or their families, in case of sickness, disability or death. Such an association has no authority to insure persons other than members of the society; and the benefits paid the members or their families are to be raised by assessments, dues or other payments.

Some of the objections which may be urged against this association are:

First—The International Fraternal Alliance, while claiming to be a fraternal beneficiary society may, under its charter, constitution and by-laws, practically do an insurance business upon almost any plan it chooses. It undertakes to collect fixed assessments from its members irrespective of the amount needed to pay the losses, and reserves to the trustees the right to fix, and at any time change the proportion of the funds which shall go to the benefit or expense fund.

Second—It assumes to issue policies of insurance upon the lives of children. I do not understand how a child two years of age could take upon itself the obligations of the order and bind itself by any contract for the payment of its share of the losses and expenses of the association.

Third—It is authorized by its charter to do the business of a building and loan association. It may loan money to its members, and may borrow money for that purpose, and for paying benefits. Certainly a fraternal society organized under the laws of our State would have no authority to transact the business of a building and loan association.

Fourth—The company discriminates against all persons

International Fraternal Alliance.

other than those of the "White or Caucasian race." This it cannot do under our law.

Fifth—Under the constitution and by-laws the executive committee or trustees have the power to "juggle" the different funds of the association in such proportion as they may at any time determine. This is not permitted under our law.

Sixth—It assumes the right to deduct from a benefit, the fixed payments or prospective assessments which may be levied for the entire fiscal year in which a claim may originate.

For these reasons, as well as others, this association should not be permitted to do business within Ohio. Some of these objections may not be of a serious nature, but it occurs to me the whole plan of organization and method of doing business by this company is such as to confer upon it as many general and indefinite powers as the imagination can devise, and to throw about its members so many conditions, restrictions and limitations, that the real beneficiaries of the company are its officers, and not its members.

It may be true, as stated by the officers of this company, that our fraternal beneficiary law was prepared by them, and prepared with the express design of so framing the law, as to permit it to come within our State and do the various branches of business authorized by its charter and by-laws. And while the Legislature may have been deceived in passing a bill so prepared, rather than the one drafted by the commission appointed by the Legislature for that purpose, the amendments made to the bill as originally prepared are sufficient, taken in connection with the insurance law of this State, to defeat the covert aim of those who now boast they prepared the bill.

I do not think a company of this character can properly be authorized to do business within Ohio.

Very Respectfully,

JOHN L. LOTT,
Assistant Attorney General.

Transfer of Prisoners to Boys' Industrial School.

TRANSFER OF PRISONERS TO BOYS' INDUSTRIAL SCHOOL.

Office of the Attorney General,
Columbus, Ohio, November 13, 1896.

*Hon. W. B. Cherrington, R. W. C. Gregg, C. S. Muscroft
and L. F. Limbert, Joint Committee:*

DEAR SIRS:—This department is in receipt of a communication from you, as a committee, appointed by the joint boards of the Ohio Penitentiary and the Ohio State Reformatory, request a written opinion as to certain propositions, and a construction of certain sections of the act passed April 24, 1891, governing the Ohio State Reformatory.

Your first inquiry is: "Can the managers of the Ohio State Reformatory receive prisoners of any different ages than those specified in section 7, of the act passed April 24, 1891?"

Section 7, or so much thereof as is pertinent to your inquiry, provides that said board of managers shall receive all male criminals between the ages of 16 and 30, and not known to have been previously sentenced to a state prison in this or any other State, who shall be legally sentenced to said Ohio State Reformatory on conviction of any criminal offense in any court having jurisdiction thereof. And any such court may, in its discretion, sentence to said Ohio State Reformatory any such male person convicted of a crime punishable by imprisonment in the Ohio Penitentiary, between the ages of 16 and 30, as aforesaid.

This section standing alone might bear a somewhat different construction than that to be given it when taken in connection with other sections of the same act, and sections governing the same subject matter in other parts of the statutes.

Section 753, Revised Statutes, provides that male youth not over 16 nor under 10 years of age, may be committed to the Boys' Industrial School by any judge of police court,

Transfer of Prisoners to Boys' Industrial School.

judge of common pleas court or of probate court, upon conviction of any offense against the laws of the State.

Section 761, as amended April 21, 1893, provides that the governor may cause any juvenile offender confined in the penitentiary or sentenced to the penitentiary, to be transported to the Boys' Industrial School. And the governor may, for satisfactory reasons, remand or transfer from the school to the penitentiary, in compliance with that statute.

Section 754 of the statutes provides that any such youth convicted of any crime or offense, the punishment of which is in whole or in part confinement in jail or in the penitentiary, may, at the discretion of the court giving sentence, in lieu of being sentenced to the jail or penitentiary, be committed to the Boys' Industrial School. But section 14 of the act of April 24, 1891, provides that said managers also upon the order of the governor, shall receive from the Ohio Industrial School for boys, such of its inmates as he may deem advisable to transfer to the Ohio State Reformatory, and hereafter no prisoners shall be transferred from the Ohio Penitentiary to the Boys' Industrial School.

From this it would appear that at present there is, as to one element in this inquiry, a direct contradiction by the statute in defining the governor's duties as to the transfer of prisoners from the Boys' Industrial School. The last clause of section 14 of the act of 1891 indicates that the governor is prohibited from transferring any prisoner from the Ohio Penitentiary to the Boys' Industrial School, and the act of 1893 as above cited, says the governor may remand or transfer to the penitentiary offenders sentenced thereto, and so transfer from the Boys' Industrial School back to the penitentiary to serve out their remaining sentence. And the governor may also, under said law of 1893, cause any juvenile offenders to be transferred from the penitentiary to the Boys' Industrial School. The old rule of construction in cases of this kind would apply, namely, where two statutes passed at different times, both relating to the same subject matter but inconsistent with each other,

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the court will inquire as to the dates of their respective enactments, and will give effect to that which is last in point of time, rejecting the other. And in cases of a conflict between the two parts or provisions of such statute which is not so radical as to require that one or the other shall be absolutely disregarded, the court will endeavor to so modify the early provisions as to bring them into harmony and consistency with the latter. 16 Fed., 751; 52 Fed., 652; 6 Ark., 24.

Applying this rule, I must hold that the powers granted the governor under section 761, passed April 21, 1893, must control in the construction as to the subject matter of transferring juvenile prisoners from the penitentiary to the Boys' Industrial School.

Taking this view of the statutes as they now stand, both the court and the governor have a right to transfer prisoners to the Boys' Industrial School between the ages of 10 and 16. And the age defined in section 7 applies only to the court in its sentencing of prisoners in the first instance to the Ohio State Reformatory. And the governor shall have the right, under section 14, to order the managers in accordance with that section, to receive from the Ohio Industrial School for boys such of its inmates as he may deem advisable to transfer to the Ohio State Reformatory, clearly, between the ages of 10 and 16 years; or any other age that they may legally be in the Ohio Industrial School for boys.

Your said joint committee asks under your second proposition, in what manner boys who have already been sentenced to the Ohio Penitentiary may legally be removed or transferred to the reformatory. By this inquiry I suppose you refer to juvenile criminals between the ages of 10 and 16, who would be eligible in any event to such reformatory. Having already held that prisoners may be transferred to the reformatory from the industrial school regardless of the age limit, upon the order of the governor

Transfer of Prisoners to Boys' Industrial School.

under section 14 of the act of 1891, would answer the proposition as to one means or mode of transfer.

A second mode would be under the powers granted to the board of managers of the Ohio State Reformatory in section 14, which provides that such board of managers shall have authority to make *requisitions* upon the managers of the Ohio Penitentiary, who shall select the number required * * * and transfer them to said reformatory * * * under the rules and regulations thereof. And the board of managers are hereby authorized to receive and detain * * * such prisoners so transferred. Inasmuch as they use the plural "requisitions" and the term "youthful," and inasmuch as the age limit is not confined to from 16 to 30 of prisoners transferred from the industrial school, and the clear intention of the law seems to be for the reformatory to take charge of and provide for the youths under 16, I am of the opinion that the board of managers of the reformatory can make repeated requisitions upon the Ohio Penitentiary under section 14 for any criminals under 30 years of age. And that their original requisition heretofore made did not exhaust their powers under said act.

The third mode in which prisoners from the Ohio State Penitentiary, under 16 years of age, may reach the Ohio State Reformatory, would be for the governor to remand them to the industrial school, and then under the other statute, from the industrial school to the reformatory.

It would seem the proper course to save further confusion between courts and the boards of managers and the governor's duties, for the judges of our respective courts, as far as possible, to sentence all eligible criminals to the industrial school between the ages of 10 and 16, leaving it to the discretion of the governor under section 14 of this act referred to, to direct and recommend the transfer to the Ohio State Reformatory from such school.

Respectfully submitted,

F. S. MONNETT,

Attorney General.

Fish and Game Laws.

FISH AND GAME LAWS.

Office of the Attorney General,
Columbus, Ohio, November 13, 1896.

Hon. L. H. Reutinger, Athens, Ohio:

DEAR SIR:—This department is in receipt of a communication from you under date of November 12, 1896, asking for a construction of section 6964 as amended April 1, 1896, asking, first, when it is illegal to expose for sale, game described in that section; especially wishing to know whether it would be a violation of the statute for any one to sell quail at any time, or whether the spirit of the law is such that it would tolerate the selling of these birds during the open season for quail.

Section 6964 prohibits merchants or vendors from selling, purchasing, exposing for sale or having in their possession, any quail except between the 10th of November and the 15th of December, inclusive. That exception standing alone would clearly imply that such merchant or vendor could sell such game between the 10th of November and the 15th day of December. But section 1 as amended April 1, 1896, enacts that no person shall at any time kill any quail for the purpose of conveying the same beyond the limits of this State, or for the purpose of sale in the markets of this State, of any such birds killed within this State; and any person violating the provisions of this section shall be liable to a fine as provided in section 6968.

Section 6804 of the general statutes provides: "Whoever aids, abets or procures another to commit any offense, may be prosecuted and punished as if he were the principal offender." The Supreme Court has held frequently that all who aid or participate in the commission of a misdemeanor, are principals. Perhaps this principle of law is as old as criminal law itself, and would have been true without the special statute upon the subject.

Transfer of Prisoners to Boys' Industrial School.

It is my opinion therefore that inasmuch as the statutes have made the killing of quail at any time, for the purpose of sale in the markets of this State, a misdemeanor; that a purchaser of quail from such criminal would be a party to the unlawful sale, and aids, abets and procures another to commit such an offense; that the person killing and the person buying would be held equally guilty under the statutes. But I do not understand that a merchant or vendor is prohibited from selling quail between November 10th and December 15th, if the same has been lawfully killed and shipped into this State from any other State. And the exception only applies to game killed in the State of Ohio for the purpose of sale in the markets of this State.

Respectfully submitted,

F. S. MONNETT,
Attorney General.

TRANSFER OF PRISONERS TO BOYS' INDUSTRIAL SCHOOL.

Office of the Attorney General,
Columbus, Ohio, November 24, 1896.

Mr. C. D. Hilles, Steward Boys' Industrial School, Lancaster, Ohio:

DEAR SIR:—Your recent favor addressed to this department asking for an opinion in writing in reference to the action your board should take in reply to a demand made by a court of common pleas, asking to have a convict removed from the Boys' Industrial School, under section 752, in order that the trial judge may re-examine into the facts connected with the arrest, conviction and detention, was duly received.

I beg leave to reply that under section 761, as amended April 21, 1893 (90 O. L., 224), provides that the governor

Repairing of Bridges; Duty of Trustees.

may cause any juvenile offender confined in the penitentiary or sentenced to the penitentiary, to be transferred to the Boys' Industrial School, and while at the Boys' Industrial School be governed by the same rules and regulations relative to department and discharge as other persons committed to such institution. Other persons committed to such institution under section 752 have the right to this re-examination of the facts by the trial judge or judge sentencing such youth, upon the other provisions of section 752 being complied with. It is a matter of some doubt where executive powers have intervened whether it applies to a juvenile offender so removed from the penitentiary. But I prefer to give the convict the benefit of the doubt inasmuch as the question can be squarely raised by the prosecuting attorney before the court attempting to assume jurisdiction for a re-examination, and pleading to the jurisdiction, and have an adjudication upon the same by a court of record.

That has been the policy of this office where courts take cognizance of the subject matter, to have a decree rather than base it upon an opinion of the office.

It would be my opinion and advice that you deliver up the offender or convict to the court and allow the question to be raised by the prosecuting attorney.

Respectfully submitted,

F. S. MONNETT,
Attorney General.

REPAIRING OF BRIDGES; DUTY OF TRUSTEES.

Office of the Attorney General,
Columbus, Ohio, November 24, 1896.

Hon. J. H. Wickersham, Greenfield, Ohio:

DEAR SIR:—Your esteemed favor of the 24th inst., asking for a construction of section 4940 as amended April 17, 1896, duly received.

Extra Compensation for Department Clerks.

This question should have been directed to the prosecuting attorney of your county, as I have no authority to issue official opinion directly over your legal adviser. But I will give you my private opinion thereon, which you may submit to your prosecuting attorney before promulgating the same.

Construing section 4940, together with 860 as amended 91 O. L., 19, it seemed to me a fair construction of the amended act would be that the trustees shall keep in repair all bridges constructed by the commissioners, provided the repairs in any one year thereon shall not exceed \$10. That the word "all" in the above sentence is not limited nor affected by the exception in the sentence preceding, in said act.

But I do think the exceptions set forth in section 860 should be considered and treated as in full force in construing the word "all" in this amended section 4940.

Respectfully submitted,

F. S. MONNETT,
Attorney General.

EXTRA COMPENSATION FOR DEPARTMENT
CLERKS.

Office of the Attorney General,
Columbus, Ohio, November 24, 1896.

*Mr. Frank Koehne, Clerk Ohio Penitentiary, Columbus,
Ohio:*

DEAR SIR:—Your recent favor stating facts in refer-
ences to the extra services performed by you while clerk of
the penitentiary, duly received. Your request that I examine
the statutes and render an opinion for yourself and the
auditor of state in the matter, is herein complied with.

Extra Compensation for Department Clerks.

By examining the statute making the appropriation (92 O. L. 308) section 3 requires that "the bill shall set forth a statement of the services rendered," and makes it the duty of the auditor of state to see that the provisions of that section are complied with. One of the provisions of that section is that "no bills for extra clerk hire in favor of any clerk or clerks while drawing salary from the State shall be allowed from any amount hereby appropriated."

I have examined the statement submitted to me in your communication, purporting to be an itemized statement which reads:

"Ohio Penitentiary, to Frank Koehne, Clerk, Dr." "To extra services from May 1, 1896, to November 1, 1896," etc.

This indicates that the bill for \$250.00 is payment to you as clerk. It is due to you for extra services and for time during which you are drawing a salary. On the face of this bill, you certainly come clearly within the exception. The only way in which a clerk could receive extra pay perhaps would be just what you claim for services performed outside of regular hours. If any work was done during regular hours, it would not be extra services. And then again, it is made to you as clerk, showing that the board recognized it as the duty of the clerk.

Basing my opinion upon the facts submitted in your above communication, I cannot overrule the auditor's decision already made, that this is clearly prohibited in section 3.

Respectfully submitted.

F. S. MONNETT,
Attorney General.

Non-resident Members of Mutual Protective Associations.

NON-RESIDENT MEMBERS OF MUTUAL PROTECTIVE ASSOCIATIONS.

Office of the Attorney General,
Columbus, Ohio, November 30, 1896.

*W. H. Deam, Secretary Miami Farmers' Fire Association,
West Charleston, Ohio:*

DEAR SIR:—This department is in receipt of a communication from your company asking for a legal construction of section 3636, as applied to former members of your association owning property in the State of Ohio, and after having insured the same as residents of Ohio, and during the life of their policy, became non-residents of the State, but continue to own and insure said property in your company as they did formerly as residents.

In view of the construction given by Judge Burket to section 3686, 50 O. S., 145, I think that that portion of 3686, "Any number of persons of lawful age, residents of this State, may associate themselves together for the purpose of insuring each other against loss by fires," etc., being a section governing mutual protective associations, the question of residence becomes a vital element in the contract, and the remaining members of the company have a right to assume that all members will in the future continue to comply with the requirements of the association, one of which requirements, under the statute, is that a member and a party to a contract shall remain a resident of the State. His violating this provision of the contract by becoming a non-resident of the State would be a legal termination of the contract. And until the courts further review this section, I would advise your company to cancel such contracts of record, holding the policy liable for all assessments, of course, up to the point of removal. Many questions of estoppel might arise in each particular case that I would not undertake to pass upon, but relying upon the plain proposition submitted, I think you will be justified in following the above rule.

Respectfully submitted,

F. S. MONNETT,
Attorney General.

Power of Accountant to Compel Witness to Testify.

POWER OF ACCOUNTANT TO COMPEL WITNESS
TO TESTIFY.

Office of the Attorney General,
Columbus, Ohio, December 17, 1896.

*Hon. O. T. Corson, State Commissioner of Common
Schools:*

DEAR SIR:—This department has the honor to receive a communication from you asking for an official opinion in writing on section 365, especially requesting to know the power of an accountant to compel witnesses to testify when directed by your department on a complaint for fraudulent use of money; first, as to the power, and second, as to the course he should pursue in the event that the witness should refuse to appear and give the testimony required by this section.

Section 364 says, when a complaint is made in writing, verified by the affidavits of at least three freeholders and taxpayers resident of any school district of the State, and setting forth sufficient grounds and demanding an examination of the books, accounts and vouchers, etc., you are authorized and required to appoint some trustworthy and competent accountant for the purpose of investigating such complaint. And such accountant shall visit such school district, take possession of all the books and papers and vouchers and accounts of such district and investigate the truth of the allegations of such complaint and the condition of the school fund of such district.

Section 365 empowers such examiner to call before him forthwith, upon written notice, and examine witnesses under oath to be administered by him. And he shall immediately after completing such investigation report in writing, etc.

Section 2, Revised Statutes, requires each person chosen or appointed to an office under the constitution or laws of the State before entering upon the discharge of his duties to take an oath of office, and this, I take it, is true whether

Power of Accountant to Compel Witness to Testify.

the special statute appointing the officer requires such oath or not.

Section 5252 provides, disobedience of a subpoena, a refusal to be sworn except in case of refusal to pay fees on demand, a refusal to answer as a witness when lawfully ordered, may be punished as a contempt of the court or officer by whom the attendance or testimony of the witness is required. The exception to this principle under the constitution would be that a witness is not bound to answer any question that will directly or indirectly criminate himself, and he has a right to determine for himself whether the answer will have that effect. But a witness may not refuse to answer a question pertinent to the issue on the ground that the answer will tend to disgrace such witness when it will not tend to criminate him when the witness so testifies.

Section 5253 provides, that when a witness fails to attend in obedience to a subpoena, the officer before whom his attendance is required may issue an attachment to the sheriff, coroner or constable of the county commanding him to arrest and bring the person therein named before such officer at the time and place to be fixed in the attachment to give his testimony and answer for the contempt. If the attachment is not for immediately bringing the witness before the court or officer, a sum may be fixed in which the witness may give an undertaking with surety for his appearance, which sum shall be indorsed on the back of the attachment, and if the sum is so fixed and indorsed, it shall be \$100. And if the witness was not personally served, the court may by a rule order him to show cause why an attachment should not issue against him.

When a witness fails to attend in obedience to the subpoena, the court or officer may fine him in a sum not exceeding \$50.00, or may imprison him in the county jail, there to remain until he submits to be sworn and testify or gives his deposition. The fine imposed by the court shall be paid into the county treasury and that imposed by an

Power of Accountant to Compel Witness to Testify.

officer shall be for the use of the party for whom the witness was subpoenaed, and the witness shall also be liable to the party injured for any damage occasioned by his failure to attend or his refusal to be sworn and testify or to give his deposition.

It would seem to me that if such accountant was duly appointed and qualified and complies strictly with the powers and duties imposed under section 364 and section 365, that the written notice provided for in said section supplies the place of a subpoena, and when such subpoena is properly served upon a witness, such witness is bound to appear before such officer, and such officer would have like powers of a notary public under similar circumstances. Without such means and powers to enforce the duties devolving upon such examiner the section would be a dead letter. It is not a judicial act in the sense of the constitution conferring judicial powers upon the courts of the State. When the question propounded involves no question of privilege on the part of the witness it is his duty to answer if ordered by the accountant to do so. And if he is properly before the accountant under such written notice and he refuses to answer when ordered by the officer, he may be committed as a contumacious witness in compliance with the above statute cited for such procedure.

Respectfully submitted,

F. S. MONNETT,

Attorney General.

Compulsory Education.

COMPULSORY EDUCATION.

Office of the Attorney General,
Columbus, Ohio, December 19, 1896.

*Hon. O. T. Corson, Commissioner of Common Schools,
Columbus, Ohio:*

DEAR SIR:—This department has the honor to be in receipt of a communication from your office, requesting an opinion in writing regarding the power of a board of education under the compulsory education law, to compel the attendance of a minor over 14 and under 16 years of age, who can read and write the English language, and is not employed at some regular employment.

This question involves the construction and harmonizing of the present act entitled "An act to compel the elementary education of children."

Section 1 of said act provides that all children between the ages of 8 and 16, not engaged at some regular employment, shall attend school for the full term of the schools of the district in which they reside, during the school year, unless excused for the reason above named. Section 3 also provides that all minors over 14 and under 16 years of age, who cannot read and write the English language, shall attend school at least one-half of each day, etc., unless provision is made for such minors to have private instruction as in said act provided, while so employed.

Section 4 further states that every child between the ages of 14 and 16 years, unable to read and write the English language, or not engaged in some regular employment, being guilty of the defaults set forth in said section, may be punished according to that act.

Again section 7 treats of the two classes of minors, namely: Those between the ages of 8 and 14, and the class inquired about, those between the ages of 14 and 16 years; and provides that when any child between the ages of 14 and 16 years cannot read and write the English language,

Fish and Game Law.

or if such child is not engaged in some regular employment, or, being discharged, is not attending school without lawful excuse, the truant officer shall notify the parent, guardian or other person in charge of such child of that fact.

Taking these sections all together and trying to read them harmoniously, and using the plainer clauses to explain the ambiguous ones, I am of the opinion that section 1 elucidates the ambiguity of section 7, and the true reading should be that every minor between the ages of 14 and 16 years, whether he can read and write the English language or not, is obliged to attend school unless he is engaged in some regular employment. And that because he can read and write the English language, and is above 14 and under 16 years of age, will not justify him in being a truant, remaining without regular employment for that reason alone. And upon the proper notice being served upon the parent, guardian, etc., like liabilities would arise and punishment should be inflicted upon such person for neglect.

Any other construction would not give full meaning to all parts of the act, and this one is in the interests of good government and order.

Respectfully submitted,

F. S. MONNETT,
Attorney General.

FISH AND GAME LAW.

Office of the Attorney General,
Columbus, Ohio, December 29, 1896.

Mr. L. H. Reutinger, Chief Warden, Athens, Ohio:

DEAR SIR:—Your esteemed favor of the 26th inst. asking by what authority the commissioners of Erie County allowed a defendant to be dismissed from jail on payment of costs only, in a case of conviction under the game laws,

Fish and Game Law.

duly received. It is inferred the county commissioners had overlooked the special law governing the confinement of prisoners in default of fine and costs under this statute; and they had no authority to release him before the full period of thirty days. Until the higher courts have construed otherwise, we shall, most assuredly, observe the above construction.

Respectfully submitted,

F. S. MONNETT,
Attorney General.

FISH AND GAME LAW.

Office of the Attorney General,
Columbus, Ohio, December 29, 1896.

Mr. L. H. Reutinger, Chief Warden, Athens, Ohio:

DEAR SIR:—Your esteemed favor of the 26th inst. asking for a construction of one clause of section 6968-3, referring to the having of fish in possession out of season, duly received. The clause reads: "No person shall buy, sell, or offer for sale, or have in his possession any fish caught out of season or in a manner prohibited."

This is somewhat ambiguous, but until the courts pass upon it I think the fair interpretation would be that, inasmuch as seasons are statutory periods or creations, and cannot be extended to territory outside of Ohio, that which would be a season in Ohio waters would not be a season in Pennsylvania or New York waters, and I suppose they technically have a right to bring in fish legally caught beyond the boundaries of Ohio and sell them. If the other meaning is to be given to the statute they should have removed all ambiguity and used language like they did in the game law.

Respectfully submitted,

F. S. MONNETT,
Attorney General.

Fish and Game Law.

FISH AND GAME LAW.

Office of the Attorney General,
Columbus, Ohio, December 31, 1896.

Mr. L. H. Reutinger, Chief Warden, Fish and Game, Athens, Ohio:

DEAR SIR:—Your esteemed favor of the 30th inst. asking for an opinion from this department regarding that part of section 6968 with reference to fines paid under the provisions of this act by anyone pleading guilty, or who has been convicted, duly received. Whether or not fines paid to the court by parties who voluntarily plead guilty is subject to the order of the fish and game commission, the same as in the case of a person who has been regularly convicted.

Sections 6963, 6964, and the other sections, all refer to the fines to be assessed as provided in section 6968. Section 6968 provides that a person convicted of any violation of any of the provisions of this act, shall be fined, etc. *And all fines collected under the provisions of this act shall go to the county fish and game fund, in the county wherein such offense shall have been committed, unless otherwise ordered and directed by the fish and game commission of this State.*

I see no reason for giving this clause any other than the ordinary direct meaning of the statute, nor do I discover any material modification thereof by other clauses in the act.

It is my opinion that the fact of voluntarily pleading guilty by a defendant, of going before some other justice, does not change the channel through which the fine should flow, namely, through the above fund; and such fines collected should be treated the same as those collected by prosecutions carried on by the department.

Respectfully submitted,

F. S. MONNETT,
Attorney General.

Fish and Game Law.

FISH AND GAME LAW.

Office of the Attorney General,
Columbus, Ohio, December 31, 1896.

*Mr. L. H. Reutinger, Chief Warden, Fish and Game,
Athens, Ohio:*

DEAR SIR:—This department has the honor to receive a communication from you under date of December 30th, asking for a construction of the latter part of section 6961, Revised Statutes, with reference to the killing of rabbits and squirrels by the owner or tenant of any premises.

The secondary definition of the words "to find" is to discover by methodical means, ascertain or make out by systematic explorations, trial or study. Another definition, to discover or ascertain by experience, learn from observation.

It is my opinion that the expression "found injuring" does not require that the tenant or owner will be obliged to see the act performed and kill the identical animal, but if he can discover or ascertain by experience, or by examination, that such injury has been done by rabbits or squirrels, he will be justified, in good faith, of ridding himself of such pests.

Your further inquiry as to whether other persons than the absolute owner or tenant of such owner of any premises would have authority to act under the exception of the statute, I hold that where a case, in good faith, should arise, that such animals are actually found injuring grain, fruit trees, shrubbery or vegetables, that the owner, under a proper state of facts, showing the good faith, might contract to protect his grain, fruit trees and shrubbery from their ravages. The good faith of such contract should be determined under all the circumstances of each particular case.

Respectfully submitted,
F. S. MONNETT,
Attorney General.