of study it has prescribed for graduation. The statute imports, at least, that the institution shall be one which has established a favorable reputation among members of the medical profession; and the board should not be required to recognize one, that, from the brief period of its existence, or the novelty of its system of treatment has not yet acquired such reputation, but might, in the judgment of the board, be considered as still in an experimental state. The statute has undoubtedly left much in this respect to the sound discretion of the members of the board, who, in passing upon the various applications presented to them, it must be assumed, will act as their official position requires, fairly, impartially, and justly to all concerned."

You inquire as to the authority to make a rule that only schools having a nine months course shall be recognized. I do not think the recognition of schools is a matter which may be arbitrarily governed by rules and regulations. Nor do I think your board has the power to arbitrarily rule that no school may be recognized which has a course of less than nine months. While the statute has given the board some latitude, to arbitrarily attempt to require a course half again as long as contemplated by the legislature would very possibly constitute an abuse of discretion. The standing of a school to be such as to justify your recognizing it, is not, as stated by our Supreme Court, to be determined by the course of study alone. Neither is the length of the course the sole determining factor. There may possibly be some schools having a nine months course which because of the inadequacy of the instruction given, the insufficiency of the subjects covered, and their general bad reputation, should not be recognized by your board. In the last analysis the various schools should be independently considered and passed upon.

In specific answer to your inquiry, it is my opinion that the Board of Embalming Examiners, in passing upon the question of whether or not an embalming school shall be recognized by the board, is not compelled to recognize a school merely because it has a twenty-six weeks course; neither is it precluded from recognizing only schools which may have a reasonably longer course if, upon due consideration of the facilities of the various schools, the board should determine that a reasonably longer course is necessary to adequately fit an applicant to become an embalmer.

Respectfully,

GILBERT BETTMAN,
Attorney General.

3962.

COMPENSATION OF PUBLIC OFFICIAL—CONTRACT TO TAKE LESS THAN STATUTORY COMPENSATION AGAINST PUBLIC POLICY—MAY DONATE PORTION TO POLITICAL SUBDIVISION AND CANNOT LATER RECOVER SUCH COMPENSATION WHEN.

SYLLABUS:

1. *A public officer may, lawfully, if he sees fit, draw his salary or compensation and donate a portion or all of it to the political subdivision from which it*

was drawn. A previous agreement to do so, however, is not enforcible, as it is contrary to public policy and therefore void.

2. *A contract whereby a public officer agrees to perform services required of him by law for a less compensation than that fixed by law, is contrary to public policy, and void.*

3. *Although the general rule is that the acceptance of less compensation than that established by law for the office does not estop an officer from subsequently claiming the legal compensation circumstances may be such that an officer who, voluntarily, with full knowledge of his right to full compensation, and moved by force of an independent consideration freely accepts a lesser amount in full satisfaction for his services will be precluded from later claiming more than the amount so accepted.*

COLUMBUS, OHIO, January 18, 1932.

HON. JAMES M. AUNGST, *Prosecuting Attorney, Canton, Ohio.*

DEAR SIR:—I am in receipt of your request for my opinion in answer to the following question:

> "May the county officials who are elected to office, and whose salaries are fixed by statute, agree not to draw a certain per cent of their salaries, or draw their full salary, and then pay back a certain per cent into the county treasury?"

It is well settled in this state and elsewhere, that an offer or agreement, made by a candidate for a public office, whereby he agrees to accept no compensation, or a lesser compensation than that fixed by law, if elected, which offer is made for the purpose of influencing voters and effecting his election, is contrary to public policy and void. *Prentiss* vs. *Ditmar,* 93 O. S., 314, *State* vs. *Etting,* 29 Kans., 397; *Bush* vs. *Read,* 154 Cal., 277.

In *Prentiss* vs. *Ditmar, supra,* it is held that such an offer is an offense within the purview of the law to prevent corrupt practice in elections. A contest of elections may be predicated on such an offense and, if proven, will invalidate the election of a candidate committing the offense, but neither this rule nor the decisions cited, meet or cover the question presented here. Here the question of influencing voters is not an element to be considered. The problem presented relates to the effect of an agreement or offer made by a public officer during his term of office after his election, to accept less than the salary fixed by law or to pay back a portion of his salary after he receives it.

Counties are authorized by statute to accept gifts. Section 18, General Code. There is no limitation on the source of the subject of a gift to a county, or the person of the donor. I see no reason why a county officer may not make a gift to the county of which he is an officer, or why the subject of such a gift is material, whether it be from moneys received as salary or otherwise. I am accordingly of the opinion that a county officer may, if he sees fit, draw his salary and donate all or a portion of it back to the county from whose treasury it had been drawn. An agreement on his part, prior to his drawing his salary, to return a portion of it after it is drawn would, in my opinion, be without consideration, and could not be enforced.

A more difficult question is met with respect to the validity of an agreement on the part of a public officer to accept less than the compensation fixed by law

for his office, and whether, if he does accept less than the amount fixed by law, he is estopped from later claiming the full amount.

It is a well recognized principle of law that the statutory salary of a public officer belongs to the incumbent as an incident of the office and as a matter of right. This rule is stated in Corpus Juris, Vol. 46, page 1015, as follows:

> "The right to the compensation attached to a public office is an incident to the title to the office and not to the exercise of the functions of the office."

In support of this principle of law many cases are cited. As a corollary to this principle the rule has been evolved that when the compensation of a public officer is fixed by law, it cannot be reduced by his superior officer or the person by whom he is employed, and the mere fact that he takes the reduced salary does not prevent him from claiming the residue and it has been said that an agreement or promise on the part of a public officer to accept such reduced salary is not binding upon him. Mechem on Public Officers, Section 857; *State* vs. *Mayor of Nashville,* 54 A. R., 427; *Bodenhofer* vs. *Hogan,* 102 Iowa, 321, 120 N. W., 659.

The general rule with reference to this matter is stated in 22 R. C. L., 538, as follows:

> "As a general rule an agreement by a public officer to render the services required by him for less than the compensation provided by law is void as against public policy. * * Even the actual receipt of less than the legal rate of compensation for the services rendered by a public officer does not estop him from recovering the full amount which may by law be due to him."

In an annotation found in Volume 70, A. L. R. at page 973, it is stated:

> "The rule seems to be settled in most jurisdictions that a contract whereby a public officer agrees to perform services required of him by law for a less compensation than that fixed by law is contrary to public policy and void."

The same rule is stated in American and English Encyclopedia of Law, 2d Ed., Vol. 23, page 402, in the following language:

> "An officer is not debarred from recovering the legal salary or fees by an agreement to perform the service for less than the legal allowance, and one who accepts reduced pay is not thereby estopped to claim the statutory allowance especially if accepted under protest. But an officer may, by the voluntary acceptance of a reduction and long acquiescence therein be estopped to claim more."

And in Corpus Juris, Vol. 46, page 1027, it is said with reference to this matter:

> "The acceptance of less compensation than that established by law for the office does not estop an officer from subsequently claiming the legal compensation."

There are many cases cited by the several text writers in support of the rule

stated. These cases, many of them, turn on constitutional, statutory or charter provisions, or particular facts, especially with reference to the question of the right of an officer, after accepting a reduced compensation, to recover the balance. Some of the cases involving this phase of the matter have to do with situations where acceptance of a reduced amount although not accepted under formal protest, is done involuntarily or at least without the possibility of getting the entire amount at that time, because of a refusal to pay more. Others, however, deal with situations where the acceptance is voluntary although sometimes without full knowledge of the recipient's rights. Some cases distinguish between officers and mere employes. Others turn on the question of consideration for the promise or consideration for the acceptance of the lesser amount. Thus, in the cases of *Collins* vs. *New York,* 136 N. Y. S., 648, and *Kirk* vs. *New York,* 136 N. Y. S., 1061, certain employes of the city of New York had agreed to accept less compensation than the amount fixed by law rather than have the number of employes in the department reduced; lack of funds made one or the other alternative necessary. The court held in both cases that there was consideration for the agreement to accept a lesser salary than that fixed by law, and held the employes to their promise to accept this lesser amount. In the course of the opinion in the Collins case, the court said:

> "The plaintiff did not hold an office to which his compensation attached as an incident."

The cases are far from being in accord on the question of the right to recover the full amount of salary or compensation due after accepting less, although most of them turn on questions of fact. Even on the question of the validity of a contract of a public officer to accept less than the salary fixed by law, there is considerable conflict of authority. In the annotation found in 70 A. L. R., 973 et seq., noted above, it is said, after stating the majority rule quoted above:

> "In several cases the general rule appears to be departed from, and it is held that a contract by a public officer to render services for a compensation less than that fixed by statute is valid."

In support thereof there are cited *Bloom* vs. *Hazzard,* 104 Cal., 310, 37 Pac., 1037 and *Key* vs. *Moncton,* 36 N. B., 377. Other cases might be cited. In McQuillen on Municipal Corporations, 2d Ed., Sec. 542, it is said:

> "The acceptance of a less sum than that allowed by law as salary or compensation without objection and in full satisfaction for services rendered ordinarily estops the officer or employe from claiming more. Sometimes the facts of the particular case will not warrant the application of the doctrines of waiver and estoppel."

Many cases are cited in support of the text. Time and space forbid a review of the many conflicting cases involving these questions. Most of the cases on the subject will be found by examining the texts referred to. See also Annotation 36 L. R. A. N. S., 244. Upon examination of the authorities it will be found that the weight of authority favors the rule that an agreement on the part of a public officer to accept less than the salary or compensation fixed by law for the office is against public policy and void.

It is more difficult, however, to determine where the weight of authority

lies with reference to the right of an officer after accepting less than the amount fixed by law to recover the balance. As stated above, the cases, many of them, turn on facts peculiar to the situation.

The more reasonable rule to be gleaned from the authorities, in my opinion, is that where a public officer accepts a lesser amount of salary or compensation than is due him according to law voluntarily and with full knowledge of his right to the full amount, it amounts to an accord and satisfaction and he is precluded from later claiming more than he has accepted, especially if there may be said to be any consideration for his accepting the lesser amount. This view is not entirely without precedent in Ohio. The case of *Toledo* vs. *Sandwell,* 13 O. C. C., 496, although not precisely in point, states a principle somewhat analogous to that involved in this question. It was there held as stated in the syllabus of the case:

> "Under the constitution, where land is appropriated for municipal purposes the city should pay to the owner the damages assessed by the jury in the condemnation proceeding. But where this is not done, but the city gives to the owner a certificate of indebtedness to amount to an accord and satisfaction to relieve the city of liability, it must appear that the owners accepted such certificate with a full understanding and knowledge of what they were doing, and the certificate must be for the full amount of the indebtedness, or if for a less amount, the payment of a consideration for the deficiency must appear."

I assume that the question you have submitted grows out of a situation which is common to all the counties, and political subdivisions in the state, and in fact in the entire nation; that is, a shortage of funds; we are in the midst of a depression, of which the courts would no doubt take judicial notice. The result is that all political subdivisions are compelled, because of a shortage of funds, to retrench in their activities. In many places public officers have expressed a willingness to voluntarily accept a lesser compensation than that fixed for them by law so that other departments of government will not suffer so seriously because of such a shortage. I am of the opinion that this constitutes a sufficient consideration for the acceptance by the said officers of a lesser salary than that fixed by law and that if such a lesser amount is accepted voluntarily and with full knowledge of their rights and in consideration of the assistance thus afforded to other departments of local government, they can not be heard later to claim more than they have accepted.

While an agreement unexecuted, to accept a lesser amount than that fixed by law, even though based on a consideration, is against public policy and void, and therefore can not be enforced, when that agreement becomes executed, and a consideration passes, as it does under the circumstances mentioned, it amounts to an accord and satisfaction and the officer will be precluded from later recovering anything in addition to the amount accepted.

Respectfully,

GILBERT BETTMAN,
Attorney General.