Note from the Attorney General's Office:

1918 Op. Att'y Gen. No. 18-1332 was overruled by 1988 Op. Att'y Gen. No. 88-010.

1918 Op. Att'y Gen. No. 18-1292 overruled in part by 1981 Op. Att'y Gen. No. 81-066.

1918 Op. Att'y Gen. No. 18-1206 was overruled by 2019 Op. Att'y Gen. No. 2019-005.

1918 Op. Att'y Gen. No. 18-1123 was overruled by 1994 Op. Att'y Gen. No. 94-086.

1918 Op. Att'y Gen. No. 18-949 was overruled by 1989 Op. Att'y Gen. No. 89-027.

1918 Op. Att'y Gen. No. 18-926 was overruled by 1983 Op. Att'y Gen. No. 83-036.

OPINIONS OF THE ATTORNEY-GENERAL FROM JANUARY 1, 1918, TO JANUARY 13, 1919.

905.

APPROVAL—CASE OF CANAL LANDS TO THE WESTERN OHIO RAILWAY COMPANY; O. C. McCLELLAND AND TO THE COMMISSIONERS OF LUCAS COUNTY.

COLUMBUS, OHIO, January 5, 1918.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of December 21, 1917, enclosing leases in triplicate for my approval, as follows:

> To the Western Ohio Railway Company, marginal strip of berme bank of the Miami and Erie canal north of Piqua, being a renewal of a former lease; valuation $3,166⅔.
>
> To O. C. McClelland, crossing over abandoned Ohio canal in Madison township, Licking county, Ohio; valuation $100.00.
>
> To commissioners of Lucas county, Ohio, crossing under Miami and Erie canal in Lucas county for sanitary sewer; valuation $250.00.

I have carefully examined said leases and find them correct in form and legal. The one lease is to The Western Ohio Railway Company, and in connection therewith I desire to call attention to the provisions of section 13965 G. C., in which it is stated that land "may be leased for any purpose or purposes other than for railroads operated by steam." However, the section further provides that the superintendent of public works may—

> "* * prescribe regulations for the crossing of the canals, canal basins or canal lands by any railroad operated by steam * * or for the necessary use, for railroad purposes, of any part of the berme banks of a canal, canal basin or any portion of the canal lands for a distance not exceeding two miles, * *."

It is my view that the terms of the lease to said railroad company are within the provisions of the above quoted section. Hence I am endorsing my approval upon said three leases and am forwarding the same to the governor of Ohio for his consideration.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

906.

APPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN MORGAN, MUSKINGUM AND SCIOTO COUNTIES.

COLUMBUS, OHIO, January 5, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of December 27, 1917, in which you enclose, for my approval, final resolutions on the following improvements:

Morgan County—Sec. H, McConnellsville-Athens road, I. C. H. No. 162. (In duplicate.)
Muskingum County—Sec. R, National road, I. C. H. No. 1.
" " Sec. Q, National road, I. C. H. No. 1.
" " Sec. S, National road, I. C. H. No. 1.
Scioto County—Sec. O, Ohio River road, I. C. H. No. 7.

I have carefully examined said final resolutions, find the same correct in form and legal, and have therefore endorsed my approval thereon, in accordance with the provisions of section 1218 G. C.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

907.

FOREIGN CORPORATION—DELIVERING GOODS DIRECT FROM FACTORY TO PURCHASERS IN THIS STATE—NOT REQUIRED TO COMPLY WITH LICENSE FEE LAW OR INITIAL FRANCHISE TAX LAW.

A foreign corporation delivering goods direct from its factory to purchasers in this state on orders taken in this state or otherwise is not required to comply with either the license fee law prescribed by sections 178 *et seq. G. C. nor with the initial franchise tax law prescribed by sections* 183 *et seq. G. C.*

COLUMBUS, OHIO, January 5, 1918.

HON. WILLIAM D. FULTON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—This department is in receipt of a communication from you under date of December 17, 1917, with which you enclose for opinion a letter addressed to you by Mr. H. Gerald Chapin, an attorney of New York city, in which he inquires whether or not under the facts stated by him a certain New York corporation is required to obtain permission to do business in this state. The letter of the attorney to you is as follows:

"Will you please inform me whether under your statutes a New York corporation would be obliged to obtain permission to do business in Ohio under the following circumstances:

"The company maintains a manufactory in New York. A citizen of Ohio who does a business of his own in an Ohio city and who is not employed by the New York corporation, orders goods from time to time.

He solicits orders on his own account which he forwards to the New York concern, the New York concern making collections direct. The New York corporation pays to the Ohio dealer a commission on such orders. The Ohio dealer pays all the expenses of his own business, including rent, etc., the New York corporation paying absolutely nothing towards the maintenance of his business. The Ohio dealer does business entirely in his own name.

"If it is your practice to require that a foreign corporation obtain a certificate to do business, under such circumstances, will you please forward me blanks, which I assume you have, for the purpose."

In this opinion I will briefly consider the question whether the corporation referred to in the attorney's communication is required to comply with the license fee law relating to foreign corporations, which has been carried into the General Code as sections 178 to 182, inclusive, as well as whether said corporation is required to comply with the initial franchise tax law provided for in sections 183 to 192, inclusive, of the General Code.

In Opinion No. 236, addressed to you under date of May 3, 1917, in answer to an inquiry as to whether or not The Rubber Goods Manufacturing Company, a New Jersey corporation, was required to comply with said statutory provisions under facts set out in said inquiry, I considered at some length said statutory provisions and certain general principles of law applicable to questions of this kind. I do not deem it necessary to again cover this ground with respect to the questions at hand, nor for the purposes of these questions do I deem it necessary to here quote the statutory provisions above noted further than to note the provisions of sections 178 to 183, respectively, of the General Code. These sections read as follows:

"Sec. 178. Before a foreign corporation for profit transacts business in this state, it shall procure from the secretary of state a certificate that it has complied with the requirements of law to authorize it to do business in this state, and that the business of such corporation to be transacted in this state, is such as may be lawfully carried on by a corporation, organized under the laws of this state for such or similar business, or if more than one kind of business, by two or more corporations so incorporated for such kinds of business exclusively. No such foreign corporation doing business in this state without such certificate shall maintain an action in this state upon a contract made by it in this state until it has procured such certificate. This section shall not apply to foreign banking, insurance, building and loan, or bond investment corporations."

"Sec. 183. Before doing business in this state, a foreign corporation organized for profit and owning or using a part or all of its capital or plant in this state shall make and file with the secretary of state, in such form as he may prescribe, a statement under oath of its president, secretary, treasurer, superintendent or managing agent in this state, containing the following facts:

1. The number of shares of authorized capital stock of the corporation and the par value of each share.

2. The name and location of the office or offices of the corporation in Ohio, and the names and addresses of the officers or agents of the corporation in charge of its business in Ohio.

3. The value of the property owned and used by the corporation in Ohio, where situated, and the value of the property of the corporation owned and used outside of Ohio.

4. The proportion of the capital stock of the corporation represented by property owned and used and by business transacted in Ohio."

From the terms of section 178 of the General Code, it is apparent that the conditions imposed therein, and in the sections immediately following, apply only to foreign corporations transacting business in this state or which seek to do so; while the provisions of sections 183 et seq. of the General Code, apply only to foreign corporations doing business in this state and owning or using a part or all of its capital or plant in this state.

With respect to the application of both sections 178 and 183 of the General Code, it may be noted that irrespective of such statutes a foreign corporation is only liable to regulations prescribed by the state or to franchise taxes imposed by such state when the corporation is in fact doing business in such state, and what constitutes "doing business" is to be determined from what it actually does, and that it cannot consist in the corporation doing what it has a right to do without the consent of such state.

Judson on Taxation, 2d Ed., Sec. 188.

Statutes of similar import to those of our own state above noted, applying to foreign corporations of different kinds, have been enacted in practically all of the states, and the provisions of these statutes in respect to what constitutes "doing business" within the meaning of this term as used in such statutes have been construed in many of the decisions of the courts of the several states and of the United States. In these decisions, however, the courts for the most part have refrained from formulating any general rule for determining when a foreign corporation is "doing business" within the meaning of such statutes, but have contented themselves in determining whether under the facts in the particular cases such corporations are within the particular statute.

With respect to mercantile and commercial corporations it may be noted that in so far as any general rule can be gathered from the decisions the phrase "doing business" within any particular state, as applied to such corporations, implies corporate continuity of conduct in respect to such business such as might be evidenced by the investment of capital, the maintenance of an office for the transaction of business and those incidental circumstances which attest the corporate intent to avail itself of the privilege of carrying on the business and activities such as appertain to the ordinary business and purpose of the corporation.

Penn Collieries Co. v. McKeever, 183 N. Y. 98;
Simmons-Burks Clothing Co. v. Linton, 90 Ark., 73;
Kilgore v. Smith, 122 Pa. 48;
Caesar v. Cappell, 83 Fed. Rep., 403, 422;
Cooper Mfg. Co. v. Ferguson, 113 U. S. 727;
Toledo Commercial Co. v. Glen Mfg. Co., 55 O. S., 217, 222, 223.

Further, as a principle of immediate application to the question at hand may be noted that though corporations are not citizens within the meaning of the provisions of the federal constitution, guaranteeing to the citizens of each state all the privileges and immunities of citizens in the several states, the right to engage in interstate commerce does not depend upon citizenship and the capacity of a foreign corporation to do so must be determined by its own charter as granted by the state of its creation and by the law of the state in which it is carrying on business. A manufacturing company, therefore, incorporated and doing business under the laws of one state can send its commercial travelers soliciting sales

through other states and may ship its goods to the purchasers or to its agents for delivery to purchasers. In like manner foreign corporations may employ commercial agents in different states, and such agents will be entitled to the same protection in transacting interstate commerce as if they were employed by non-resident individuals.

Judson on Taxation, 2d Ed., Sec. 167.

In the case of *Toledo Commercial Co. v. Glen Manufacturing Co.*, supra, it was held that the sale and delivery on orders secured by traveling agents of a corporation of goods manufactured by such corporation in another state was not the "doing of business" by such corporation in this state within the meaning of statutory provisions which, as amended, have been carried into the General Code as sections 178 et seq. thereof. The court in its opinion in this case says:

> "The holdings are numerous that it is the right of persons and of corporations residing in one state to contract and sell their commodities in another, unrestrained except where restraint is justified under the police power. This rule does not deny the right of any state to impose conditions upon the power of foreign corporations to establish themselves within its boundaries for the performance generally of their business, involving the exercise of corporate franchises and powers, but does hold that the selling through traveling agents and delivering of goods manufactured outside of the state, does not fall directly within the purview of their corporate powers. * * * * The distinction to be noted is that the sale and delivery of merchandise is a right possessed in common by all the citizens of the state; the exercise of corporate franchises and powers, is not—it is a special privilege conferred only on corporations. And the sale and delivery in one state of goods manufactured in another state, by a citizen of that state, is interstate commerce."

Applying these principles to the questions at hand, I am of the opinion that upon the facts stated by Mr. Chapin in his communication to you the corporation in question is not required to comply with either of the statutory provisions above noted. From the attorney's communication it appears that the goods of the corporation in question are disposed of in this state in two ways: In one instance, as I read said communication, the goods of the company are sold direct to the person in Ohio referred to in said communication on his orders, which goods, I assume, are received by such person as his own and consumed or resold by him as such; in the other instance, the goods manufactured by this corporation are sold and delivered to various customers in this state on orders taken on his own account by the person referred to in said communication and forwarded to the corporation at its home office.

It is obvious in view of the principles before noted herein that in neither instance is the corporation in question doing or transacting business in this state within the meaning of sections 178 and 183, respectively, of the General Code; and it is further evident that in neither instance does the corporation own or use any part of its capital or property in this state within the purview of section 183 of the General Code. Of course, should it be disclosed that the person in Ohio referred to in said communication receives goods from said corporation as the property of the corporation, and that from a stock of such goods he makes sales to consumers in this state on account of such corporation a different question would be presented. However, on the facts stated in the attorney's communication

as I interpret them I am of the opinion, in direct answer to the questions here presented, that the corporation in question is not required to comply with either the license fee law prescribed by sections 178 et seq. of the General Code or with the initial franchise tax law prescribed by section 183 of the General Code.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

908.

BOARD OF EDUCATION—VALIDITY OF ELECTION OF MEMBER WHOSE NOMINATION PETITION DID NOT CONTAIN REQUIRED NUMBER OF SIGNATURES.

Where a person filed a nomination petition for member of the board of education, which had less than twenty-five signers thereon, and where no objections thereto were filed or considered, and the deputy state supervisors of elections, irrespective of the number of signers, placed the name on the ballot, and at the election the person received the highest number of votes, he was duly elected as a member of said board of education, and irregularities in the making of the nomination would not affect the validity of his election.

COLUMBUS, OHIO, January 5, 1918.

HON. OTHO W. KENNEDY, *Prosecuting Attorney, Bucyrus, Ohio.*

DEAR SIR:—You have submitted to me the following request for opinion:

> "We have this condition in one of the school districts in this county, at the recent election. One of the members of the board of education filed a purported petition as a member of the board of education. That is, to become a candidate for that position. He had less than twenty-five signers on his petition, but the deputy state supervisors of election, irrespective of this number of signers, put his name on the ballot (I am informed that this was an oversight), with the result that this party was one of the five who received the highest number of votes, and therefore, so far as the votes are concerned, was elected as a member of the board.
>
> "I desire your opinion on the point as to whether or not a candidate who files a petition that has not twenty-five signers on it, even though the deputy state supervisors of election may put his name on the ballot, and he should receive the required number of votes to elect him, will be deemed to be elected? Or, in other words, whether it is necessary that a candidate have at least twenty-five names on his petition, and if he fails in having that number, whether that will have any bearing upon his right to hold a position on the board of education? That there may be no misunderstanding, I will say this is a rural district."

Section 4997 G. C. provides for nominations for the office of member of the board of education and reads as follows:

> "Sec. 4997. Nominations of candidates for the office of member of the board of education shall be made by nominating papers signed in the aggregate for each candidate by not less than twenty-five qualified electors of

the school district, of either sex, in village districts and in city school districts by not less than two per cent. of the electors voting at the next preceding general school election in such city school districts."

Section 5005 G. C. reads as follows:

"When so filed, certificates of nomination and nomination papers shall be preserved and be open, under proper regulations, to public inspection. If in apparent conformity with the provisions of this chapter, they shall be deemed to be valid unless objection thereto is duly made in writing within five days after the filing thereof."

Inasmuch as you state that the deputy state supervisors of elections, irrespective of the number of signatures on the nomination paper, placed the name on the ballot, it appears that no question was raised or objection made to the nomination paper so filed.

So we have the plain question whether or not a person, whose name is placed on the official ballot by the election officers and who has received the highest number of votes for the office for which he was voted, can have his right to such office questioned after the election, owing to some defect or irregularity in the manner of his nomination.

While I do not find that this exact question has been passed upon by the courts of Ohio, still the adjudications on election matters are uniform in upholding the right of an elector to have his ballot counted after it has been cast and deposited in the ballot box. Nor will the act or omission to act of any election officer deprive the voter of this right, so long as his expressed will is ascertainable, and it is reasonably certain that his ballot has not been changed.

As stated by the court in State ex rel. v. Markley, 9 C. C. (N. S.) 551, affirmed without report in 76 O. S. 636 (third paragraph of the syllabus):

"The will and judgment of voters cannot be rendered ineffectual through a disregard by the judges of election of their duty as laid down in the statute, whether such disregard be due to fraud, accident, mistake, misapprehension or negligence; and where such omitted duties with reference to the ballots cast were of a ministerial character, oral evidence is admissible to show the true character of the ballots as to which there is doubt, and to identify with certainty the poll books and tally sheets, and when the ballots in question are found to be truthful, they should be counted for the candidate for whom the voters intended they should be counted if that intention can be ascertained."

I quote the above, not that it is directly in point, but only to show the manifest tendency of our courts to sustain the expressed will of the voter after his ballot has been cast, and not permit the acts or omissions of the election officials to deprive him of his rights.

In Schuler v. Hogan, 168 Ill. 369, the supreme court, under a somewhat similar statute, although the proceeding was one in contest, held that the failure to object to a certificate of nomination was a waiver of all objections that might exist to the presence of the name of one's opponent on the official ballot. In this case also the court held that a provision of the Illinois election laws, requiring that a convention making a nomination for a county office shall represent a political party which cast at least two per cent. of the total county vote at the last general election, would be regarded as directory merely, where no objections to the certificates of nomination were made or considered.

In Attorney-General v. Campbell, 191 Mass. 497, the court held in the third paragraph of the syllabus that under their election laws when a ceritficate of nomination for a state office has been filed with the secretary of the commonwealth and is "in apparent conformity with law," it is "valid unless objections thereto are made in writing," and are filed in the manner prescribed by the election laws.

In Blackmer v. Hildreth, 181 Mass. 29, there was a failure to comply with a statute in regard to the nomination papers, but the court held that the irregularities did not invalidate the election. In that case Mr. Justice Hammond said in the opinion of the court at page 32:

> "But with the preparation of the ballot the influence of these provisions end. If there be irregularities like those in this case they do not accompany the ballot and taint it in the hands of the voter. This view of the statute gives due weight and scope to the provisions in question, and preserves the sanctity of the right of suffrage and its free and honest exercise. To hold otherwise would be to lose sight of the purpose for which these provisions were made, namely, to provide the method and time for the preparation of the ballot, and would subject our elections to intollerable and perplexing technicalities in no way material to the substantial merits of the controversy or to the freedom and result of the action of the voters. Its natural tendency would be to thwart rather than to secure a true expression of the popular will."

Coming then to your specific inquiry, it is my opinion it is now too late to raise the question that the person, having received the required number of votes to elect him in the manner stated in your inquiry, was not legally elected, owing to some defect in his nomination paper. All objections to nomination papers should have been raised prior to the time of the printing of the person's name on the official ballot.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

909.

TRANSPORTATION OF PUPILS—WHEN COUNTY BOARD OF EDUCATION MAY ACT—BOARD OF EDUCATION—MEMBER MAY RESIGN AND BE APPOINTED TO FILL LONGER TERM—SCHOOL DISTRICT TRANSFERRED TERRITORY MUST BE CONTIGUOUS TO OTHER TERRITORY.

When a local board of education neglects or refuses to provide transportation for pupils, as provided by law, the county board of education shall provide same and charge the expense thereof to the local district.

When a local board acts in providing transportation, the county board has no power to interfere with such act unless the local board grossly abuses the discretion placed in it or acts fraudulently.

A and B are members of a local board of education. A's term expires on the day preceding the first Monday in January, 1918. *B's term expires on the corresponding day,* 1920. *B removes from the district and creates a vacancy. Can A resign and be appointed to fill the vacancy in B's term? Yes.*

Where by annexations of territory a rural school district is divided into three separate integral parts, must the county board of education transfer such territory so that it is contiguous to the other territory of the district to which it belongs? Yes.

COLUMBUS, OHIO, January 5, 1918.

HON. JARED P. HUXLEY, *Prosecuting Attorney, Youngstown, Ohio.*

DEAR SIR:—Your request for my opinion reads as follows:

"(1) Section 7731 of the school laws of Ohio state 'When local boards of education neglect or refuse to provide transportation for pupils, the county board of education shall provide such transportation and the cost thereof shall be charged against the local school district.'

Suppose a local board of education maps the transportation route so that forty-five children fall to one transportation conveyance and when they cannot be all placed in one wagon, a trailer is attached to the wagon and a complaint is filed with the county board of education stating that such transportation is unsafe and, therefore, petition the county board to provide adequate transportation. Can the county board of education, according to the provisions of section 7731, provide the transportation petitioned for?

(2) Mr. A. and Mr. B. are members of a local board of education. Mr. A.'s term expires January 1, 1918, and Mr. B.'s January 1, 1920. Mr. A. is a candidate for re-election in November, 1917, but is defeated. Mr. B. is about to remove from the school district, thereby creating a vacancy. Mr. A. at once tenders his resignation. Can the present board of education reappoint Mr. A. to fill the vacancy of Mr. B. when it shall have been created?

(3) Section 4685 reads: 'The territory included within the boundaries of a city, village or rural school district, shall be contiguous except where an island or islands form an integral part of the district.'

In making a map showing all of the school districts of the county school district, the county board of education discovers that in a township rural school district, through annexation within the civil township, the territory of this township rural school district now stands in three integral pieces; that is, is not contiguous. Is it mandatory that the county board of education proceed to transfer territory until the territory in question shall be a part of a district with contiguous territory?"

You ask three separate and distinct questions and I shall take them up in the order in which they are asked and numbered in your letter.

Referring to question No. 1:

Section 7731 G. C., as amended in 107 O. L., 625, reads as follows:

"In all rural and village school districts where pupils live more than two miles from the nearest school the board of education *shall* provide transportation for such pupils to and from such school, the transportation for pupils living less than two miles from the school house by the nearest practicable route for travel accessible to such pupils shall be optional with the board of education. When transportation of pupils is provided the conveyance must pass within one-half mile of the residence of such pupils or the private entrance thereto. *When local boards of education neglect or refuse to provide transportation for pupils, the county board of educa-*

tion shall provide such transportation and the cost thereof shall be charged against the local school district. When the county board of education certifies to the county auditor the amount paid for such transportation the county auditor shall transfer such amount from the funds due the said board of education to the county board of education fund."

The above section of the General Code places the duty of providing transportation, that is, of providing the means of transportation, in the rural and village boards of education. It is a duty therefore that the boards in the first instance have a right to exercise and cannot be interfered with unless in the exercise of such right or duty the board grossly abuses the discretion placed in it or acts in a fraudulent manner.

Where authority is placed in a local board of education to perform certain functions, the said local boards cannot be interfered with unless there is a gross abuse of discretion in the performance of said functions.

Youmans vs. Board of Education, 13 C. C., 207;
Board of Education vs. Minor, 23 O. S., 211;
State vs. McCann, 21 O. S., 205;
State vs. Board of Education, 76 O. S., 297.

A provision very similar to the one contained in the above quoted section (7731) was contained in section 7610 G. C. prior to the amendment of said section on the twenty-first day of March, 1917. In said last mentioned section it was provided that if the board of education in any district failed in any year to estimate and certify the levy for a contingent fund or if the amount so certified was deemed insufficient for school purposes, or if such board failed to provide sufficient school privileges for all the youth of school age in the district, or failed to provide for the continuance of any school for at least thirty-two weeks in the year, and numerous things therein referred to, then the county commissioners of the county to which such district belonged, upon being advised and satisfied thereof, was authorized to do and perform any and all of such duties and acts "in as full a manner as the board of education is by this title authorized to do and perform the same."

In Board of Education vs. Commissioners, 10 O. N. P., n. s., 505, in which case the provisions of said section 7610 were under consideration, the court on page 507 says:

"The school electors of each school district elect a board of education for their district schools; into the hands of this board of education the law of our state commits, in general, all the powers granted respecting the maintenance of schools in such district; such as the determination of the number of school houses necessary, the selection and purchase of sites, the building and equipment of school houses, the assignment of pupils thereto, the rules and regulations governing the conduct of pupils, the course of study, text-books and grading, the hiring and payment of teachers and other instructors, and the raising of money by taxation to meet proper and legal expenditures; these powers are broadly vested in the local board, who, in the judgment of the law are best qualified by residence, interests and local knowledge, to exercise them carefully, wisely and with discrimination, to the best interest of the school children of the district, which is the ultimate aim and just purpose of all school legislation.

As a rule courts will not interfere with board of education in the exercise of these functions. * * *

It will be noted that some of these powers committed to the county commissioners after default on the part of the board of education, such as certifying the levy, hiring and paying teachers, etc., are ministerial merely in their nature, and that some of them are judicial. As to the ministerial acts, the law is simple; if the local board of education fails to perform them the county commissioners step in, upon being advised and satisfied of such default, and perform them in the place and stead of the local boards.

As to the exercise of judicial powers, the case is different. The county commissioners in such cases cannot interfere merely by reason of a difference of opinion; they certainly have no higher powers than the courts have; that is, they can only interfere and assume the functions of the local board, when that board has acted, or declined to act, in such a way as to show a gross abuse of discretion."

In Board of Education vs. Shaul, et al., 4 O. N. P., n. s., 433, the court held:

"Where a township board of education voluntarily or willfully fails to perform any of its ministerial duties, the county commissioners may step in and perform such duties as authoritatively and in the same manner as though it was a board of education which was acting.

But with reference to the judicial duties of a township board, such as the suspending at its discretion of the schools in certain subdistricts, or the abolishing of the subdistricts and the providing in either instance for the conveyance of the pupils to other public schools or to one or more centralized schools, the county commissioners are without authority to interfere or to reverse orders made by the township board in that behalf; and the fact that the action of the township board was contrary to the will of the people and against their protest does not change the rights of the board in that regard."

A ministerial act "is one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment upon the propriety of the act being done." Nash vs. State, 66 O. S., 558.

Judicial acts involve the investigation and determination of a state of facts, an act of choice or discretion or judgment as to the propriety of actions to be taken in reference to the facts thus ascertained. Board vs. Commissioners, 10 O. N. P., 510.

So that in your case the county board of education could exercise no greater powers under the provisions of section 7731 G. C. than could the county commissioners under the provisions of section 7610 G. C., and when the local board of education exercised its discretion in reference to the transportation of pupils, that discretion was in the nature of a judicial act and could not be interfered with unless there was a gross abuse thereof or unless the local board acted fraudulently.

Our courts have recently spoken on the matter of discretion when exercised by boards of education. In the case of Cline v. Martin, 24 O. C. C., n. s., 81, one of the questions under consideration was whether or not a county board of education had abused its discretion in transferring territory from one rural district to another. On page 85 of said report the court says:

"The statute nowhere limits the authority of the county board in this matter, and there is nothing in the evidence submitted to the court that

would indicate an abuse of authority on the part of the county board, and we do not think that a court would be justified in imposing a limitation by construction, or in any way interfering with the acts of such board in arranging the lines of the district and otherwise acting under said provisions of the statute, *in the absence of proof clearly establishing fraud or gross and intentional abuse of discretion.* And not finding in the present case, on the part of the county board, any equitable grounds of fraud, or mistake, and not finding its acts wrongful, fraudulent, collusive or arbitrary, we do not feel that the board abused its discretion."

Also on the same subject, in Johann vs. Board of Education, 26 O. C. C., n. s., 209, 212, the court say:

"The statutes investing county boards of education with the power to change the boundary lines of school districts evince a legislative purpose to repose a discretion in the judgment of such boards, and when such boards act within the power conferred by statute, *their judgment is only subject to review by the courts, when it appears that they have acted fraudlently, or that they have grossly abused the discretion vested in them.*"

I must conclude, then, from all the above, that while the action of the local board of education in the matter of the transportation may be one as to which honest men might exercise a different judgment, yet it is in the nature of a judicial act and the local board which has the authority to act, having acted in the matter the county board can only act in case the act of the local board would be shown to be fraudulent or to be clearly an abuse of discretion on its part. Accordingly, then, I advise you, in answer to your first question, that the local board having acted, the county board cannot act in the same matter except as provided above.

Coming now to your second question, in which you state that Mr. A. and Mr. B. are members of a local board of education, that Mr. A.'s term will expire on the first Monday in January, 1918, and that the term of Mr. B. will expire on the first Monday in January, 1920; that Mr. B. is about to remove from the school district and thereby create a vacancy, and inquire whether or not Mr. A. may tender his resignation and have the same accepted by the board and be elected to fill the vacancy made by the non-residence of Mr. B., I beg to advise there is nothing in the statute to prohibit any such course in case the remaining members of the board of education desire to so elect Mr. A. to the position made vacant by the non-residence of Mr. B.

In your third question you inquire whether or not it is mandatory with the county board of education, in the arrangement of the rural school districts, for the territory of each district to be contiguous.

Section 4685 G. C. reads as follows:

"The territory included within the boundaries of a city, village or rural school district shall be *contiguous* except where an island or islands form an integral part of the district."

The above language is very clear, and where in your case a township rural school district has, through annexations of territory to various districts, been so divided that the territory of the township rural school district is now in three integral pieces, it is mandatory upon the county board to transfer territory until the territory of each district is contiguous.

Very truly yours,

JOSEPH McGHEE,
Attorney-General.

910.

TRANSPORTATION OF PUPILS—ELEMENTARY AND HIGH SCHOOL PUPILS.

The provisions of section 7731 G. C., in reference to the transportation of pupils apply only to elementary pupils and do not apply to the transportation of high school pupils.

Transportation for high school pupils is provided for in sections 7748 and 7749 G. C.

COLUMBUS, OHIO, January 5, 1918.

HON. JAMES P. WOOD, JR., *Prosecuting Attorney, Athens, Ohio.*

DEAR SIR:—Your inquiry of November 10, 1917, reads as follows:

> "I desire your opinion on the following: Section 7731 provides in part that:
>
> 'In all rural and village school districts where pupils live more than two miles from the nearest school the board of education shall provide transportation for such pupils to and from such school.'
>
> The question has arisen in several school districts in this county as to whether or not the provisions of this section apply to high school pupils as well as to elementary pupils. The section apparently makes no distinction between these two classes of pupils. Section 7749 provides for the transportation of high school pupils when there has been a centralization of schools, but I cannot see that this section modifies the provisions of section 7731, which requires all pupils to be transported regardless of rank."

Section 7731, as amended in 107 O. L., p. 625, reads in part as follows:

> "In all rural and village school districts where pupils live more than two miles from the nearest school, the board of education shall provide transportation for such pupils to and from such school the transportation for pupils living less than two miles from the school house by the nearest practicable route for travel accessible to such pupils shall be optional with the board of education. When transportation of pupils is provided the conveyance must pass within one-half mile of the residence of such pupils or the private entrance thereto. When local boards of education neglect or refuse to provide transportation for pupils, the county board of education shall provide such transportation and the cost thereof shall be charged against the local school district. * * * *."

Said section makes provision for the transportation of pupils in all village and rural school districts, and is the general section upon the subject of transportation and applies to all schools except those for which provision is specially made in other sections of the General Code.

Section 7730 G. C. provides in part (107 O. L., 638):

> "The board of education of any rural or village school district may suspend any or all schools in such village or rural school district. Upon such suspension the board in such village school district may provide and in such rural school district shall provide, for the conveyance *of all pupils*

of legal school age, who reside in the territory of the suspended district, to a public school in the rural or village district, or to a public school in another district. * * * *"

This section provides for the transportation of pupils in districts where a part or all of the schools are suspended, and the pupils are assigned to another school or schools of the district or to another school or schools of another district, and it is the general provision of law with reference to the transportation of pupils in suspended school districts.

Section 7733 G. C. provides:

"At its option the board of education in any village school district may provide for the conveyance of the pupils of the district or any adjoining district, to the school or schools of the district, the expense of conveyance to be paid from the school funds of the district in which such pupils reside. But such boards as so provide transportation, shall not be required to transport pupils living less than one mile from the school house or houses."

This section applies only to the transportation of pupils of a village school district or of a district which adjoins a village school district and the transportation instead of being from the district to another district, or from schools which are suspended, it applies to the transportation or conveyance of pupils "to the school or schools of the district." That is, the board of education of a village district may provide for the conveyance of the pupils of such village district, or, under the provisions of said section may provide for the conveyance of the pupils of an adjoining district to the school or schools of such village district, and the expense of such conveyance shall be paid from the school funds of the district in which such pupils reside. Such board of education, however, could not provide for the conveyance of pupils of an adjoining district at the expense of such adjoining district, without an agreement with the board of education of such adjoining district therefor.

Section 7748 G. C. refers to the transportation of high school pupils and reads:

"A board of education providing a third grade high school as defined by law shall be required to pay the tuition of graduates from such school residing in the district at any first grade high school for two years, or at a second grade high school for one year. Should pupils residing in the district prefer not to attend such third grade high school, the board of education of such district shall be required to pay the tuition of such pupils at any first grade high school for four years, or at any second grade high school for three years and a first grade high school for one year. Such a board providing a second grade high school as defined by law shall pay the tuition of graduates residing in the district at any first grade high school for one year; except that, a board maintaining a second or third grade high school is not required to pay such tuition when the maximum levy permitted by law for such district has been reached and all the funds so raised are necessary for the support of the schools of such district. *No board of education is required to pay the tuition of any pupil for more than four school years; except that it must pay the tuition of all successful applicants, who have complied with the further provisions thereof, residing more than four miles, by the most direct route of public travel, from the high school provided by the board, when such applicants attend a nearer*

high school or in lieu of paying such tuition the board of education maintaining a high school may pay for the transportation of the pupils living more than four miles from the said high school, maintained by the said board of education to said high school. Where more than one high school is maintained, by agreement of the board and parent or guardian, pupils may attend either and their transportation shall be so paid. A pupil living in a village or city district who has completed the elementary school course and whose legal residence has been transferred to a rural district in this state before he begins or completes a high school course, shall be entitled to all the rights and privileges of a resident pupil of such district."

That is, under the provisions of said section a board of education which maintains a high school, shall pay the tuition of pupils of said district who reside more than four miles from such high school, but if such board provides transportation for such pupils to the high school maintained by the board, then the board is exempted from the payment of any tuition at another high school for such pupils who so reside more than the four miles from the high school maintained by the board.

Section 7749 G. C. provides:

"When the elementary schools of any rural school district in which a high school is maintained, are centralized and transportation of pupils is provided, all pupils resident of the rural school district who have completed the elementary school work shall be entitled to transportation to the high school of such rural district, and the board of education thereof shall be exempt from the payment of the tuition of such pupils in any other high school for such a portion of four years as the course of study in the high school maintained by the board of education includes."

This section refers to the schools where centralization is had, and provides that all pupils who are residents of the *rural* school district who have completed the elementary work, shall be entitled to transportation to the high school of such rural district, and that when the board of education provides such transportation, it shall be exempt from the payment of such tuition of pupils at other high schools for such portion of four years as the course of study in the high school maintained by the board of education includes. That is, if it is a third grade high school, it would be for a period of not less than two years, and if it be a second grade, it would cover a period of not less than three years, and if it be a first grade high school, it would cover the full period of four years, and a rural board of education by furnishing transportation to its high school pupils in such centralized district, would entirely relieve itself of the payment of tuition for its high school pupils to other high schools in the state for such a portion of four years as the course of study in the high school maintained by the board of education includes.

The above sections and the matters referred to by them severally indicate that section 7731, which is the general section on transportation, refers only to the pupils of the elementary schools in rural and village school districts. Special provision having been made for the pupils of the districts where schools are suspended and where the pupils are assigned to other schools, and where the schools are centralized, and for high school pupils, can lead to no other conclusion, it seems to me, than that the said section 7731 applies only to the pupils of elementary schools, and that the transportation of high school pupils being provided for in certain cases will exclude the payment of transportation for high

school pupils in all other cases. In other words, a board of education being a body of limited jurisdiction, can do only those things which are authorized by statute.

I therefore advise you that the provisions of section 7731 do not apply to the transportation of high school pupils.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

911.

BOARD OF EDUCATION—LEGALITY OF CONTRACT BETWEEN MEMBER AND SAID BOARD, ENTERED INTO PRIOR TO TIME SAID PERSON BECAME MEMBER OF SAID BOARD.

A member of a board of education cannot have an interest in a contract for the transportation of pupils with the board of which he is such member.

One who has a contract for transportation with a board of education relinquishes his interest in such contract when he qualifies and takes his place on such board after being elected thereto.

COLUMBUS, OHIO, January 5, 1918.

HON. WAYNE STILWELL, *Prosecuting Attorney, Millersburg, Ohio.*

DEAR SIR:—Your recent request for my opinion reads as follows:

> "A man who received a contract for conveyance of pupils some months ago was elected a member of the board at the recent election. Can he serve as a member of the board and hold his contract or does section 4757 G. C. apply?"

Several questions may naturally arise from the facts contained in your inquiry, the first being: May a member of a board of education have an interest in a contract with the board of which he is such member?

Pertinent to the above is section 4757 G. C., which reads in part as follows:

> "No member of the board of education shall have directly or indirectly any pecuniary interest in any contract of the board of which he is a member, except as clerk or treasurer. * * * *"

The above quoted language seems very plain and in effect provides that if a person is a member of a board of education, he shall not have any pecuniary interest, either directly or indirectly, in any contract with the board. In this case the board of education has entered into a contract with a certain person (whom we shall designate as A.), in which contract A. agreed to transport the pupils of the district to and from the school or schools therein, and while it is not mentioned in your inquiry, it is only fair to presume that there is a money consideration to be paid to A. for said services. This gives A. a direct interest in the contract and such interest would, on account of the amount to be paid for such services, be a pecuniary interest therein. The contract, of course, is an executory

one. That part of it which has been performed or which can be performed before the first Monday in January, 1918, (which day is the beginning of the terms of new members of the board), is not affected, and it is only to that part of the contract which is covered by whatever services are necessary to be performed and by whatever money is necessary to be paid after the said first Monday in January, 1918, that our attention will be directed.

Assuming for the time being that A. qualifies and takes his place upon the board and that he continues to furnish the services of transportation, and for said services presents his bill to the board for allowance and for an order upon the treasurer, the question then is, can the board act upon the bill, or, in other words, can recovery of the amount so earned, after he is a member as aforesaid, be had?

In placing a construction upon the above quoted language of said section, and in a case in which a person was both a member of a board of education and a member of a partnership which had a contract with the board, it was held in Grant v. Brouse, et al., 1 O. N. P., 145, that:

> "Section 2974 R. S. (4657 G. C.) expressly provides that 'no member of a board shall have any pecuniary interest, either direct or indirect, in any contract of the board.' The real question which arises is, are the acts complained of prohibited by this statute. To us it appears plain that the statute was intended to and does embrace in its prohibition the alleged transaction. 'No member of a board shall have any pecuniary interest in any contract of the board,' *seems so plain as not to need construction.* The fact that Cornelius A. Brouse was at this time a member of the firm of C. A. Brouse & Company necessarily implies that *he had a pecuniary interest in the contract* of sale made by the firm with the board, and being so *it was a contract the board was prohibited from making and therefore one it had no right to make; nor did it have any right to allow the bill of the firm or draw an order for its payment on the treasurer of the board.*"

In the above case contract was entered into between the board and the partnership having a common member and the language of said section is given direct application, and it is specifically determined that the board has no right to draw an order for the payment of the bill of the firm.

The same construction would apply equally to our case, and even though the services of transportation were rendered by A. while a member of the board, the board would be powerless to draw an order for the payment for said services.

The case of Grant v. Brouse, supra, was cited with approval in State ex rel v. Egry, 79 O. S., 400, 418, wherein the court uses the following language:

> "In Commonwealth v. The Commissioners of Philadelphia County, 2 S. & R., 195, Tilghman, C. J., in considering the effect of a statute upon the right of the county commissioners to purchase chairs from a member of their own board said: 'The meaning of the law, where the words are ambiguous, may be best known by considering the mischief which it was intended to prevent. Now, it is certain that it is dangerous to permit a body of men entrusted with the public money to purchase from themselves the articles required for the public service, because men are generally partial to themselves, and therefore, inclined to sell their own goods to the best advantage, but being both buyers and sellers they could have the game completely in their own hands. One would suppose, therefore, if

words will bear it, that *the manner of contracts, either for the sale of goods or employment in the public works, were intended to be prohibited.'"*

If the above view is taken in a case in which the language of the statute is ambiguous, it can be urged with much greater force when the language is so clear, plain and explicit as is that which is contained in the statute under consideration.

It seems clear, then, from the above, that a member of a board of education cannot have an interest in a contract with the board of which he is such member, and in this instance the member who has contracted with the board to furnish transportation of pupils comes within the provisions of said statute.

The next question then that naturally arises is, if a person has contracted with the board and the contract is not completed, can he become a member of the board while the contract is in force.

It is within the province of the legislature to say what the qualifications of the members of the boards of education shall be.

Cline v. Martin, 94 O. S., 420;
Mills v. Board of Education, 54 O. S., 631; 9 O. C. C., 134.

The legislature may also say what acts shall stand as a disqualification for membership on a board of education.

29 Cyc., 1380.

At no place in our statute is found language to the effect that a person who has a contract with a board of education shall be by that act alone disqualified from becoming a member of such board. What the statute does say is that no member of a board of education shall have an interest in any contract. If, then, a person who has a contract with a board of education is elected as a member of such board, and after being so elected duly qualifies and takes his place upon such board as a member thereof, he by that act causes a forfeiture and a relinquishment of all his rights under such contract. The contract becomes void and no further rights thereunder can accrue to either the board of education or the member who was formerly a party thereto.

It was held in Bellaire Goblet Co. v. The City of Findlay, et al., 5 O. C. C., 418, 429, and in a case where the same person was a gas trustee and also an officer in a corporation which sold its product to the city that:

"Section 6969 of the Revised Statutes in effect provides that an officer elected or appointed to any office of trust or profit, shall not be interterested in any contract for the purchase of any property under severe penalty.

"Section 7976 of the Revised Statutes provides that an officer or member of the council of any municipal corporation, who is interested directly or indirectly in the profits of any contract, etc., shall be fined or imprisoned, or both.

"So that this dual relation existing as to Mr. Gorby, prevented him from acting upon this so-called contract as a member of the board of gas trustees. The records show he did not act. Yet the board consisted of five members; each one of the members was entitled to be heard, each one of the members was entitled to act, but on account of the personal interest of Mr. Gorby, he could not act, so that in fact five mem-

bers constituted the board, and in law five members was a legal board, but through the personal interest of Mr. Gorby the board, for the purpose of acting upon this contract, was reduced to four, which was not a legal board, and hence had no power to act.

"It is said by Thurman, Judge, in the case of Bloom v. Richards, 2 Ohio St. 395:

'That the infliction of a penalty for the commission of an act is equivalent to an express prohibition of such act, seems to be settled by a great weight of authority.'

"Also in the case of Doll v. The State, 45 Ohio St., 449, Williams, Judge, says:

'To permit those holding offices of trust or profit to become interested in contracts for the purchase of the property for the use of the state, county or municipality, of which they are officers, might encourage favoritism and fraudulent combinations and practices not easily detected, and thus make such officers charged with the duty of protecting those whose interests are confided to them, instruments of harm. *The surest means of preventing this was to prohibit all such contracts.*'"

In our case, however, the statute expressly prohibits the act, and therefore any attempt on the part of the board of education and a member to enter into a contract would be invalid. In this instance the great weight of authority is not only followed, but the language of the statute itself wherein the prohibition is contained. If, then, there is no way to prevent the person who has a contract with the board from becoming a member of the board, and if the contract with the board would be an invalid one, then a person who has such contract and does so become a member of the board necessarily invalidates and makes void the contract to which he was a party prior to his becoming a member of the board.

In Pickett v. School District No. 1, etc., 25 Wisc., 551, it is held:

"It is a violation of the trust for several persons, holding together a fiduciary relation to others, to contract with one of their own number in matters relating to such trust. Paine, J., says:

'The general principle upon which this proposition must rest is, that no man can faithfully serve two masters whose interests are in conflict, and as man usually and naturally prefer their own interests to those of others, where one attempts to act in a fiduciary capacity for another, *the law will not allow him, while so acting, to deal with himself in his individual capacity.*'"

In Cumberland Coal Co. v. Sherman, 30 Barb., 553, Davies, J., uses the following language:

"Neither are the duties or obligations of a director or trustee altered from the circumstances that he is one of a number of directors or trustees, and that this circumstance diminishes his responsibility, or relieves him from any incapacity to deal with the property of his *cestui que trust.* The same principles apply to him as one of a number, as if he was acting as a sole trustee. * * * * * *

"In the language of the plaintiff's counsel, it is justly said: 'Whether it be a director dealing with the board of which he is a member, or a trustee dealing with his co-trustees and himself, the real party in interest, the principal, is absent; the watchful and effective self-interest of the director or trustee seeking a bargain, is not counteracted by the equally

watchful and effective self-interest of the other party, who is there only by his representatives, and the wise policy of the law treats all such cases as that of a trustee dealing with himself.'"

In the case of People v. The Township Board of Overyssel, 11 Mich., 222, Manning, J., said:

"All public officers are agents and their official powers are fiduciary. They are entrusted with public functions for the good of the public—to protect, advance and promote its interests and not their own; and a greater necessity exists than in private life to remove from them every inducement to abuse the trust reposed in them, as the temptations to which they are sometimes exposed are stronger and the risk of detection and exposure is less."

In Waymire et al. v. Powell, et al., 105 Ind., 328, the first syllabus of the case reads:

"A board of county commissioners can make no contract of any kind with one of its members and *no legal allowance can be made by such board to a county commissioner for services voluntarily rendered or things voluntarily furnished the county by him.*"

Mitchell, J., page 352, says:

"Upon every claim that is presented for allowance the county is entitled to the unbiased judgment of its board of commissioners. The law does not yet recognize it as a fact that members of boards of commissioners, or of any other tribunal, can sit as judges in their own cases. * * * *"

It seems clear to me, from the above and many other authorities examined, that no order can be drawn by the board in favor of one of its members for any services which such member would perform, and especially in the face of a statute which specifically prohibits the board from entering into any contract with a member thereof.

Answering your question specifically, then, I advise you that a person who has had a contract with the board of education for the transportation of pupils may be elected to and may become a member of a board of education, but from the time he becomes such member he cannot further carry out the conditions of his contract, for a member of a board of education shall not have, directly or indirectly any pecuniary interest in any contract of the board of which he is a member, except as clerk or treasurer.

Very truly yours,

JOSEPH McGHEE,
Attorney-General.

912.

BOARD OF EDUCATION—WHICH MAINTAINS NO HIGH SCHOOL—LIABILITY FOR TUITION OF PUPIL WHO ATTENDS IN ANOTHER DISTRICT.

A board of education which maintains no high school is liable for tuition of a high school pupil who attends high school in a district other than in the district

of the residence of such pupil, due notice in writing being given to the clerk of the board of education wherein such pupil resides of the name of the school to be attended and the day the attendance is to begin, even if such pupil at the same time attends the normal department of such high school in addition to the regular high school attendance.

COLUMBUS, OHIO, January 5, 1918.

HON. JAMES W. DARBY, *Prosecuting Attorney, McArthur, Ohio.*

DEAR SIR:—Your request for my opinion covers the following statement of facts:

> "Miss W. E., a Boxwell-Patterson graduate from the eighth grade of Huntington township, Gallia county, Ohio, came to Wilkesville county normal school, located at Wilkesville, Vinton county, Ohio, during the term of 1915-16.
>
> "Mr. L., a high school inspector, visited the county normal school and found that Miss W. E. had only one year of high school work completed. He therefore directed her to take half high school work and half normal work so that she could complete her high school work. This she did for the full eight months of school and received her high school credit for the same. We asked the Huntington township school board to pay her high school tuition, but they have refused to do so on the ground that she was a normal student. The Huntington township school board maintains no high school of any kind. The Wilkesville board asks that the Huntington board pay the above named tuition on the ground that she, Miss E., was a regular high school student, taking up a certain amount of the high school teacher's time and denying that time so taken up to the Wilkesville scholars. * * * *"
>
> "The question is, can the Wilkesville board of education recover the tuition from the Huntington township board or can it only recover a part?"

Upon my request for additional facts you state that the Huntington township rural school district board of education has entered into no contract with the board of education of the same or an adjoining township for the education of its high school pupils and that the Huntington township rural school district board of education has not paid high school tuition for Miss W. E. for four school years, and that due notice in writing was given to the clerk of the board of education of the Huntington township rural school district that Miss W. E. would attend the Wilkesville high school and the date the attendance was to begin and that the said board of education paid the tuition at said high school for the first half of the school year, and it is only as to the payment for said second half that any question is raised.

Your question involves a consideration of those sections of the General Code which refer to county normal schools and those which refer to the payment of tuition of high school pupils.

Section 7654-1 of the General Code provides:

> "Boards of education which maintain first grade high schools in village or rural districts may establish normal departments in such schools for the training of teachers for village and rural schools. Not more than three such normal schools shall be established in any one county school district, and not more than one such department shall be maintained in any village or rural district. At least one such school in each county

shall be located in a rural district or in a village with less than 1,500 population, and not more than one such school in each county shall be located in a village having a population of 1,500 or more. Schools desiring such a department shall make application therefor to the superintendent of public instruction and a copy of such application shall be filed with the county superintendent. The superintendent of public instruction shall examine all applications and shall designate such schools as may establish such departments."

It is a condition precedent, therefore, that the board of education which desires to establish a normal department in the schools of its district shall maintain a first grade high school and that the normal department is operated as a department of such first grade high school for the training of teachers for village and rural schools.

Section 7654-2 G. C. provides:

"Each high school normal department shall offer at least a one-year course for the training of teachers. The entrance requirements of such departments shall be fixed by the superintendent of public instruction. Such departments may offer short courses during the school year, but shall not offer summer courses unless practice departments are maintained during such courses."

Section 7654-5 G. C. provides:

"The board of education in any village or rural school district which maintains a normal training department approved by the superintendent of public instruction shall receive from the state *the cost of maintaining such department in a sum not to exceed one thousand dollars per annum for each school so maintained. Such amount shall be allowed by the auditor of state upon the approval of the superintendent of public instruction* * * *."

So that, where the board of education does maintain such normal training department in connection with and as a part of a first grade high school, the cost of so maintaining such department shall be paid by the state, provided such cost does not exceed the sum of one thousand dollars per annum. Nothing is said in any of the aforesaid sections with reference to the payment of tuition and none can be charged and collected in such normal training department. Therefore whatever tuition may be charged, if any is charged, must be in connection with the high school work outside of the normal training department, and it is then as to that part of your inquiry that my attention shall now be directed.

Tuition of pupils who are eligible to attend high schools is provided for by section 7747 et seq., of the General Code. Section 7747 G. C., as amended in 107 O. L., 621, reads:

"The tuition of pupils who are eligible for admission to high school and who reside in village or rural districts, *in which no high school is maintained,* shall be paid by the board of education of the school district in which they have legal school residence, such tuition to be computed by the month. An attendance any part of the month shall create a liability for the entire month. No more shall be charged per capita than the amount ascertained by dividing the total expenses of conducting the high school of the district attended, which may include charges not exceeding five per

cent per annum and depreciation charges not exceeding five per cent per annum, based upon the actual value of all property used in conducting said high school by the average monthly enrollment in the high school of the district. The district superintendent shall certify to the county superintendent each year the names of all pupils in his supervision district who have completed the elementary school work, and are eligible for admission to high school. The county superintendent shall thereupon issue to each pupil so certified a certificate of promotion which shall entitle the holder to admission to any high school. Such certificate shall be furnished by the superintendent of public instruction."

This section gives the authority generally for the collection of high school tuition by one board of education from another board of education which maintains or provides no high school. But before the last mentioned board, that is the board of education of the residence of such pupil, can be charged such tuition, a notice in writing must be given to the clerk of the board of education in which the pupil resides, in which notice the name of the school to be attended and the date of attendance is to begin shall be stated, and the notice shall be filed not less than five days previous to the beginning of attendance. Said provision is found in section 7750 G. C., which provides in part as follows:

"* * * In case no such agreement is entered into, the school to be attended can be selected by the pupil holding a diploma, if due notice in writing is given to the clerk of the board of education of the name of the school to be attended and the date the attendance is to begin such notice to be filed not less than five days previous to the beginning of attendance."

You state that such due notice in writing was given to the clerk of the board of education of the Huntington township rural school district that said Miss W. E. would attend the Wilkesville high school and that the first half of her tuition at such school was paid, but refusal is made as to the last half year on the ground that said student was enrolled in the normal department of said high school at the same time she was taking her high school work. I know of nothing in the statutes that relates to the payment of tuition for high school pupils which compels any high school student to take any particular class or amount of work at a high school in order that the tuition of such pupil may be collected from the board of education of the district in which such pupil resides when such board of education of the residence of such pupil maintains no high school.

It is provided in section 7748 G. C. that no board of education is required to pay the tuition of any pupil for more than four school years and that if the board of education maintains a third grade high school it shall only be required to pay the tuition of graduates from such school at a first grade high school for two years, or at a second grade high school for one year, except that where pupils which reside in the district prefer not to attend a third grade high school, then the board shall pay the tuition at a first grade high school for four years, or a second grade high school for three years and a first grade high school for one year. But there is nothing in any of said sections which prevents a pupil from attending a first grade high school for any number of years over four. The only condition is that the board shall not be required to pay the tuition for more than four years. Manifestly, then, if in your case Miss W. E., who was entitled to attend the high school, could take whatever work she desired or was capable of taking in said high school, and the board of education maintaining such high school was entitled to tuition on account of the attendance of such pupil, the fact that she took work in the normal

department, in addition to the high school work, is no bar to the claim for tuition because you state as a fact in your letter that she received her high school credit for the full eight months' work taken by her in the high school. That said pupil was also a student in the normal department made her no less a student in attendance at the regular high school outside of such normal department. She attended the classes in such high school. She received instruction at said high school and she procured her full year's credit just the same as though she had not been in attendance at the normal department. Now the board of education of the district of her residence could justify its action in paying one-half of the year's tuition and then refuse to pay the other half is not explained.

I can come to but one conclusion and that is that the Wilkesville board of education is entitled to recover for the tuition of Miss W. E. from the board of education of the district of her residence for the last half of said school year.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

913.

LIABILITY OF OFFICER OF MUNICIPAL WATERWORKS—FOR FURNISHING WATER TO PERSONS AND INSTITUTIONS WITHOUT CHARGE AND WITHOUT AUTHORITY OF LAW.

Where departments, institutions or individuals receive water from a municipal waterworks without charge and without authority of law, the officer responsible for the management of such waterworks may be held civilly liable for water so furnished, and a reasonably accurate estimate of the water so furnished, based upon the circumstances of each particular case, may be the basis of recovery.

COLUMBUS, OHIO, January 5, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Under recent date, you submit the following question for answer:

> "Our examiners of public utilities have ascertained for a long time past that much water is furnished free by the waterworks departments of various cities in addition to such water as may be furnished free under the provisions of section 3963 G. C. As such water is furnished without any method of measurement, the financial value could not be ascertained and would be most difficult to estimate in numerous cases. In fact, it could not be safely estimated. We have criticised this for a long time, and while we have made correction in certain instances, we have been unable to cause correction in others.
>
> Question: Can departments, institutions or individuals receiving such water without authority of law, or the officer responsible for the conduct of the waterworks, or both, be held financially responsible for such free water on an estimate which might be made but could not be definitely verified?"

Your question involves a construction of the provisions of section 3963 General Code. This section provides as follows:

> "No charge shall be made by the director of public service in cities, or by the board of trustees of public affairs in villages, for supplying water

for extinguishing fires, cleaning fire apparatus, or for furnishing or supplying connections with fire hydrants, and keeping them in repair for fire department purposes, the cleaning of market houses, the use of any public building belonging to the corporation, or any hospital, asylum, or other charitable institutions, devoted to the relief of the poor, aged, infirm, or destitute persons, or orphan or delinquent children, or for the use of public school buildings; but, in any case where the said school building, or buildings, are situated within a village or cities, and the boundaries of the school district include territory not within the boundaries of the village or cities in which said building, or buildings, are located, then the directors of such school district shall pay the village or cities for the water furnished for said building or buildings."

This section enumerates the purposes for which a city or village may furnish water free of charge. The enumeration of these purposes excludes all others. There is, therefore, an implied duty placed upon those in charge of a municipal water plant to charge all other persons for water received by them.

This was the holding of Honorable U. G. Denman, attorney-general, in an opinion to your department under date of May 16, 1910, and recorded in the attorney general's report for 1910, at page 376. A like holding was made by Honorable T. S. Hogan, attorney-general, in an opinion to Honorable Stanley K. Henshaw, under date of June 26, 1912, and recorded in volume 2, page 1979, of the reports of the attorney-general for the year 1912.

You state that in a number of instances officers have been furnishing water free of charge to others than those mentioned in section 3963 General Code, and you inquire as to the civil liability of those who receive water without charge and of the officer who is guilty of furnishing such water free of charge without authority of law.

Where persons or institutions receive service from a municipal corporation free of charge, which under the statutes is to be paid for, such persons or institutions would be required to pay the usual charge made to other persons for such service. There is an implied contract to pay what such service is reasonably worth.

Under the provisions of section 4326 General Code, the director of public service is given the management of the municipal waterworks. This section reads as follows:

"The director of public service shall manage municipal water, lighting, heating, power, garbage and other undertakings of the city, parks, baths, playgrounds, market houses, cemeteries, crematories, sewage disposal plants and farms, and shall make and preserve surveys, maps, plans, drawings and estimates. He shall supervise the construction and have charge of the maintenance of public buildings and other property of the corporation not otherwise provided for in this title. He shall have the management of all other matters provided by the council in connection with the public service of the city."

This section places upon the director of public service the duty of managing the waterworks plant of the city and to collect for the service rendered, unless he is authorized by section 3963 General Code, to furnish water free of charge.

Therefore, if such officer furnishes water to persons or institutions without charge, in violation of law, after attention is called thereto by your examiners, he would also be civilly liable to the municipality for any and all losses incurred by his official conduct.

You state that it is not now possible to ascertain the exact amount of water used by these individuals and institutions. Under such circumstances, it is permissible to make a reasonable estimate of the amount of water consumed. Such estimate must be based upon such facts as might be reasonably ascertained; for example, the size of the pipe supplying such water, the length of time the water is used and the continuous or intermittent use of the water, or any other circumstance that would tend to show the amount of water consumed.

If the municipality has a flat rate for charges to consumers who have no meters, such flat rate would apply. If there is no flat rate, then a reasonably accurate estimate of the amount of water used would be sufficient upon which to base a recovery.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

914.

STREET IMPROVEMENT—COUNCIL CANNOT PROVIDE FOR BOND ISSUE FOR CITY'S SHARE OF COST OF BOND ISSUE IN ANTICIPATION OF SPECIAL ASSESSMENT FOR PROPERTY OWNERS' SHARE.

It would be illegal for a city council to provide in one ordinance for an issue of bonds for the city's portion of the cost and expense of a street improvement and for an issue of bonds in anticipation of special assessments for the property owners' share, since there should be separate and distinct ordinances or legislation for each particular issue.

COLUMBUS, OHIO, January 5, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—You submit for my opinion the following request:

> "The city's portion of a special assessment improvement is a general bonded debt, when covered by bond issue, the property owners' portion, of course, being assessment bonded debt. The records of the sinking fund to be consistent would have to treat the general portion separate and distinct from the assessment portion.
>
> *QUESTION:* Is it legal for the officers of a municipality to combine the city's portion and the property owners' portion into one, and issue bond or bonds covering both; in other words, a combined bond issue?"

Section 3821 G. C. provides:

> "A municipality may issue and sell bonds as other bonds are sold to pay the corporation's part of any such improvement, and may levy taxes in addition to all other taxes authorized by law to pay such bonds and the interest thereon."

Section 3939 G. C., as amended 107 Ohio Laws, 553, reads, in part:

> "When it deems it necessary, the council of a municipal corporation, by an affirmative vote of not less than two-thirds of the members elected

or appointed thereto, by ordinance, may issue and sell bonds in such amounts and denominations, for such period of time, and at such rate of interest, not exceeding six per cent. per annum, as said council may determine and in the manner provided by law, for any of the following specific purposes:

* * * *

22. For resurfacing, repairing or improving any existing street or streets as well as other public highways.

23. For opening, widening and extending any street or public highway.

24. For purchasing or condemning any land necessary for street or highway purposes, and for improving it or paying any portion of the cost of such improvement.

* * * *"

A city may provide under either of the foregoing sections for its share of the cost of a particular street improvement.

Heffner v. City of Toledo, 75 O. S. 413.

Section 3914 G. C. provides for the issuing of bonds for the property owners' share in anticipation of special assessments, and reads as follows:

"Municipal corporations may issue bonds in anticipation of special assessments. Such bonds may be in sufficient amount to pay the estimated cost and expense of the improvement for which the assessments are levied. In the issuance and sale of such bonds the municipality shall be governed by all restrictions and limitations with respect to the issuance and sale of other bonds, and the assessments as paid shall be applied to the liquidation of such bonds."

It is also provided in said section 3914 that the assessments as paid shall be applied to the liquidation of such bonds.

Section 3892 G. C. reads:

"When any special assessment is made, has been confirmed by council, and bonds, notes or certificates of indebtedness of the corporation are issued in anticipation of the collection thereof, the clerk of the council, on or before the second Monday in September, each year, shall certify such assessment to the county auditor, stating the amounts and the time of payment. The county auditor shall place the assessment upon the tax list in accordance therewith and the county treasurer shall collect it in the same manner as other taxes are collected, and when collected pay such assessment to the treasurer of the corporation, to be by him applied to the payment of such bonds, notes or certificates of indebtedness and interest thereon, and for no other purpose. For the purpose of enforcing such collection, the county treasurer shall have the same power and authority as allowed by law for the collection of state and county taxes."

The latter section provides for the collection of special assessments in anticipation of which bonds, notes or certificates of indebtedness have been issued, and requires that said assessments when collected shall be paid to the treasurer of the corporation and applied by him to the payment of such bonds, notes or certificates of indebtedness and interest thereon, and for no other purpose.

Section 3949 G. C. provides:

"The 'net indebtedness' prescribed in sections three and ten (G. C. sections 3941 and 3948) of this act shall be the difference between the par value of the outstanding and unpaid bonds and the amount held in the sinking fund for their redemption. In ascertaining the limitations of one per cent, four per cent and eight per cent herein prescribed, the following bonds shall not be considered:

a. Bonds issued prior to April 29, 1902.

b. Bonds issued to refund, extend the time of payment of, or in exchange for, bonds representing an indebtedness created or incurred prior to April 29, 1902.

c. Bonds issued in anticipation of the collection of special assessments, either in original or refunded form.

d. Bonds issued for the payment of obligations arising through emergencies caused by epidemics, floods or other forces of nature.

e. Bonds issued to meet deficiencies in the revenues, as provided for in section 3931 of the General Code.

f. Bonds issued for the purpose of purchasing, constructing, improving and extending waterworks when the income from such waterworks is sufficient to cover the cost of all operating expenses, interest charges and to pass a sufficient amount to a sinking fund to retire such bonds when they become due."

It might be well to state that while the above quoted section has not been expressly amended, the limitations of one per cent, four per cent and eight per cent have been changed by the operation of other sections. Under the provisions of section 3940 G. C., as amended 107 O. L. 578, the one per cent limitation was changed to one-half per cent, and under the provisions of section 3952 G. C. on and after October 1, 1911, the four per cent limitation was reduced to two and one-half per cent and the eight per cent limitation to five per cent.

It is obvious from the provisions of said last quoted section that bonds issued in anticipation of the collection of special assessments, either in original or refunded form, are placed in a different classification from other bonds in considering what is meant by the "net indebtedness" of a municipality.

From all the foregoing sections from which quotations have been made and to which reference has been had heretofore it is gathered that the legislature has provided one scheme for bonds that are issued to provide funds for the city's share of a street improvement on the assessment plan, and a different one for bonds that are issued in anticipation of special assessments for the property owners' share. In view of this fact it would seem to follow that the legislature intended that there should be a separate proceeding in respect to the issue of each particular kind of bonds. If such had not been the intention of the legislature it would have been unnecessary for it to enact all of the separate and distinct provisions for each particular kind of bonds.

Our supreme court in the case of *Gas and Water Co. v. City of Elyria,* 57 O. S., 374, had occasion to consider the question of the right of the city council to provide in one piece of legislation or proceeding for the issue of bonds for the purchase of waterworks and the erection of a new waterworks. Branch 4 of the syllabus reads as follows:

"The purchase of waterworks, and the erection of new ones, are distinct measures, requiring different proceedings; and a resolution of council which

combines both as one, and provides for the submission, in that form, of the question of the issue and sale of the bonds of the municipality for both purposes combined, is unauthorized, and ineffectual for either purpose; nor can it be made effectual for either, by the elimination of the other in the proceedings subsequent to the resolution. It is the policy of the statute that each measure for which it is proposed to issue and sell the bonds of the corporation shall stand on its own merits, unaided by combination with others, and that it be voted upon as an independent measure, by the council and electors, uninfluenced by such combination."

In view of all the foregoing, then, I advise you that it is my opinion that it would be illegal for a city council to provide in one ordinance for an issue of bonds for the city's portion of the cost and expense of a street improvement and for an issue of bonds in anticipation of special assessments for the property owners' share, since there should be separate and distinct ordinances or legislation for each particular issue.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

915.

CORPORATIONS—MAY INCREASE PREFERRED STOCK WITHOUT AMENDING ARTICLES OF INCORPORATION—CHANGES IN PREFERENCES, RESTRICTIONS, ETC., MUST BE EFFECTED BY AMENDMENT OF ARTICLES OF INCORPORATION.

Though a corporation in this state may increase its preferred stock without amending its articles of incorporation, such increased preferred stock will carry the same dividend rate and be entitled to the same preferences and be subject to the same restrictions, designations, etc., applicable to the preferred stock originally provided for in the articles of incorporation, and that any change in the dividend rate of such increased preferred stock or in the preferences, restrictions, designations, etc., to which the same is entitled or subject must be effected by amendment of the articles of incorporation by proceedings to amend such articles in the manner provided in section 8719 General Code.

COLUMBUS, OHIO, January 5, 1918.

HON. WILLIAM D. FULTON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—This department is in receipt of a communication from you under date of December 13, 1917, in which you say:

"I desire an opinion from your department whether this department may receive and file an increase of capital stock without an amendment to the articles of a corporation, increasing the preferred stock which is already provided for in the articles of incorporation; the new increase, however, having a different yearly dividend and different designations, preferences, restrictions, etc., from the preferred stock previously provided for in the articles."

I am advised by a representative of your department that the corporation in question is one that has been organized for some time and that by its articles of incorporation it has both common and preferred stock, and it appears that the corporation desires to increase the amount of its authorized preferred stock, such new issue of preferred stock to carry a different dividend rate and otherwise to be entitled to different preferences and to be subject to different restrictions, designations, etc., from those applying to its present authorized issue of preferred stock.

The dividend rate, preferences, restrictions, designations, etc., applicable to the present preferred stock of said company as stated in its articles of incorporation are such as are authorized by the provisions of sections 8668 and 8669 General Code, and before the amendment of the last named section in 107 O. L. 411 these sections read as follows:

> "Sec. 8668. When the capital stock is to be both common and preferred, it may be provided in the articles of incorporation that the holders of the preferred stock shall be entitled to yearly dividends of not more than eight per cent, payable quarterly, half yearly, or yearly out of the surplus profits of the company each year in preference to all other stockholders. Such dividends also may be made cumulative."
>
> "8669. A corporation issuing both common and preferred stock may create designations, preferences, and voting powers, or restrictions or qualifications thereof, in the certificate of incorporation, and if desired, preferred stock may be made subject to redemption at not less than par, at a fixed time and price, to be expressed in the stock certificates thereof."

The matter of increase of the authorized capital stock of corporations in this state is now provided for by section 8698 General Code as amended 107 O. L. 414. Applicable to the question at hand this section provides, in part, as follows:

> "Sec. 8698. * * *
>
> After the organization of the corporation, if its authorized common stock is fully subscribed for and an installment of ten per cent on each share of stock has been paid thereon, the common stock may be increased by a vote of the holders of a majority of all its stock, at a stockholder's meeting called by a majority of its directors, at least thirty days' notice of the time, place and object of which has been given by publication in some newspaper of general circulation and by letter addressed to each stockholder whose place of residence is known.
>
> After the organization of the corporation, the authorized capital stock may be increased at any time by issuing preferred stock, within the limits permitted by law, upon the written consent of three-fourths of all of its stockholders, representing at least three-fourths of both its subscribed and issued capital stock.
>
> After the organization of the corporation, if its authorized common stock is fully subscribed for and an installment of ten per cent on each share of such stock has been paid thereon, the authorized capital stock may also be increased by both common and preferred stock or common only, at a meeting of the stockholders at which all are present in person or by proxy and waive in writing notice of such meeting and also agree in writing to such increase, naming the amount thereof and the proportion of common and preferred stock when both are increased. In increasing the

authorized capital stock at any time by both common and preferred, the total authorized preferred stock of such corporation after such increase shall not exceed the limits provided by law.

Whenever after organization a corporation increases its capital stock, the president and secretary thereof shall file a certificate setting forth the action taken and the amount of the increase, showing the proportion of common and preferred stock when both are increased, with the secretary of state, and no corporation shall issue or dispose of such increased stock until such certificate is filed. If the original articles of incorporation do not provide for preferred stock a certificate of increase providing for preferred stock shall not be filed unless accompanied by a certificate of amendment to the articles of incorporation providing for the preferred stock, which shall be filed and recorded in the manner provided by law.

For the purposes of this section restrictions or limitations on the voting power of any of the authorized capital stock shall not apply; and no increase of the authorized capital stock shall be made by increasing the par value of the shares."

The provisions above noted authorize an increase in either the common or preferred stock of a corporation, or of both, but there is nothing in said provisions authorizing an increase in the preferred stock of a corporation which authorizes any change whatever in the provisions of the articles of incorporation with respect to the rate of dividend, preferences, restrictions, designations, etc., applicable to the preferred stock of the corporation, and clearly any increase in the preferred stock of the corporation by proceedings under the above quoted provisions of section 8698 G. C. would be entitled to the same dividend and preferences and be subject to the same restrictions and other designations provided for in the articles of incorporation, and any changes that may be desired as to such increased preferred stock with respect to the matter of dividends, preferences, restrictions, designations, etc., can be effected only by an amendment of the articles of incorporation.

"Where the method of dividing profits between preferred and ordinary shareholders is fixed by the incorporation paper, no alteration therein can be made (unless in the method, if any, provided by law for altering that instrument); and this is true although the relative rights of shareholders are not required by law to be determined by that instrument."

Machen Modern Law of Corporations, Volume 1, Section 536.

In this connection it will be noted from the provisions of sections 8668, 8669 and 8698 of the General Code that in this state the relative rights of shareholders of common and preferred stock, other than those prescribed by law, are required to be determined, if at all, by the articles of incorporation.

Full power to effect the purposes of the corporation in question with respect to its increased preferred stock is provided by section 8719 General Code, as amended 107 O. L. 415. This section provides:

"Sec. 8719. A corporation organized under the general corporation laws of the state may amend its articles of incorporation as follows:

* * * * * * * * * *

4. So as to increase or decrease the number of shares into which its capital stock is divided; to provide for preferred stock, or dispense with unissued preferred stock; to change unissued common stock to preferred

stock, within the limits permitted by law; to change unissued preferred stock to common stock; to add any or all of the provisions permitted by sections 8668 and 8669 of the General Code, or to make new provisions of such nature with respect to newly authorized preferred stock; or to amend or eliminate such provisions as to unissued preferred stock; or to add to the articles anything omitted from, or which lawfully might have been provided for originally, or to take out of the articles any unnecessary provisions or provisions which might lawfully have been omitted from them originally. But the authorized capital stock of a corporation shall not be increased or diminished by such amendment."

Answering your question specifically, therefore, on a consideration of the statutory provisions applicable thereto, I am of the opinion that though a corporation in this state may increase its preferred stock without amending its articles of incorporation, such increased preferred stock will carry the same dividend rate and be entitled to the same preferences and be subject to the same restrictions, designations, etc., applicable to the preferred stock originally provided for in the articles of incorporation, and that any change in the dividend rate of such increased preferred stock or in the preferences, restrictions, designations, etc., to which the same is entitled or subject must be effected by amendment of the articles of incorporation by proceedings to amend such articles in the manner provided in section 8719 General Code.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

916.

PRIVATE EMPLOYMENT AGENCIES—CONTRACT IN VIOLATION OF ACT REGULATING SAME.

The act regulating private employment agencies covers persons, firms or corporations who agree to help others to find employment as teachers where a fee is charged for such service.

A contract to furnish services to secure employment or help for the applicant, which contract contains provisions for the furnishing of other services to be performed for such applicant at a fee in excess of two dollars is in violation of the provisions of the act regulating private employment agencies.

COLUMBUS, OHIO, January 5, 1918.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Under recent date you submitted the following inquiry to this department for answer:

"The commission desires your opinion as to whether a person, firm or corporation that charges a fee to applicants for employment on a contract enforcing the purchase of other business features at a price exceeding $2.00, is entitled to a license to operate a private employment agency."

There is submitted with your inquiry a brief by Messrs. Doud, Crawfis, Brad-

ford and Dones, attorneys at law, on behalf of their clients covering the question which you submit, and other questions in reference to an application for license as an employment agency.

The brief of counsel and the circular and other printed matter have been carefully considered. Many questions are raised by the attorneys above named, which you do not submit to this department.

The particular question submitted appears to arise from a contract to furnish to teachers certain service. In this contract, a copy of which is submitted, the service to be given or rendered is divided into seven classes as follows: Correspondence, lectures, privileges, agency, compensation, purchase discounts and identification card.

Your question arises under the classification of service termed "Agency." This is the fourth class of service and reads as follows:

> "Assistance in finding a teaching position. Uniting the superintendents' wants and the teachers' desires in one common medium of service without cost to the teacher."

Under this paragraph the corporation or club as it is called agrees to aid persons in finding positions as teachers. The entire service is rendered at a cost greatly in excess of $2.00, and there is no provision for a person to contract for any one branch of the service, but he must contract for the seven classes at the fee fixed.

A substitute clause is submitted wherein it is attempted to designate that a certain sum being less than $2.00 is to constitute the fee for the agency service, but there is no provision therein which will permit any one to secure the agency service at the fee fixed, independent of the other service to be contracted for. In other words, the sum designated for the agency service is an arbitrary one which cannot be taken advantage of by any one unless the entire fee for the seven classes of service is paid. This fee is greatly in excess of the $2.00 specified in the act regulating private employment agencies.

Section 886 of the General Code reads as follows:

> "No person, firm or corporation shall open, operate or maintain a private employment agency for hire, or in which a fee is charged an applicant for employment or an applicant for help, without obtaining a license from the commissioner of labor statistics, and paying to him a fee according to the population of the municipality as shown by the last preceding federal census, viz:
>
> | | |
> |---|---|
> | In cities of 50,000 and upward | $100 00 |
> | In cities of 16,000 to 50,000 | 75 00 |
> | In cities of less than 16,000 | 50 00 |
> | In villages | 25 00 |
>
> The commissioner may refuse to issue or renew a license to an applicant if, in his judgment, such applicant has violated the law relating to private employment agencies, or is not of good moral character."

This section covers all persons, firms or corporations which charge a fee to an applicant for employment or an applicant for help.

In section 894 General Code the term "applicant for employment" is defined. This section reads:

> "The term 'applicant for employment' as used in the laws governing private employment agencies shall mean any person seeking work of a moral

character, and 'applicant for help' shall mean any person seeking help in any legitimate enterprise. Nothing in such laws shall limit the meaning of the term 'work' to manual labor, but it shall include professional service and all other legitimate service. All moneys received from fees and fines as provided by the laws governing private employment agencies, shall be paid into the state treasury by the commissioner of labor statistics in the manner provided by law."

Although you do not submit the question it is contended in the brief of the attorneys above named that this act does not apply to persons seeking positions for others as teachers. This contention is not sound. The act clearly contemplates that all persons who aid others in securing work, whether that work be of manual labor or for professional service, shall be included within the terms of the act where a fee is charged the applicant for such service.

It is clear therefore that the act will cover persons or corporations who agree to help others to find employment as teachers.

Under the provisions of section 890 General Code, a limit is placed upon the amount that may be charged to applicants seeking employment. This section reads as follows:

"When a registration fee is charged for receiving or filing applications for employment or help, it shall not exceed two dollars, for which a receipt shall be given containing the date, name of applicant, amount of fee and character of employment or help desired. If the applicant does not obtain a situation or employment through the agency within one month after registration, and makes a demand therefor within thirty days after the expiration of such period, the fee paid by him shall be returned to the applicant by the person in charge of the employment agency."

The fee herein fixed shall not exceed two dollars.
Section 893 General Code reads as follows:

"Except an employment agency of a charitable organization, a person, firm or corporation furnishing or agreeing to furnish employment or help, or displaying a sign or bulletin, or offering to furnish employment or help through the medium of a circular, card or pamphlet, shall be deemed a private agency, and subject to the laws governing such agencies."

The copy of contract submitted is a printed form upon the back of which is contained certain information which may be designated a circular or pamphlet within the meaning of the above section.

It is my opinion that the contract submitted comes clearly within the provisions of the act regulating private employment agencies.

This act was enacted for the purpose of alleviating certain evils which had arisen in the business of seeking positions for others for hire. These statutes provide the manner in which private employment agencies may conduct their business. A limitation is placed upon the charge that may be made for receiving or filing applications for employment or help. Any provision of a contract by which a larger fee would be secured for receiving or filing such applications would be in violation of section 890 General Code.

In the present case other services are rendered for which a fee may be legally made, but this fee is in excess of the two dollar limitation contained in the act

now under consideration. There is no provision which specifies the amount that is charged for the agency service, or that permits any person to secure the agency service independent of the other services rendered.

To permit persons to combine service as an employment agency with other services, at a fee in excess of two dollars, where the agency service could not be secured independently at a fee of two dollars or less as limited by section 890 General Code, would lay down the bars and permit various subterfuges by which the provisions regulating private employment agencies could easily be evaded. This would tend to bring about the same conditions which existed prior to the enactment of this act, which condition this act sought to remedy.

It is my opinion that a contract to furnish services to secure employment or help for the applicant, which contract contains provisions for the furnishing of other services to be performed for such applicant at a fee in excess of two dollars, is in violation of the provisions of the act regulating private employment agencies.

You ask further whether or not a person, firm or corporation entering into such a contract is entitled to a license to operate as a private employment agency. Persons or firms entering into such contracts if granted a license could not continue their present form of contract. The service as an employment agent should be independent of any other service unless the fee for all services rendered would come within the limitation fixed by section 890 General Code.

It is within the discretion of your department to determine the persons who shall be entitled to a license to operate a private employment agency. From the conclusions above reached you can determine the right of the person in question to secure such a license.

Very truly yours,

JOSEPH MCGHEE,
Attorney-General.

917.

BOARD OF EDUCATION—EFFECT OF FAILURE TO ELECT MEMBER FOR SHORT TERM IN JANUARY, 1913, UNDER JUNG-SMALL LAW —IN CASE NO ELECTION IS HELD—OLD MEMBER HOLDS OVER—WHEN PERSONS ARE CANDIDATES FOR RE-ELECTION BEFORE EXPIRATION OF TERM—DOES NOT EFFECT PROPERLY ELECTED CANDIDATES.

Where there is a failure to elect a member of a board of education for the short term under the provisions of the Jung-Small school board law in 1913, *no such election can be had for such short term thereafter.*

In case there is no election for a member of a board of education, the old member will hold over for the full term of four years.

Where the present members of a board of education, whose terms do not expire, are candidates for re-election, but who do not receive sufficient votes to be elected, the fact that they were such candidates can make no difference in the election of those persons who were properly elected.

COLUMBUS, OHIO, January 5, 1918.

HON. OTHO W. KENNEDY, *Prosecuting Attorney, Bucyrus, Ohio.*

DEAR SIR:—Your request for my opinion reads as follows:

"I desire your opinion on the matters hereinafter set forth, relative to the board of education of the Galion city school district.

"On August 25, 1913, the board of education adopted the following resolution:

'RESOLUTION

Reorganizing the board of education of the Galion city school district so as to comply with the provisions and requirements of the General Code of the state of Ohio.

Be it resolved by the board of education of the Galion city school district, state of Ohio:

That in full compliance with the requirements of section 4698, both inclusive of the General Code of the state of Ohio, the board of education of said Galion city school district be reorganized and composed as follows: All members in office at the time this resolution takes effect shall serve the unexpired terms for which they were respectively elected and until their successors are elected and qualified. To fill the place of the three (3) members of the board of education whose terms expire on the day preceding the first Monday in January, 1914, two (2) members of said board shall be elected at the general election for the year 1913, so as to reduce said board to five (5) members, and on and after said last mentioned date the board of education of the Galion city school district, state of Ohio, shall be composed of five (5) members, who shall possess the qualifications required by law and shall be elected at large by the qualified electors of said school district.

To further carry out the intent and purposes of the provisions of the General Code above referred to it is hereby provided that the two (2) members of said board to be elected in the year 1913 be elected each for a term of four (4) years. At the general election for the year 1915, three members of said board shall be elected, one of said members for a term of two years (2), and each of said other two (2) members for a term of four (4) years. In the years following the year 1915, two (2) members shall be elected in the year preceding, and three (3) members shall be elected in the year following the calendar year divisible by four, and their terms shall be for four (4) years each and until their successors are elected and qualified.

That the clerk of this board is hereby authorized and directed to notify the board of deputy state supervisors of elections of the passage of this resolution, by mailing a copy of this resolution to said board.

Passed August 25, 1913.

Attest: C. C. COYLE,
Clerk.

JOHN J. SCHAEFER,
President.'

On the _____ day of _____, 1917, this resolution was amended, as follows:

'RESOLUTION

Amending the resolution of August 25, 1913, reorganizing the board of education of the Galion city school district so as to comply with the provisions and requirements of the General Code of the state of Ohio, by providing for the election of five (5) members of said city school district in 1917, at the general election for the said year.

Whereas, it is provided by the General Code of Ohio and by resolution of the board of education of the Galion city school district, that said board of education shall be composed of five (5) members elected for a term of four (4) years each, and until their successors are elected and qualified; and,

Whereas, at the general election in November, 1915, one member should have been elected for a term of two (2) years and two members for a term of four (4) years each, but by error in the preparation of the ticket at said election of 1915, there was no valid election for members of said board of education at said election, and it now becomes necessary at the general election in November, 1917, to elect three (3) members of said board of education for a term of two (2) years each from the day preceding the first Monday in January, 1918, to fill out unexpired terms of members of said board of education, and two (2) members for the full term of four (4) years each from the day preceding the first Monday in January, 1918, now, therefore,

Be it resolved by the board of education of the Galion city school district, three-fourths (¾) of all the members thereto concurring:

That said resolution of August 25, 1913, reorganizing the board of education of the Galion city school district, etc., be and it hereby is amended so as to provide for the general election in November, 1917, as follows:

That three (3) members of the board of education of the Galion city school district shall be elected at the general election in November, 1917, for the term of two (2) years from the day preceding the first Monday in January, 1918, and two (2) members of said board of education shall be elected at said general election in November, 1917, for the term of four (4) years from the day preceding said first Monday in January, 1918.

That the clerk of this board is hereby authorized and directed to notify the board of deputy state supervisors of elections of the passage of this resolution, by mailing a copy of this resolution to said board.

Passed _____, 1917.

Attest, _____,
Clerk.

_____,
President.'

As the facts are given to me, they are about as follows:

In the year 1915 the board of education was composed of the following members, whose respective terms expired as here indicated:

E. J. Gelsenleiter, term expiring first Monday in January, 1916;

J. L. Gugler, term expiring first Monday in January, 1916;

C. C. Coyle, term expiring first Monday in January, 1916;

B. E. Place, term expiring first Monday in January, 1918;

J. J. Schaefer, term expiring first Monday in January, 1918.

An election was had in November of 1915, at which election three members, as it was supposed, were to have been elected, and according to the resolution adopted on August 25, 1913, one of the three to be elected should be elected for two years, and two of the three to be elected should be elected for the term of four years. The ballot was silent as to this long and short term, and for some reason or other, I do not know the facts, but anyway, they were advised that the election was invalid, for the reason that the ballot did not indicate this long and short term. The three receiving the highest number of votes, however, in 1915, were C. C. Coyle, Albert

Helfrich and Theodore Poister. C. C. Coyle, being one of the three that received the highest number of votes at the election in 1915, is the same C. C. Coyle that was already on the board, whose term expired on the first Monday of January, 1916. Helfrich and Poister were new members. But, being advised by the attorney general's office that the election held in November, 1915, was invalid, E. J. Gelsenleiter, J. L. Gugler and C. C. Coyle held over. No one of the three newly elected members attempted to qualify under that election. Hence, these three men have ever since been acting on this board of education.

In the November election, 1917, it was supposed that there would be elected five members on this board of education. That is to say, that the three members who were holding over would only hold over until such time as their successors could be elected and qualified, this being presumptively in November of 1917, and the terms of B. E. Place and J. J. Schaefer expiring on the first Monday of January, 1918, made it necessary to elect an entirely new board of education. So in November, 1917, there were eleven candidates, B. E. Place (now on board), A. J. Helfrich, F. E. Cook, E. J. Gelsenleiter (now on board), J. L. Gugler (now on board), J. J. Schaefer (now on board), C. C. Coyle (now on board), Carl Monat, M. G. Nungesser, Ralph Sloan and O. L. Huffman.

You will note that all of the five present members of this board were on this ballot in November of 1917. At the election of November, 1917, the vote stood as follows:

B. E. Place	716
A. J. Helfrich	595
F. E. Cook	592
E. J. Gelsenleiter	544
J. L. Gugler	542
J. J. Schaefer	541
C. C. Coyle	489
Carl Monat	486
M. G. Nungesser	453
Ralph Sloan	310
O. L. Huffman	254

The first question naturally arising is as to whether or not E. J. Gelsenleiter, J. L. Gugler and C. C. Coyle are holding over for only two years, or whether it is for four years. If they do hold over, what effect would it have on the ballot in November, 1917, if any, their names being on the ballot?

Second, were there to be five members, or only two members elected in November, 1917?

Third, under the foregoing facts, who is the newly elected board of education, and to whom should certificates of election be issued; or, by reason of the facts above mentioned, is it possible that the entire election held in November of 1917 would be void?

Having the facts fully before you, I believe, I will ask you for a full consideration thereof, and that you give me your opinion, answering the questions above asked, and such others as may suggest themselves to you, that this matter may be fully straightened out."

The resolution of the board of education of the city school district of Galion,

Ohio, which was passed on August 25, 1913, was an endeavor on the part of the board to comply with the provisions of what is commonly known as the Jung-Small school law, as found in 103 O. L., 275.

Section 4689 G. C., as therein amended, provides in part:

> "In city school districts containing according to the federal census a population of less than fifty thousand persons, the board of education shall consist of not less than three members nor more than five members elected at large by the qualified electors of such district."

The city of Galion comes within said class, that is, it is now and was in 1913 a city of less than 50,000 persons.

Section 4699 G. C., as amended in said act, provides:

> "Within thirty days after this act shall take effect the board of education of each and every city school district in which the number of members does not conform to the provisions of section 4689, shall by resolution determine within the limits prescribed by said section the number of members of said board of education. Said resolution shall provide for the classification of the terms of members so that they will conform to the provisions of section 4702, General Code, taking into consideration the terms of office of existing members whose terms do not expire or terminate on the day preceding the first Monday in January, 1914. * * *"

In your case the terms of three members of the board of education expired on the day preceding the first Monday in January, 1914.

Section 4701 G. C. of said act provides:

> "Whenever the number of members of the board of education of a city school district, as fixed by the resolution provided for in section 4699, shall be more than the number of members whose terms expire or terminate on the day preceding the first Monday in January, 1914, the additional members of such board shall be elected at the general school election in the year 1913 for such terms of two or four years as may be necessary to comply with the two provisions of sections 4698 and 4702."

The number of members of the board of education of such city school district was fixed at five and it was provided that two members of the board should be elected at the general election in 1913 for a term of four years.

General Code section 4702, as amended in said act, provides:

> "The term of office of all members of boards of education in city school districts, except as provided in section 4701, shall be four years. All members in office at the time this act takes effect shall serve the unexpired portions of the terms for which they were respectively elected *and until their successors are elected and qualified,* unless their terms shall expire or shall have been terminated as provided by sections 4698 and 4701.
>
> If the number of members of a board of education of any city school district to be elected at large as fixed pursuant to section 4699 be * * * odd, one-half of the remainder after diminishing the number by one shall be elected in the year preceding, and the remaining number shall be elected in the year following the calendar year divisible by four. * * *"

It was further provided by the resolution of said board that the remaining three members of the board who were not elected in 1913 should be elected in 1915,

one of said members for a term of two years and the other two members for terms of four years, and that thereafter three members of such board shall be elected in the year following the calendar year divisible by four and for a term of four years. At the election in 1915 three members were elected but failed to qualify and the old members held over. At the November election in 1917 there were eleven candidates, it being presumed that the terms of all five members would expire and that an entirely new board was to be elected, and one of your questions is, which of the eleven candidates were elected and for what term.

I desire at the outset to call your attention to the case of State vs. Strawsburg, 96 O. S., —, decided by our supreme court July 3, 1917, wherein the court said:

> "The board of education of Springfield consisted of seven members, the terms of four of whom were to expire in January, 1914, and the terms of the other three in January, 1916. The portions of that law pertinent to the consideration of this case are now sections 4698 and 4702, General Code. The Springfield city school district comes within the class, which, under the provisions of section 4698, General Code, is required to have a board of education consisting of not less than three nor more than five members.
>
> By a resolution passed July 14, 1913, said board of education attempted to meet the requirements and comply with the provisions of that act. It was therein determined that the number of members of said board should be five, one should be elected at large; that the three members whose terms did not expire until January, 1916, should hold their positions until that date; that at the general election in November, 1913, there should be elected two members to serve the full term of four years; and that at the election in November, 1915, two members should be elected for the full term of four years and one for the fractional term of two years. Two members were elected for the full term of four years at the election of November, 1913.
>
> In the election of November, 1915, the defendants and five others were candidates for the office of members of the board of education of such district. The ballots on which their names appeared were headed 'For members of board of education, vote for not more than three.'
>
> No designation of or reference to the term, or length thereof, of any candidate was made on any ballot, nor had there been any such designation upon the ballots in the primary election whereat said candidates were nominated. The defendants * * * received the highest number of votes at said election. They were declared elected as members of said board of education, certificates of election for a term of four years each were issued, and in pursuance of that authority they assumed to qualify and enter upon, and ever since have discharged, the duties of such position—more than fifteen months—the validity of their election not having been challenged until the bringing of this suit in *quo warranto,* April 14, 1917.
>
> It is now contended that because of such want of designation of terms, whether for four years or two years, on the ballot or elsewhere, it is impossible to ascertain which of said candidates were elected for the four year term and which one for the two year term, and that, therefore, there was no valid election for either term and the certificates of election issued were unauthorized.
>
> An examination of the sections of the General Code, above cited, discloses that as applying to the city of Springfield their several provisions were not in accord, and, therefore, could not be observed and applied.

Under their provisions no existing term should be disturbed. If necessary to accomplish the reduction in numbers required by law, two-year terms could be provided by resolution; *but an election to such two-year terms was limited to the year* 1913. It was expressly provided in above sections that all elections thereafter should be for four-year terms; thenceforward one-half of the remainder, after diminishing the total number of members of the board by one, should be elected in the year preceding the calendar year divisible by four, and the remaining number the year following such calendar year. Under that provision, directory in its nature, two members would be elected in 1915, three in 1917, and so on. There was no provision whatever for a two-year term member to be elected in 1915, and if only two members should be elected the board would consist of but four members instead of five members, as had been determined by the board under authority conferred by law.

These provisions are inconsistent; they cannot all be enforced; therefore the rational solution of the situation seems to lie in such construction and application of the law as to make it feasible and practicable and capable of accomplishing the obvious design and purpose of its enactment, which was to create boards of education, the terms of the members of which should be four years, and, presumably to bring about that condition and situation at the earliest possible time. The mere order in which members are elected seems quite immaterial, and that provision might well have been regarded by the board as only directory. In the theory that all three of the defendants were in fact elected for four-year terms that is the only provision disregarded; and, as we have seen, it is a provision in direct conflict with other and more important and essential provisions of the law.

Although the resolution provided for the election of a short-term member in 1915, such was not authorized by law, and thereafter all matters concerning the election, including notice, proclamation, form of ballots and certificates of election, proceeded in a manner consistent only with the theory that three members for the full term of four years were being elected. Therefore, for the reasons we have indicated, the tenure of those members should not now be disturbed."

I have quoted at length from the above case because of the similarity of the facts in that case and yours. In that case, as in yours, the resolution provided that three members should be elected in the year 1915, two for the term of four years and one for the term of two years. In the Springfield case certificates of election were issued to the three members. This, the court held, was valid and proper. In your case, however, no certificates of election were issued and the members who were elected failed to qualify and the old members held over until their successors should be duly elected and qualified. Under the law, as set forth in State ex rel. vs. Strawsburg, supra, there was no authority to elect the short term member in any year, except the year 1913, and none having been elected for the short term in that year, none could be elected for the short term in any year thereafter. In your case, prior to the passage of the resolution of August 25, 1913, and for that matter up to the first Monday in January, 1914, the said board of education consisted of six members, the terms of three of which members expired on the day preceding the first Monday in January, 1914, and the term of the remaining three expired on the day preceding the first Monday in January, 1916. So that, in order to have a board of five it was necessary to elect two members in 1913 whose terms would begin on the first Monday in January, 1914, the terms of the other three members not yet at that time expiring. This was accordingly

done and B. E. Place and J. J. Schaefer were so elected in 1913 and said persons duly qualified and took their office on the first Monday in January, 1914, and are serving for the full term of four years and their terms will expire on the day preceding the first Monday in January, 1918.

In order that two members of said board could be elected in the year preceding the calendar year divisible by four, and three members of the board of five be elected in the year following the calender year divisible by four—that is, in order that two members of the board of five could be elected in 1915 for the term of four years and three members of said board of five could be elected in the year 1917 for the term of four years, and so on—the board passed a resolution which provided that at the November election in 1915 one member should be elected for the short term of two years from and after the first Monday in January, 1916, and two members should be elected for the full term of four years from and after the first Monday of January, 1916. But instead of following that resolution when the election was had in 1915, no designation of term was mentioned on the ballot and the election was considered invalid and those persons who were voted for failed to qualify and the old members held over. The very thing which your board attempted to do, that is, to elect one member in 1915 for the short term and two for the long term, is the thing which the court says in State ex rel. vs. Strawsburg, supra, would be unlawful; that is, that no short term election could be had under said law in any year except 1913. And, the very thing which was considered in your case to be unlawful, that is, that the election was invalid because no long and short term is designated, is the very thing which the court holds in State vs. Strawsburg, supra, to be lawful, and certificates of election should have been issued to the three persons who were voted for at the November election in 1915. This, however, was not done and I know of no authority to do the same now. The three members whose terms would have expired on the day preceding the first Monday in January, 1916, held over and will hold over for the full term of four years, or until the day preceding the first Monday in January, 1920.

Bearing directly upon this last proposition is the case of State vs. Metcalf, 80 O. S., 261, wherein the following language is used:

> "It has never been the policy of the state to create vacancies in office for the mere purpose of giving somebody an opportunity to fill them. Piling vacancy upon vacancy is an anomaly. * * * The policy to discourage the needless creation of vacancies is recognized in a number of decisions of this court. As instance, The State ex rel. vs. Howe, 25 Ohio St., 588, where it is held by McIlvaine, J., that the general assembly may provide against the recurrence of vacancies by authorizing *incumbents to hold over their terms in cases where the duration of their terms is not fixed and limited by the constitution,* and that from this it results that the evils contemplated as likely to result from vacancies in office are guarded against by confining the exercise of the power to fill vacancies to those cases where no one is authorized by law to discharge the public duties; which, we think, is the constitutional scope of that power. Also, by the case of The State ex rel. v. Bryson, 44 Ohio St., 457, where it is observed that the office (that of fire engineer) could not be regarded as vacant *while filled by one lawfully entitled to it, nor could an appointment made ostensibly to fill a vacancy create one.* Also, in The State ex rel. v. McCracken, 51 Ohio St., 123, where, at page 129, it is observed that: 'The recognized policy of the state is to avoid, if practicable, the creation of a vacancy in an elective office, and where the right to hold over is given in language that is not limited, and the same is not otherwise qualified, a court would hardly be justi-

fied in seeking for an unnatural construction by which a limit would be placed upon the right. *In contemplation of law there can be no vacancy in an office so long as there is a person in possession of the office legally qualified to perform the duties.'"*

In opinion No. 596, rendered by this department to Hon. Henry W. Cherrington, September 6, 1917, it was held:

> "The two members (of boards of education) whose terms expired on the first Monday in January, 1916, and who are holding over, will continue to so hold said positions until the first Monday in January, 1920, and that their successors shall be elected at the November election in 1919."

There being, then, no vacancies or terminations of terms, as far as the three members are concerned, whose terms would have expired on the day preceding the first Monday in January, 1916, it is only for the filling of the other two terms that an election was had this year. I note by the result of the election that the two members whose terms will end on the day preceding the first Monday in January, 1918, that is, the terms of B. E. Place and A. J. Helfrich, received the highest number of votes and were therefore re-elected to their places on the board. That other persons were voted for for positions which were not vacant or were not to be filled, can make no difference in this particular case.

Answering then, your questions in the order in which they are asked, I advise you:

(1) The three members whose terms would have expired on the day preceding the first Monday in January, 1916, are holding over and will so hold over until the day preceding the first Monday in January, 1920.

(2) It can have no effect upon the legality of the election of 1917 that those three members were candidates for members of the board.

(3) There were only two members elected at the November election in 1917.

(4) The newly elected board of education consists of the three hold-over members and the two old members who were re-elected, which makes the board of education the same as it was prior to the time of election and certificates of election should be issued to the two persons who received the highest number of votes at said election in 1917.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

918.

APPROVAL—SALE OF CANAL LAND TO THE AMERICAN BOTTLE CO., NEWARK, OHIO.

COLUMBUS, OHIO, January 7, 1918.

HON JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of December 29, 1917, in which you enclose in duplicate certain final resolution and proceedings had by your department relative to the sale of a portion of the abandoned canal lands in Newark, Ohio, to The American Bottle Company, which is the present lessee.

This sale and the proceedings leading up thereto are had under an act found in 107 O. L. 512, entitled:

> "To abandon the north fork feeder of the Ohio canal, in the city of Newark, Licking county, Ohio, and to provide for the leasing and selling of the land included therein."

Section 3 of said act provides as follows:

> "Any lessee of the state occupying any portion of the canal feeder herein abandoned may surrender his lease to the superintendent of public works for cancellation, and take a deed for the same by paying into the state treasury the amount of the appraisement as fixed by the superintendent of public works at the time of such sale."

Section 4 of the same act provides that the sale must be made "subject to the approval of the governor and attorney-general."

In compliance with this act you have appraised the said property at the sum of $2,500.00.

I have examined the proceedings had by your department and find the same to be correct and legal, and that the sale of the property therein described to The American Bottle Co., at the appraised value thereof, would be legal and in conformity to the provisions of said special act.

I therefore approve the said proceedings and the sale and have endorsed my approval thereof upon the resolutions submitted by you and am forwarding same to Hon. James M. Cox, governor, for his consideration.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

919.

ROAD IMPROVEMENT—PLANS AND SPECIFICATIONS—CANNOT BE CHANGED AFTER CONTRACT IS EXECUTED.

There is no provision of law authorizing or permitting a change in the plans and specifications upon which a contract for the improvement of a public road is made, after the contract is executed.

COLUMBUS, OHIO, January 7, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of December 15, 1917, setting out a copy of letter received by you from the board of county commissioners of Coshocton county. Your letter reads in part as follows:

> "On August 27, 1917, this department entered into contract with T. J. Norman & Son, of West LaFayette, for the construction of section 'D' of the Newcomerstown-Coshocton road, I. C. H. No. 407, Coshocton county. The improvement calls for the construction of roadway, bridges and culverts and pavement of the combined type of 24,889 square yards of water-bound macadam and 4,107 square yards of monolithic brick.

I am now in receipt of the following letter from the board of county commissioners of Coshocton county: * *

In this letter, as you will see, the board of county commissioners request a change of contract making the improvement all of one type of pavement.

I respectfully ask for your opinion as to whether I can legally make a change of contract as desired by the commissioners of Coshocton county."

Briefly stated, the question is whether, after a contract is let and the work partly completed, the plans and specifications under which the contract was let can be changed, and material used other than that specified in the contract, or rather, in the plans and specifications which became a part of the contract. In other words, it is the desire of the county commissioners to so modify the plans and specifications that the 24,889 square yards of waterbound macadam provided for therein may be eliminated, and that the same number of square yards of brick be substituted therefor, the reason given being that it will be impossible to complete the waterbound macadam road for an indefinite period, owing to the priority order of the federal government, relative to shipment of certain material, and that a brick surface could be completed within a reasonable length of time, because brick could be hauled from either Newcomerstown or Coshocton in trucks.

The object in the minds of the county commissioners is a worthy one. But if you will refer to an opinion rendered to your department on June 16, 1917 (No. 369), you will find I anwer this specific question, to the effect that after a contract is let and the work entered upon, the plans and specifications under which the contract was originally let can not be modified. On page 5 of said opinion I quote my predecessor, Hon. Edward C. Turner, who held to the same effect, that there is no authority for changing the plans and specifications under which a contract was let, after the contract is awarded.

On page 6 of said opinion I held as follows:

"In other words, the taxpayers and those assessed for the making of the improvement have a right to demand that the contract be let to the lowest and best bidder. In order that the contract may be let to the lowest and best bidder, the bid must have been made with a view to certain plans, estimates and specifications. Those who bid upon the work rely upon the fact that the road will be constructed in the manner set out in the plans and specifications, and they bid accordingly."

On page 8 I laid down the following proposition:

"Any taxpayer would have the right to enjoin the payment of money for the construction of this work with a six-inch foundation. This for the reason that the plans and specifications call for an eight-inch foundation of sandstone, and for the further reason that the work might have been let for a much less sum had the specifications provided for a six-inch foundation instead of an eight-inch foundation."

In that case both the county commissioners and the original contractor were agreeable to making the change in the plans and specifications. So that the opinion rendered to you in that matter exactly covers the facts now under consideration, and said opinion is as plain as it is possible for me to make it.

The theory upon which our statutes relative to the building of public highways proceed is that the contract must be let to the lowest and most responsible bid-

der, after due advertisement, and the contract must be based upon certain plans and specifications, which plans and specifications become a part of the contract itself. This principle would be entirely avoided if the plans and specifications could be modified after the contract was let. Who knows whether other contractors might not have bid much lower than the bid submitted by the contractor who was the successful bidder, provided they had known that, instead of waterbound macadam, brick would be used for the surface of the improvement?

The contractor states that he will put down brick at his original bid per square yard, but who knows whether other parties might put down brick for a less amount than for waterbound macadam?

From this it is readily seen that the principle of letting the contract for the building of public highways to the lowest responsible bidder would be entirely abrogated if it were permitted to change the plans and specifications after the contract was let.

Further, if the plans and specifications are modified in any respect, the surety of the contractor would be released from his contract, in which he guarantees that the contractor will complete the work according to the plans and specifications. In other words, the surety agrees to stand good for the original contractor, on the theory that the contract will be completed according to the original plans and specifications.

Any taxpayer of Coshocton county or any abutting property owner who will be assessed for said improvement would have the right to enjoin the payment of money upon the part of the state or the county, for an improvement differing from that which is contracted for and based upon the original plans and specifications.

From all the above it is clear that it is legally impossible to modify the plans and specifications upon which a contract is based, after the contract is once entered into.

Hence answering your question specifically, there is no provision in law which would warrant the change in the plans and specifications under which a contract is entered into, so that 24,889 square yards of waterbound macadam surface might be eliminated and a brick surface substituted therefore.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

920.

CORPORATIONS—POWERS FOREIGN TO THE PRINCIPAL PURPOSE FOR WHICH SAME ORGANIZED CANNOT BE CONFERRED UPON SAME BY AMENDMENT.

A corporation incorporated and organized for the purpose of manufacturing glass and glassware and the purchase and sale of goods connected with such manufacture, and of bottler's general supplies cannot legally amend its articles of incorporation so as to authorize said corporation to engage in farming of all kinds, the growing and marketing of fruits, and dairying, and the acquiring, possessing and managing of real estate necessary or proper for such purpose.

COLUMBUS, OHIO, January 8, 1918.

HON. WILLIAM D. FULTON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—This department is in receipt of a communication from you with which you enclose a certificate of amendment to the articles of incorporation of

The Edward H. Everett Company, Newark, Ohio. In your communication you state that the purpose clause is so broad that you hesitate to allow it, and you ask my opinion with respect to the matter.

By memoranda attached to your communication it appears that this company was incorporated October 1, 1885, for the following purpose set out in its articles of incorporation:

> "That the purpose for which said corporation is formed is the manufacture of glass and glassware, and the purchase and sale of goods connected with such manufacture, and of bottler's general supplies."

It further appears that by certificate of amendment filed August 25, 1902, the original articles of incorporation of this company were amended

> "so as to authorize this company to lease land in Licking county and in adjoining counties in Ohio for the mining and boring for natural gas and oil, and piping and transportation thereof through tubing and the sale of same; also for the quarrying of stone, dressing and crushing of the same, the manufacturing of sand and transporting and sale of same or its products; also for the quarrying of clay and the sale of brick, tile and other clay products."

The proposed amendment to the articles of incorporation set out in the certificate accompanying your communication provides:

> "That the articles of incorporation of this company be amended so as to authorize this company to engage in farming of all kinds, the growing and marketing of fruits, and dairying, and the acquiring, possessing and managing of real estate necessary or proper for such purposes."

Without discussing the obvious questions suggested by the amendment to the company's articles filed in 1902 above noted, and without discussing the question as to what uses a manufacturing company can legally make of surplus lands acquired by it for a purpose, it may be, in keeping with the principal purpose for which said company was incorporated and organized, I have no difficulty in reaching the conclusion that the proposed amendment to the articles of incorporation is illegal for the reason that said amendment, when read as a whole, assumes to confer upon the company independent powers wholly foreign to the purpose for which said company was incorporated and organized.

Corporations organized under the laws of this state can be incorporated for one principal purpose only.

> State ex rel v. Taylor, 55 O. S. 61, 67.

The sole principal purpose of the corporation here in question is that disclosed in its original articles of incorporation, and in furtherance of such purpose the company may exercise such express powers as may be given it by its articles of incorporation read in connection with the law, and it may further exercise such implied or incidental powers as may be reasonably necessary for the purpose of carrying out the express powers granted to the corporation. Such incidental powers it has a right to exercise whether stated in the articles of incorporation or not. But, on the other hand, such corporation has no right to exercise powers wholly foreign to the principal purpose for which the company is incorporated,

and it is obvious that no additional rights in this respect can be conferred upon the corporation by incorporating such illegal power in the articles of incorporation either originally or by way of amendment.

I am of the opinion in answer to your request, therefore, that the certificate of the proposed amendment should not be filed.

I am returning to you herewith certificate of amendment and check for $5.00 submitted with your letter of December 11th.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

921.

BOND—OF CONTRACTOR PERFORMING PUBLIC WORK—REQUIREMENTS.

The provisions of the act found in 107 O. L., 642 do not operate to the exclusion of the provisions of other acts in reference to bonds. This act merely requires that an additional obligation, provided for in section 1 thereof, shall be added to bonds usually required by law in matters set out in the act, and that the form of bond provided in section 4 thereof be substantially followed.

COLUMBUS, OHIO, January 8, 1918.

HON. DEAN E. STANLEY, *Prosecuting Attorney, Lebanon, Ohio.*

DEAR SIR:—I have your communication of December 18, 1917, which reads as follows:

> "Section 2365-1 to and including section 2365-4 of the General Code, as amended March 30, 1917, and found in the annual report, Vol. 107, at pages 642 and 643, provides for the execution of a bond by contractors doing certain public work. Other sections of the General Code, including section 2365, relate to the subject of bonds given by contractors doing public work.
>
> I desire to inquire whether or not the act passed by the last legislature above referred to operates to the exclusion of the other form of bond which had previously been in use or whether two bonds are required, one to comply with the law as it formerly stood and the other being in the form prescribed by the last legislature."

We will first note the purpose of the act to which you call attention. The title thereof reads as follows:

> "To protect persons performing labor and furnishing materials for the construction and repair of public works."

Section 1 of said act, which is section 2365-1 G. C. (107 O. L. 642), provides:

> "That when public buildings or other public works or improvements are about to be constructed, erected, altered or repaired under contract, * * it shall be the duty of the board, officer or agent, contracting on behalf of the state, county, city, village, township, or school district, *to require the usual bond as provided for in statute* * *."

From this provision it is quite evident that it was not the aim and purpose of this act to in anywise do away with the bonds which are provided for in other acts and sections of the General Code. The usual bond provided for by statute must be given.

However, section 1 further provides that the bond shall contain an additional obligation and reads as follows:

> "* * with an additional obligation for the payment by the contractor, and by all sub-contractors, for all labor performed or materials furnished in the construction, erection, alteration or repair of such building, works or improvements."

So that the only requirement is that the usual bond which is given, as provided by other acts and sections, must have, as a part of the bond, an additional obligation for the purposes set out in section 1 of said act. However, this act provides that the form of the bond shall be substantially as therein set out. This provision will not materially interfere with the provisions of other acts and sections of the General Code for the reason that the form of the bond in said acts and sections is not specifically set out.

Therefore, bonds given for the purposes set out in the act under consideration should be substantially in the form set out in section 4 of said act, especially in reference to the additional obligation protecting sub-contractors, material men and laborers.

On account of this act providing that the usual bond, as provided by statute, shall be given, and merely providing further that an additional obligation, to the effect as set out in section 1 of the act, shall be added, there will hardly be any cases arise in which the provisions of other statutes or sections of the General Code, relative to bonds, will not fit into the provisions of this act. But if there are former acts in reference to bonds that cannot be harmonized with this act, then this act should be held to apply and control, because it is a later one. It would repeal by implication any provision of a former act or section of the General Code which cannot be reconciled with said later act.

Hence in view of all the above, answering your question specifically, it is my opinion that said act found at p. 642 of 107 O. L. does not operate to the exclusion of other acts relative to bonds, unless said last mentioned acts are of such a nature that they cannot be harmonized with the former; that these provisions fit into the other provisions; and that only one bond is required, which shall be substantially in the form as set out in section 4 of said act, and especially with reference to the additional obligation mentioned in section 1 thereof.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

922.

APPROVAL—RESOLUTION PROVIDING FOR QUIT CLAIMING THE INTEREST OF THE STATE IN CERTAIN CANAL LAND TO J. HARRY WIENER.

COLUMBUS, OHIO, January 10, 1918.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of January 4, 1918, which reads as follows:

> "Herewith I am transmitting duplicate copies of resolutions providing

for quit claiming the interests of the state in certain canal lands in Akron to J. Harry Wiener who is the owner of the title record of the lands involved.

There has been a contest between the state and the predecessors of Mr. Wiener in regard to this land running back some ten years without any advantage accruing to either side.

This arrangement we believe is for the best interests of all parties concerned, and I therefore respectfully request your concurrence thereto."

The proceedings which are submitted to me by you for approval were had under and by virtue of the provisions of sections 13964 of the General Code, and arose by virtue of the fact that J. Harry Wiener, of Akron, Ohio, is the owner of certain real estate located in said city of Akron adjoining certain canal lands owned by the state of Ohio. For quite a number of years past said J. Harry Wiener and those in chain of title with him to the real estate now owned by him have been paying taxes upon certain lands the title to which was afterwards claimed to be in the state of Ohio. In order to adjust this difficulty in a manner satisfactory to all parties concerned said J. Harry Wiener made application to the superintendent of public works under and by virtue of said section asking that he fix the boundary line between the lands of the state of Ohio and the lands of the said J. Harry Wiener. He further agreed that if the state of Ohio would make him a quit claim deed for the portion of the disputed lands which fell to him by virtue of the boundary line being established by the superintendent of public works, as set forth in the records of the department of public works, he would pay the state of Ohio the sum of $600.00. The superintendent of public works finding this arrangement to be equitable and just to all parties concerned has carried out the understanding of the department of public works and the said J. Harry Wiener, and these proceedings are now submitted to me for consideration.

This is not in any sense a sale of lands by the state to J. Harry Wiener. If it were, the sale would be subject to the provisions that whenever the appraisement exceeds the sum of five hundred dollars the land must be sold to the highest bidder after due advertisement. This is merely a proceeding under section 13964 General Code, under and by virtue of which the superintendent of public works fixes and establishes the boundary line, which shall be final and conclusive as to all parties thereto having notice thereof, excepting those under legal disability.

I have examined these proceedings carefully and am of the opinion that they are legal and that upon the said J. Harry Wiener paying to the treasurer of state the sum of $600.00 a quit claim deed should be made by the governor of Ohio to the said J. Harry Wiener for the lands so falling to said J. Harry Wiener by virtue of the establishing of the boundary line as shown by the records in the office of the superintendent of public works.

I have therefore endorsed my approval upon the resolution submitted to me and have forwarded the same to the governor of Ohio for his consideration.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

923.

COUNTY CHARGE—QUALIFICATIONS—HOW AND BY WHOM DETERMINED—INDIGENT POOR—UPON WHOM DUTY RESTS TO PROVIDE THEREFOR—PROPERTY OF COUNTY CHARGE.

1. ***The duty of determining whether a person is qualified to become a county***

charge rests with the superintendent of the county infirmary under the provisions of section 2544 *G. C.*

2. *The course mapped out in section* 2544 *G. C. is the only one by virtue of which a person may be found by the superintendent of the infirmary qualified to become a county charge.*

3. *Primarily the duty to provide for the indigent poor rests with the trustees of each township and the proper officer of each municipal corporation, and this condition continues until the indigent poor becomes a county charge under the provisions of section* 2544 *G. C.*

4. *When a person becomes a county charge, he is to be provided for in the infirmary of the county, or may be otherwise provided for as set out in section* 2544 *G. C.*

5. *The property of a county charge who is confined in the infirmary is subject to be used for his care and keeping under the provisions of section* 2548 *General Code, et seq., but if the county charge is provided for otherwise than in the infirmary his property is not subject to be used for his care and keeping.*

COLUMBUS, OHIO, January 8, 1918.

HON. R. A. KERR, *Prosecuting Attorney, Troy, Ohio.*

DEAR SIR: I have your communication of December 4, 1917, which reads as follows:

> "Section 2544 of the General Code provides for the admission to the county infirmary through the township trustees, and I find no other provision in the code for the admission of one to the county infirmary.
>
> Sections 2548 and following provide for the commissioners taking charge of property of a person who has become a public charge, and the last sentence in 2548 provides for the use of the proceeds of the property 'so long as he remains in the infirmary.'
>
> Does a person become a county charge when actually in need, or is it only after he has been admitted to the infirmary through the trustees, and can the commissioners determine that a person is a county charge and order and require the superintendent of the infirmary to receive him, or is section 2544 inclusive, and is the superintendent under that section the person to determine whether or not a person should become a county charge?"

The matters set out in your communication and those which are incident thereto make it necessary for one to go to the very foundation of the matter of the law relating to indigent poor. We must do this in order to determine when an indigent poor is a "charge of the county," or when he is a charge of a township or a municipality, and I shall therefore consider these questions generally before answering your questions specifically.

Probably the section of the General Code which lies more nearly at the foundation of this whole matter is section 3476 General Code, which reads as follows:

> "Subject to the conditions, provisions and limitations herein, the trustees of each township or the proper officers of each municipal corporation therein, respectively, shall afford at the expense of such township or municipal corporation public support or relief to all persons therein who are in condition requiring it."

This section, of course, is broad enough to include all persons who are given relief, no difference where they reside, because it includes all the townships and all the municipal corporations of each county.

Section 3480 General Code provides:

> "When a person in a township or municipal corporation requires public relief or the services of a physician or surgeon, complaint thereof shall be forthwith made by a person having knowledge of the fact to the township trustees, or proper municipal officer. * *"

Section 3481 General Code provides that when complaint is so made to the township trustees or to the proper official of a municipality, that they must make a visit and investigation in reference to the matter as to whether the person reported is entitled to relief, and if so the provisions of section 3476 General Code, above quoted, make it obligatory upon the township trustees or the proper official in a municipal corporation to afford the necessary relief, whether this relief be in the nature of food or clothing, or in the nature of medical relief.

From the provisions of these three sections it is clearly evident that the primary responsibility for affording relief to the indigent poor rests with the township trustees or with the proper official of a municipal corporation. In other words, no person in need of relief is primarily a county charge.

With this in mind we will turn to the provisions of the statutes in order to ascertain the conditions under which a person becomes a county charge. The section of the General Code which lies at the foundation of this matter is section 2544, which reads as follows:

> "In any county having an infirmary, when the trustees of a township, after making the inquiry provided by law, are of the opinion that the person complained of is entitled to admission to the county infirmary, they shall forthwith transmit a statement of the facts to the superintendent of the infirmary, and if it appears that such person is legally settled in the township or has no legal settlement in this state, or that such settlement is unknown, and the superintendent of the infirmary is satisfied that he should become a county charge, they shall forthwith receive and provide for him in such institution, or otherwise, and thereupon the liability of the township shall cease. The superintendent of the infirmary shall not be liable for any relief furnished, or expenses incurred by the township trustees."

The peculiar thing about the provisions of this section is that there is no condition set forth therein specifically stating under what condition a person may be found to be a county charge. The section is that when the trustees of a township are of the opinion that the person complained of is entitled to admission to the county infirmary, and if the superintendent of the infirmary is satisfied that he should become a county charge, then such person shall become a county charge; but there is nothing set out in said section indicating what facts or conditions exist before one may become a county charge. There is one section of the General Code which furnishes a sort of a clue to this matter, and I must state that it is only a clue. The section to which I refer is section 3488 General Code, which reads as follows:

> "When the trustees of a township in a county having no county infirmary are satisfied that a person in such township ought to have public

relief, they shall afford such relief at the expense of their township as in their opinion the necessities of the person require. When more than temporary relief is required, they shall post a notice in three public places in the township, specifying a time and place at which they will receive proposals for the maintenance of such person, which notice shall be posted at least seven days before the day therein named for receiving proposals."

The particular matter to which I desire to call attention in said section is the following phrase:

"when more than temporary relief is required."

Sections 3489 and 3490 General Code then proceed to the effect that if more than temporary relief is required, the township trustees may certify the amount expended upon such poor persons to the county commissioners, who shall cause the amount so paid to be refunded to the proper township; that is, in those cases where the legal settlement of such a person is not within the state or is unknown.

It will be noted that under the provisions of section 3488 General Code this section merely applies to those counties in which there is no county infirmary. If the legislature had proceeded further in section 3488 and provided that in event there is a county infirmary in the county, and in event that more than temporary relief be required, then the fact should be certified to the superintendent of the infirmary, thus making the indigent poor a county charge, we would have a full and complete scheme in reference to the whole matter in which the condition would be plainly evident under which a person might become a county charge; but the legislature stopped short of making such a provision.

However, I am clearly of the opinion that, reading to a slight extent between the lines of this section, we must arrive at the conclusion that the question as to whether an indigent poor person shall remain the charge of the township or the charge of the municipality, or whether he shall become a county charge, depends upon the question of whether the relief which is required is merely temporary or whether it is permanent in nature.

With this fundamental principle in mind, let us now turn again to the provisions of section 2544 General Code. Supposing that the superintendent of the county infirmary decides that the person is a proper one to become a county charge, what then is done? This section provides that:

"They shall forthwith receive and provide for him in such institution * *"

but the provision does not end there, inasmuch as it goes on and adds the phrase "or otherwise." This makes it clearly evident that not all the indigent poor who become county charges are necessarily inmates of the county infirmary. This is made clearly evident from the other provisions of the General Code. For example, section 2546 provides that the county commissioners may contract for the medical relief for persons under their charge in the respective townships. This provision can refer to no other persons than the county charges who are provided for "otherwise" than in the county infirmary.

Section 2545 General Code provides that the superintendent of the infirmary shall make a report to the board of state charities once each quarter. In this report he must state "the names of all persons to whom relief has been given out-

side of the infirmary;" also, section 2538 General Code provides for a report of the county commissioners. In the report, among other things, they must set out the

> "total amount paid in the county for outdoor relief during each month, including medical attention."

It is quite clear that all these provisions have reference to the matter of the "county charges" who are provided for not in infirmaries, but in some manner outside of infirmaries.

With the above principles established the answers to your questions will not be difficult to give. While you do not number the questions, yet there are a number contained in your communication. You ask:

> "Does a person become a county charge when actually in need, or is it only after he has been admitted to the infirmary through the trustees?"

The answer to this question is evident—the person does not become a county charge until he is found to be such under the provisions of section 2544 General Code, but, as was said heretofore, it is not absolutely necessary that a person be admitted to the infirmary to become a county charge, and this for the reason that he might be provided for as is set forth in said section, "otherwise," but he cannot become a county charge except as provided in section 2544 G. C.

Another question that you propose is:

> "Can the commissioners determine that the person is a county charge and order and require the superintendent of the infirmary to receive him?"

Under the above it is clearly evident that the county commissioners are not the proper officials to determine whether one is a county charge or not, but this matter rests with the superintendent of the infirmary, and the provisions of section 2544 General Code are exclusive in furnishing the method by which the attention of the superintendent of the infirmary is called to the fact that some indigent poor person in the county has the right to become a county charge.

You also ask, indirectly at least, as to when the property of an indigent person may be taken under the provisions of section 2548 and 2550 General Code, inclusive. The provisions of these sections are not entirely clear in reference to this matter, that is, whether the property of a county charge who is provided for outside the infirmary as set out in section 2544 General Code would be subject to have his property sold under the provisions of said section, or whether the provisions of said section would be limited to the property of a person who is provided for within the infirmary.

Section 2548 General Code begins "when a person becomes a county charge," and this might be construed to mean the property of a county charge who became such under the provisions of section 2544, whether provided for within the infirmary or otherwise, might be sold and the proceeds used for his care and keeping; but section 2550 General Code provides that "upon the death of such person *or when lawfully discharged from the infirmary.*" When these sections are construed as a whole I am of the opinion that the property of a county charge cannot be sold unless the county charge becomes a resident of the infirmary, and is provided for therein. If a person becomes a county charge under section 2544 General Code and is therein provided for "otherwise" his property would not be subject to be used for his care and keeping.

My predecessor, Honorable Edward C. Turner, in rendering the opinion found on page 358, Vol. I, Report of the Attorney-General for 1915, made a finding to the effect that a county charge may be provided for either within or without the county infirmary, but held that under ordinary circumstances and conditions provision should be furnished within the county infirmary.

I agree with his reasoning and conclusion, and therefore affirm the same. While in the main, his opinion does not apply to the matters here under discussion, yet to the extent that it does, I am of the opinion that the same is correct.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

924.

COUNCIL—HAS POWER TO MAKE INVESTIGATION FOR LEGISLATIVE PURPOSES—MAY ENTER INTO CONTRACT FOR SUCH PURPOSE—TRANSFER OF FUNDS—APPROPRIATIONS.

Council of a city has an implied power to make an investigation "for the purpose of securing information upon which to base proper legislation," and it may authorize a committee of council to enter into a contract on behalf of the city for the purpose of having such investigation made.

Council of a city cannot transfer funds from one fund to another except as to funds raised by taxation.

Where no provision is made therefor in the annual budget, council cannot appropriate by a supplementary appropriation ordinance moneys from the gas, water and electric funds for the purpose of payment for an investigation of such plants to be made by council for information upon which to base legislative action.

COLUMBUS, OHIO, January 8, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Under date of November 21, 1917, you submit the following statement of facts and questions:

> "Early in the year 1917, the mayor of the city of Hamilton, Ohio, appointed committees on each of the gas, water and electric light plants, to make investigations and recommend to council what they might determine to be for the best interests and efficiency of the several plants mentioned. The items herein were not provided for in the budget made for that year as covered by section 5649-3d, G. C., nor were they embodied in the semi-annual appropriations in accordance with section 3797 G. C.
>
> We are enclosing herewith written statement of our state examiner showing the full legislation and procedure in the matter, in which it will be noted that the firm of M. and S., consulting engineers (copy of contract enclosed herewith), who performed the work and rendered exhaustive report, were paid under the special appropriation ordinance shown herein, the vouchers being approved by the committee on claims of council. Council practically had entire charge of the matter; neither the service director nor the mayor had anything to do with the same. On October 3, 1917, $3,000.00 was paid to the firm mentioned; $1,000 being taken from each of the funds of the water, gas and electric light plants.

We enclose herewith copy of the opinion or brief of the city solicitor upon the matter.

QUESTION 1: Was such procedure regular and legal?

QUESTION 2: If the procedure was not legal, therefore the amount of $3,000.00 was illegally spent, and if so, who is liable for the amount?"

With your letter is submitted a copy of the ordinance making the appropriation in question and also of the ordinance which authorized the service committee of council to enter into the contract which is now in question.

Section 1 of the appropriation ordinance reads as follows:

> "That there be and is hereby appropriated out of the unappropriated moneys in the gas, water and electric funds, the sum of three thousand ($3,000) dollars, for the purpose of paying the cost and expense of securing expert investigation service for the investigation of municipal plants to secure information upon which to base proper legislative action of council, that the money to be appropriated from each of said funds shall be in amount equal to the cost and expense of paying for such expert investigation of the plant from the funds of which the money is appropriated."

This section specifically provides that the investigation is "to secure information upon which to base proper legislative action of council."

Section 1, of the ordinance, authorizing the service committee of council to enter into the contract reads as follows:

> "That the service committee of council be and is hereby authorized to enter into a contract to secure expert investigation services for the investigation of municipal plants for the purpose of securing information upon which to base proper legislative action by the city council."

A copy of the contract entered into for such investigation, is submitted and the duties of the consulting engineers are stated in the following terms:

> "Said party of the first part has employed and does by these presents employ said party of the second part to examine, investigate and report on the water, gas and electric light plants systems and properties belonging to said party of the first part; said examination, investigation and report to include a valuation of the properties, a statement of the present physical condition and fitness to perform the work required of said plants, systems and properties, a discussion of the financial relation of their operation and earnings, recommendations for betterments to bring such plants, systems and properties to a high state of efficiency for the immediate future and for their development with the growth of the city and such other information and recommendations as may be proper and necessary to maintain said plants, systems and properties in a high state of efficiency so as to meet the demands for service both present and anticipated and said party of the first part agrees to pay said party of the second part the sum of three thousand ($3,000.00) dollars for such service, payable when the examination and investigation is completed and the report thereon submitted to the city council of said party of the first part."

The facts submitted and the questions asked, involve several legal principles.

You first call attention to the provisions of section 5649-3d, General Code, and state that the items of appropriation were not provided for in the annual budget under the provisions of said section. This section reads as follows:

> "At the beginning of each fiscal half year the various boards mentioned in section 5649-3a of this act shall make appropriations for each of the several objects for which money has to be provided, from the moneys known to be in the treasury from the collection of taxes and all other sources of revenue, and all expenditures within the following six months shall be made from and within such appropriations and balances thereof, but no appropriation shall be made for any purpose not set forth in the annual budget nor for a greater amount for such purpose than the total amount fixed by the budget commissioners exclusive of receipts and balances."

It has been held by one of my predecessors, that this section applies to moneys raised from taxation and not from receipts from other sources.

In an opinion to Honorable J. J. Brown, under date of February 26th, 1912, and reported in Volume 2, page 1633, of the Annual Report of the Attorney-General for 1912, the Honorable Timothy S. Hogan, Attorney-General, held as follows:

> "Section 5649-3d limiting appropriations to the purpose set forth in the annual budget and to the amounts fixed by the budget commission relates to moneys raised by taxation only, and expressly excludes moneys designated as 'receipts and balances' such as those of the general fund derived from the transfer of balances left in other funds at the close of the preceding fiscal year."

After careful consideration of the above opinion, I concur in the above conclusion. Therefore, if the appropriation in question was made from receipts other than those received by taxation, the appropriation would not be in violation of said section 5649-3d General Code.

You also call attention to the provisions of section 3797 General Code, and state that the appropriation now in question was not embodied in the semi-annual appropriation ordinance as provided by the above section. Said section 3797 reads as follows:

> "At the beginning of each fiscal half year, the council shall make appropriations for each of the several objects for which the corporation has to provide, or from the moneys known to be in the treasury, or estimated to come into it during the six months next ensuing from the collection of taxes and all other sources of revenue. All expenditures within the following six months shall be made from and within such appropriations and balances thereof."

This section has also been under consideration by my predecessors. In an opinion to your department, under date of September 19, 1913, and reported at page 398, Volume 1, of the Report of the Attorney-General for 1913, Honorable Timothy S. Hogan, held as follows:

> "The city council may not legally enact supplementary appropriations increasing the amount appropriated in the regular semi-annual appropriating ordinance.

If the particular subject is not contained in the regular appropriating ordinance, council may with certain restrictions legally pass a supplementary ordinance making specific appropriations for such subject.

The mere fact that an item may not have been provided for in the budget of the administrative officer as revised by council for its own purposes, at the time of making up the tax levying ordinance, does not of itself preclude council from making a subsequent appropriation for that purpose, either at the time of making the regular semi-annual appropriation or at a subsequent date."

I also concur in the above conclusion.

It appears from your statement of facts that the semi-annual appropriation ordinance did not contain an appropriation for the purpose covered by the appropriation and contract now in question. It was therefore legal for the council to pass a supplementary appropriation ordinance covering the matter in question.

It is stated in the ordinance that the purpose of the proposed expenditure is to secure facts upon which to base proper legislative action of council. While such a declaration should have weight it is not conclusive as to the purpose of the appropriation.

Under the provisions of section 4211 General Code, the council of a city has legislative power only, and cannot enter into contracts. Said section 4211 of the General Code reads as follows:

"The powers of council shall be legislative only, and it shall perform no administrative duties whatever, and it shall neither appoint nor confirm any officer or employe in the city government except those of its own body, except as is otherwise provided in this title. All contracts requiring the authority of council for their execution shall be entered into and conducted to performance by the board or officers having charge of the matters to which they relate, and after authority to make such contracts has been given and the necessary appropriation made, council shall take no further action thereon."

In the case of McCormick v. The City of Niles, 81 O. S., 246, it is held:

"The liability of a municipal corporation to pay for the publication of ordinances, resolutions and legal notices required by law to be published, must rest on express contract, and not upon a mere account for the rendition of such services.

Where the statute has not prescribed the person who shall execute such a contract in behalf of a municipal corporation, it is consistent with section 1536-653, Revised Statutes, for the council, by ordinance or resolution, to authorize the clerk thereof to execute such contract according to the directions of the council."

In this case the right of contracting for the publication of ordinances was in question, and it was held that council had authority to direct the clerk of council to enter into such contract. The publication of ordinances is a part of the legislative duty as such ordinances are not effective until they are published as required by the statutes.

In municipalities of other states, the council has authority to enter into contracts on behalf of the corporation.

In such states the right of council to enter into contracts through committees

is recognized. The rule is stated in section 1177 of McQuillin on "Municipal Corporations," as follows:

> "Municipal contracts may be made through appropriate committees of the common council, or committees of other bodies, but power to make contracts by a committee can be exercised only by the concurrent action of at least a majority; and the chairman, as such, has no authority to make the contract."

The contract now under consideration, was executed by the committee under the direction of council, by the chairman and the other members of the committee. The formal execution of the contract therefore was a compliance with the above rule.

The question arises, however, as to the authority of council to enter into such contract. Council has no specific authority to enter into such contract and its authority must be implied, if at all, from its power to legislate in behalf of the city.

In the case of State ex rel. v. Gayman, 11 C. C. N. S. 257, the validity of a joint resolution of the general assembly to investigate charges of corruption was under consideration. It was declared in the resolution that the investigation was to be made for further legislation. The court, however, considered the effect of the resolution and held that the proposed investigation was not in fact to be made for the purpose of aiding legislation and held the resolution to be void.

As to the implied authority of the general assembly to make such investigation, the court through Giffen, J., says, at page 261:

> "If we are wrong in this conclusion the question still arises whether the committee can act after the final adjournment of the general assembly. The right to investigate and gather information in the manner here proposed exists, if at all, as an incident of and by implication from the power to legislate conferred by the constitution. An act duly passed by the general assembly is a complete exercise of the power to legislate; but a resolution to investigate for the purpose of further legislation, passed by the same body, is the exercise of a right incident to that power, and if that power itself be surrendered the incidental right goes with it."

The court does not directly hold that the general assembly had such inherent power.

In the case of State ex rel. v. Oglevee, Auditor, 36 O. S., 324, it is held:

> "Neither branch of the general assembly can alone appropriate money from the treasury; but where a fund is provided by law for the contingent expenses of either branch, the disbursement of the funds for such purposes is subject to the control of such branch.
>
> Hence, where a sum is allowed by the house of representatives for cleaning the hall occupied by that body, after its adjournment, the party rendering the service in pursuance of the resolution is entitled to be paid therefor out of the contingent fund previously appropriated for the use of the house."

It appears from the above holding that the general assembly has a right to contract for services performed for either branch of the legislature.

At the time the above decision was rendered and that of State ex rel. v. Gay-

man, supra, the legislative power of the state was vested in the general assembly by the provisions of section 1, article II of the Constitution, which then read as follows:

> "The legislative power of this state shall be vested in a general assembly, which shall consist of a senate, and a house of representatives."

There is, however, no provision in the constitution which grants to, or prohibits the general assembly from entering into contracts.

Under the terms of section 4211, General Code, the legislative power of a city is vested in council. In order to perform this duty the members of council would have an implied power to make investigations so that they could intelligently perform such duty and legislate for the best interests of the community. Council would have the right to make such investigation independent of any administrative or executive officer. To deny such right might in many cases hamper council in the proper performance of its duties.

Council, therefore, has an implied power to make an investigation "for the purposes of securing information upon which to base proper legislation," and it may authorize a committee of council to enter into a contract on behalf of the city for the purpose of having such investigation made.

It is within the proper discretion of council to determine to what extent such an investigation shall be made. The determination of council should not be set aside or held to be in excess of its powers except upon clear abuse of its discretion. This is not shown in the present case.

The contract now in question was within the discretion of council. It was entered into by the members of the committee authorized by council and made in the name of the city. It was, therefore, valid if the appropriation was properly made.

It appears that the money to pay for this contract was appropriated "out of the unappropriated moneys in the gas, water and electric funds." These funds were provided for carrying on these respective plants. They are not created as funds from which council may make expenditures for legislative purposes. Expenditures made by council for its use should be made from a fund created and provided for that purpose, as is done in providing funds for payment of publication of ordinances and of salaries of the clerk of council and his assistants.

The effect of the appropriating ordinance was to transfer three thousand dollars from the gas, water and electric funds to a council or legislative fund.

A transfer of funds can only be made from funds raised by taxation under the provisions of section 3799, General Code, which reads:

> "By the votes of three-fourths of all the members elected thereto, and the approval of the mayor, the council may at any time transfer all or a portion of one fund, or a balance remaining therein, except the proceeds of a special levy, bond issue or loan, to the credit of one or more funds, but there shall be no such transfer except among funds raised by taxation upon all the real and personal property in the corporation, nor until the object of the fund from which the transfer is to be effected has been accomplished or abandoned."

The expenditure now in question was not provided for in the annual budget and therefore money raised from taxation could not be used for that purpose, as that would be in violation of section 5649-3d, General Code, supra. The only money that could be reached by a supplementary appropriation ordinance as that

now in question was that coming under the term "receipts and balances," and not from that raised by taxation. The money known as "receipts" is not raised by taxation, and this could not be transferred from one fund to another.

A part of the funds expended was taken from the water fund.

Section 3959 General Code provides:

> "After paying the expenses of conducting and managing the waterworks, any surplus therefrom may be applied to the repairs, enlargement or extension of the works or of the reservoirs, the payment of the interest of any loan made for their construction or for the creation of a sinking fund for the liquidation of the debt. The amount authorized to be levied and assessed for waterworks purposes shall be applied by the council to the creation of the sinking fund for the payment of the indebtedness incurred for the construction and extension of waterworks and for no other purpose whatever."

Section 3960 General Code reads:

> "Money collected for waterworks purposes shall be deposited weekly with the treasurer of the corporation. Money so deposited shall be kept as a separate and distinct fund. When appropriated by council, it shall be subject to the order of the director of public service. Such director shall sign all orders drawn on the treasurer of the corporation against such fund."

Under the provisions of these sections monies raised for waterworks purposes shall be used for that purpose and "shall be kept as a separate and distinct fund." When appropriated by council it shall be subject to the order of the director of public service. The amount appropriated in the present case from the waterworks fund was in violation of the above sections.

Council did not have authority to make the appropriation in question from the water, gas and electric funds. The contract in question, however, has been fully executed and the city of Hamilton has secured the benefit thereof. The city solicitor has approved the consent in these terms: "O. K. as to form and legality."

Under the above circumstances no finding should be made against any of the officers for the illegal expenditures of the funds, but attention should be called to the illegal appropriation and transfer of funds.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

925.

MUNICIPAL OFFICERS—ELECTED AT NOVEMBER ELECTION AND UNABLE TO ASSUME THEIR DUTIES BECAUSE OF SERVICE IN UNITED STATES ARMY—PREDECESSORS HOLD OVER UNTIL THEY QUALIFY—WHEN COUNCIL MAY DECLARE VACANCY—HOW FILLED—HOW OFFICE FILLED AFTER NEWLY ELECTED OFFICIALS QUALIFY.

1. *Where persons were elected last November to the offices of city auditor, city treasurer and city solicitor, and where they are not able to enter upon the duties of the offices to which they were respectively elected, due to the fact that*

they are serving in the United States army, and who do not qualify until they are able to enter upon their duties, the officers elected in November, 1915, *will serve until the members elected in November,* 1917, *do qualify.*

2. *However, if the said persons elected last November do not qualify within ten days, then the council of the municipality might, if they desired, declare a vacancy, in which event the mayor should fill the vacancy for the unexpired term, this being under section* 4242 *General Code.*

3. *But if the persons elected in November,* 1917, *do qualify by taking the oath of office and giving bond and are not able to enter upon the duties of the office to which they were elected due to the fact that they are serving in the United States army, then the mayor of the municipality should appoint some person to perform the duties of the office until the disability is removed and they are able to perform the duties.*

COLUMBUS, OHIO, January 8, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I have your communication of recent date in which you make inquiry in reference to the matter of the election of three persons at the last November election for city officers, one being elected city auditor, one city treasurer, and the other city solicitor. The three persons are in the army of the United States, and therefore, for the present, at least, are not able to enter upon the performance of the duties of their respective offices. You ask what legal steps should be taken in reference to making provision for the performance of the duties of these various offices. Practically the same principles of law will apply to the three conditions.

First, let us notice the provisions of the statutes in reference to the election and terms of these three officers. Section 4275 General Code provides that the auditor shall be elected for the term of two years, and shall serve until his successor is elected and qualified. Section 4293 General Code provides that the treasurer shall be elected for a term of two years and shall serve until his successor is elected and qualified. Section 4303 General Code provides that the city solicitor shall be elected for a term of two years and shall serve until his successor is elected and qualified.

From the provisions of these sections the persons who took their offices on January 1, 1916, will continue to serve as said officers until their successors are elected and qualified—that is, they shall serve until two conditions obtain: First, the election of their successors; and, second, the qualification of their successors. So, if any of the persons elected at the last November election do not qualify, then the officers elected in November, 1915, and who took their offices on January 1, 1916, would continue to hold the offices until the persons elected last November—and who are now in the army—would qualify by taking the oath of office and filing the required bond.

This proposition, however, would have to be modified to some extent on account of the provisions of section 4242 General Code, which reads as follows:

> "The council may declare vacant the office of any person elected or appointed to an office who fails to take the required official oath or give any bond required of him, within ten days after he has been notified of his appointment or election, or obligation to give a new or additional bond, as the case may be."

From this provision, if the persons so elected should not qualify within ten days after receipt of notice of election, then the council might, if it desired to do so, declare the office vacant. In this event the vacancy would have to be filled under and by virtue of the provisions of section 4252 G. C.

But, supposing the persons elected last November qualified by taking oath and filing bond, then the officers elected in 1915 would not hold over any longer than until the bond prescribed by law is filed; and this for the reason that they hold only until their *successors are elected and qualify*. What, then, will be done in reference to the duties of the offices in the event that the persons elected thereto qualify, the said persons not being able to perform the duties due to the fact that they are in the army of the United States?

In reference to this question it is well for us to remember that the statute makes no provision whatever for deputy or assistants to the city treasurer; but the statute in reference to the city solicitor makes provision merely for an assistant, provided that council consents. The statute in reference to the city auditor makes provision for a deputy to the city auditor, provided council consents.

While these provisions are somewhat different in each case, yet I do not believe they would have any effect upon the answer to be given to your question. I believe that the provisions of section 4252 General Code would control in each case.

The above discussion applies to those officers who qualify but are not able to enter upon the performance of their duties due to the fact that they are serving in the United States army, and in this event I am of the opinion that the provisions of section 4252 General Code would apply inasmuch as it provides:

> "In case of the death, resignation, removal or *disability* of any officer * * * the mayor thereof shall fill the vacancy by appointment and such appointment shall continue for the unexpired term and until a successor is duly appointed or duly elected and qualified, *or until such disability* is removed."

It is my opinion that the plain intendment of this statute is such that the conditions suggested by you would come under its terms and provisions. The persons elected are not now able to perform the duties of the office to which they were elected, because of the fact that they are serving in the army of the United States. In other words they are disabled from the performance of these duties, but this disability will not necessarily remain during the entire term for which they were elected. They may be honorably discharged from service in the army and thus be able to perform the duties of the office to which they were respectively elected. Hence it is my opinion that the mayors of the different municipalities involved might appoint some person to fill the vacancy due to the disability of the persons elected thereto to perform the duties of the present time, and that the persons appointed would hold office until the disability is removed—that is, until the persons would be discharged from service in the United States army, and thus be able to enter upon the performance of the duties of the respective offices.

It must be remembered that the language used is not "other disability." If it were, then under the familiar rule of *ejusdem generis* "disability" would have to be given a meaning similar to the specific causes which precede it. In the statute under consideration the general term "disability" is used, and as said I am of the opinion that it is broad enough to include the conditions under consideration.

Hence, answering your question specifically:

1. If the persons elected last November should not qualify by taking oath and filing bond then in that event the respective officers who took office on January 1, 1916, would hold over until they do qualify by taking oath and filing bond.

2. However, under the provisions of section 4242 General Code, if the persons elected should not qualify within ten days after receiving notice of their election, then the council of the municipality might, if it so desires, declare said office vacant, in which event the mayor would fill the vacancy under the provisions of section 4252 General Code.

3. In the event that said persons have qualified and are not able to enter upon the duties of their office then in that event the mayor of the municipality, under section 4252 General Code would appoint some person to fill the vacancy until the disability is removed.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

926.

ORDINANCE—NOT EFFECTIVE UNTIL EXPIRATION OF THIRTY DAYS —OFFICER TAKING OFFICE DURING REFERENDUM PERIOD RAISING HIS SALARY—WILL DRAW SALARY AS IT EXISTED PRIOR TO INCREASE.

The provisions of an ordinance passed by the council of a city do not, with some exceptions, become effective until thirty days after it is filed with the mayor. Hence, if an officer enters upon his duties for the term for which he is elected before an ordinance, raising his salary, becomes effective under the principles of the referendum, he will draw the salary as it existed prior to the increase, during the term for which he is elected.

COLUMBUS, OHIO, January 8, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I have your communication of December 5, 1917, which is as follows:

"We respectfully request your written opinion upon the following matter:

STATEMENT OF FACTS

Under an existing ordinance the salary of an elected officer of a municipality, elected for a term of two years, is $1,200.00 per year. On December 15, 1917, council passes an ordinance fixing the salary for said position at $1,500.00 per year. Under the provisions of section 4227-2 General Code, the last ordinance mentioned will become operative on January 14, 1918.

Question: May the officer in question legally be paid at the rate of $1,500.00 per year from and after January 14, 1918, or must he serve his entire elective term of 1918 and 1919 at the salary of $1,200.00 per year?"

The facts upon which you desire an opinion are briefly these: Under an existing ordinance of a certain city the salary of a certain official of the city is fixed at $1,200.00. Then your supposition is that on December 15, 1917, council of said city should pass an ordinance fixing the salary of said official at $1,500.00 per year, which under and by virtue of the principle of the referendum would not become effective until thirty days after it is filed with the mayor, which would make it become effective something like January 14, 1918. Upon these facts your question is as to whether an officer who takes his position on January 1, 1918, would draw a salary of $1,200.00 up to the fourteenth day of January, 1918, and from that time

on a salary of $1,500.00, or whether he would draw $1,200.00 from the beginning of the term for which he was elected to the end thereof. Of course, there would be another alternative in that he might begin with a salary of $1,500.00 and continue to draw the same up to the end of the term for which he was elected.

The particular sections which give rise to this question are sections 4213 and 4227-2 of the General Code, which read as follows:

> "Sec. 4213. The salary of any officer, clerk or employe shall not be increased or diminished during the term for which he was elected or appointed, and, except as otherwise provided in this title, all fees pertaining to any office shall be paid into the city treasury."
>
> "Sec. 4227-2. Any ordinance, or other measure passed by the council of any municipal corporation shall be subject to the referendum except as hereinafter provided. No ordinance or other measure shall go into effect until thirty days after it shall have been filed with the mayor of a city or passed by the council in a village, except as hereinafter provided.
>
> When a petition signed by ten per cent of the electors of any municipal corporation shall have been filed with the city auditor or village clerk in such municipal corporation, within thirty days after any ordinance, or other measure shall have been filed with the mayor, or passed by the council of a village, ordering that such ordinance or measure be submitted to the electors of such municipal corporation for their approval or rejection, such city auditor or village clerk shall, after ten days, certify the petition to the board of deputy supervisors of elections of the county wherein such municipality is situated and said board shall cause to be submitted to the electors of such municipal corporation for their approval or rejection, such ordinance, or measure at the next succeeding regular or general election, in any year, occurring subsequent to forty days after the filing of such petition.
>
> No such ordinance or measure shall go into effect until approved by the majority of those voting upon the same. Nothing in this act shall prevent a municipality after the passage of any ordinance or other measure from proceeding at once, to give any notice, or make any publication, required by such ordinance or other measure."

As suggested above, there are three different views which may be taken with reference to the salary of said official, which are as follows:

The official taking office on January 1, 1918, might begin with a salary of $1,500.00 and draw the same during the entire term for which he is elected; or he might begin with a salary of $1,200.00 and draw the same during the entire term for which he is elected; or he might begin with a salary of $1,200.00 and draw said salary up to the time that the ordinance goes into force and effect under the principles of the referendum, as set forth in said section 4227-2 G. C., at which time he would begin with a salary of $1,500.00 and draw the same until the expiration of the term for which he is elected.

Which one of these different propositions is selected to be the correct one depends altogether upon the question as to what construction we place upon the ordinance increasing the salary of said officer from $1,200.00 to $1,500.00 in the light of the provisions of law as found in said above quoted sections. The first principle of law to be considered is that "the salary of any officer * * * shall not be increased or diminished *during the term* for which he was elected." The other principle of law is that "no ordinance * * * *shall go into effect* until thirty days after it shall have been filed with the mayor of a city * * *."

With the three propositions above set forth and the two principles of law just stated in mind, let us proceed with the consideration as to what is the correct conclusion to be reached in reference to your query. Of course, if the ordinance passed by the council on December 15, 1917, and filed with the mayor, becomes effective immediately upon publication, to the extent at least that the change in salary takes effect at that time or on or before January 1, 1918, then the first of the above propositions would be true, that is, the officer would begin with a salary of $1,500.00 and continue to draw the same until the expiration of the term for which he is elected. But if said ordinance does not become effective for the purpose of making the change in salary until thirty days after the same is filed with the mayor of the city, then the second of the above propositions would be true, that is, the officer would begin with a salary of $1,200.00 and continue to draw the same until the expiration of the term for which he is elected. This for the reason that the salary of an officer cannot be increased during the term for which he was elected and if the change becomes effective on or about January 14, 1918, it would come within the purview of section 4213 G. C. and would not affect the salary of the officer during the term for which he was elected. In my opinion there is no reasoning whatever which could lead us to the conclusion that the third proposition above set forth is correct; namely, that the officer might begin the term of office with a salary of $1,200.00 and draw the same up to the time at which the ordinance would become fully effective under the principles of the referendum and from that time on draw a salary of $1,500.00. The increase in salary either becomes effective before January 1, 1918, or after said date. If it becomes effective before said date, the officer would begin with $1,500.00 and end with that amount, because the principle set forth in section 4213 cannot apply to such conditions. But if the change becomes effective after January 1, 1918, then the principle set forth in section 4213 would apply and the increase in salary could not be made to apply to the officer taking office on January 1, 1918; he would draw $1,200.00 from the beginning of his term to the end of the same. Hence, we must select either the first or the second of the propositions above enumerated.

So we will proceed from now on upon that theory. Section 4227-2 G. C. provides "no ordinance shall go into effect until thirty days after it shall have been filed with the mayor of a city." This provision is made to give opportunity to the people to have any ordinance referred to them for approval or disapproval, should they desire to have it referred to them. This is what is styled as the principle of the referendum. In considering this question, it must always be borne in mind that the law making bodies of the state and of the cities of the state are no longer supreme in the matter of law making.

Section 1 of article II of the constitution provides as follows:

> "The legislative power of the state shall be vested in a general assembly consisting of a senate and house of representatives, but the people * * * reserve the power to adopt or reject any law, section of any law or any item in any law appropriating money passed by the general assembly * * *."

That is, the people of the state enter into the factor of making laws and virtually become a part of the law making machinery of the state. They reserve to themselves the right to approve or disapprove the acts which are passed by the legislature and filed by the governor with the secretary of state. This is the view that is taken of the principles of the initiative and referendum by our courts.

In *Pfeifer et al, vs. Graves,* 88 O. S., 473, the court say:

> "The language of section 1b is to be fairly and reasonably interpreted

so as to carry out the purpose of the people who adopted the dual form of *direct and indirect legislation* prescribed therein."

On page 486, the court in considering section 1 of article II of the constitution, state:

"The first named is a delegated power—from the people to their legislative agents or representatives. The second is a reserved power; it comprehends *all of the sovereign power of legislation* not thus delegated."

In *State ex rel. vs. Hildebrandt, Secretary of State,* 94 O. S., 154, the court say in the first branch of the syllabus:

"The term 'legislature,' in section 4, article I of the United States constitution, comprehends the entire legislative power of the state; and, as so used, includes not only the two branches of the general assembly but the popular will as expressed in the referendum provided for in sections 1 and 1c of article II of the Ohio constitution."

On page 161 the court reasons as follows:

"These various sections disclose that, while the legislative power has been delegated to the bi-cameral body composed of the senate and house of representatives, the people of Ohio have by the aforesaid provisions of their constitution determined the manner by which such legislative power may be exercised, under what circumstances the laws passed by it may become operative without an appeal to the people, and have further imposed the conditions under which such laws may become operative or inoperative as they may have been adopted or rejected by the popular vote designated as the 'referendum'."

From these decisions of our courts and from reason also we readily see that the people become a vital and essential part of the machinery of legislation in the state at large.

The same principle applies to municipalities. Under the provisions of section 4227-2 G. C. the people of municipalities have been given the right to have referred to them, for their approval or disapproval, ordinances passed by the council. They virtually become a part of the law making machinery of the city. The mere fact that the council of a municipality adopts an ordinance is not conclusive upon the question as to whether the principles embodied in the ordinance will become the law of the municipality or not. Council no longer has the final say in the matter as to what principles shall be enacted in law by means of ordinances or resolutions. The people have the right to speak. And until they do speak, either by permitting the ordinance to become effective without any action or by approving the same at the polls by a majority vote, the provisions of the ordinance are held in abeyance. If they take no steps to have it referred to them and quietly permit it to become a law, it will become effective in thirty days from the time it is filed with the mayor of a city. But even in reference to this it must be remembered that the people of the municipality virtually place their stamp of approval upon the same by quietly permitting it to become a law of the municipality. If they ask to have it referred to them the ordinance will not become effective until "approved by the majority of those voting upon the same * * * at a regular or general election occurring subsequent to forty days after the request to have same referred to the people is

filed with the city auditor." Instead of approving the same at the polls, the people may decide in the exercise of their sovereign rights to disapprove the same, in which case it will not become a law at all. The position of the people in reference to law making under the principles of the referendum is exactly parallel to the position of the governor of the state in the matter of law making. No act passed by both houses becomes effective from that fact alone. The act must be referred to the governor and he is given a period of ten days within which to decide whether he will permit the act to become a law without his action in reference to the same or whether he will approve the same by signing it or disapprove the same by vetoing it. No one would hold for a minute that an act is in force or effect simply because it has passed both branches of the legislature. The thing that gives the act vitality is either the tacit approval of the governor or his signing the same, and if he does not see fit to do one or the other of these things, he can veto the same and prevent its becoming a law at all.

In view of all the above, to what conclusion can we come in reference to your query, or rather to what conclusion must we come?

The statutes says no ordinance shall go into effect until thirty days after it shall have been filed with the mayor of a city. The principles above enunciated demand that the provisions of an ordinance should not go into effect until a certain time after it has been filed with the mayor in order that the people may have the right to refer the said ordinance to themselves for approval or disapproval, should they desire so to do.

The question involved is really whether the principles contained in an ordinance shall be anticipated or not. If we can anticipate the going into effect of the ordinance for the purpose of the change in salary, why not anticipate it in reference to contractual rights and remedies? If we anticipate its going into effect for one thing, why not anticipate its going into effect for all things?

It is my opinion that the going into effect of the ordinance can not be anticipated for any purpose whatever, and that the provisions of the old ordinance must be relied upon entirely as to the status of the law until the new ordinance goes into force and effect under the principles of the referendum. The provisions of the new ordinance during the referendum period are held in abeyance. The ordinance works no change or effect whatever upon the rights of persons until the thirty-day period has expired. No rights can be predicated upon it; no remedies can be secured from it. If it does not go into effect for a period of thirty days as provided in the statute, then the repealing clause of the ordinance does not go into effect until this period has expired. If the repealing clause is not in effect, then the old ordinance in reference to salary remains in full force and effect until the end of said referendum period. The provisions of both ordinances can not be in force and effect, hence the provisions of the new ordinance are not effective as to salary until the end of the referendum period. Therefore if the change in salary takes place after the first of January, 1918, it could not affect the salary of the city official taking office on the first of January, 1918, and this from the provisions of section 4213 G. C. Hence the conclusion is sound that he must draw a salary of $1,200.00 during the term for which he was elected at the November election in 1917 and upon which he had entered at the time the change in salary took place.

Further, if we should select the other alternative above suggested we would under certain circumstances get into grave difficulties. Suppose we assume that the change in salary took place when the council acted in the matter of passing the ordinance; then the change would be effective before January 1, 1918, and the official elected last November would be entitled to $1,500.00 from the beginning of his term. Section 4227-2 G. C. specifically states that the ordinance shall not be effective until thirty days after it is filed with the mayor, thus making this specific

ordinance take effect after the middle of January. How could the new official draw salary under an ordinance which is not yet in effect and while there is still an ordinance in effect fixing his salary at $1,200.00?

Further, suppose a petition should be filed with the city auditor and the question should be put up to a vote of the people at the next regular and general election and suppose further that the people by their vote disapprove of the ordinance, then we would have this situation: The officer would begin his term on the theory that the change in salary took place in December, 1917, and therefore he would be entitled to $1,500.00 from the beginning of his term. But he would awaken on the morning after the election and find that no change in salary had really been made at all because the people refused to approve the ordinance and it fell and never would become effective.

Hence, from reasoning and from the practical working out of the matter, I feel confident that the only correct conclusion is to the effect that the ordinance becomes effective for no purpose until the last turn is made by the legislative machinery, namely, until the people quietly approve it by permitting it to become a law at the end of the referendum period or until they approve the same on election day, should they ask for a referendum.

In addition to the reasoning herein set out I desire to call your attention to opinion No. 493, rendered to the public utilities commission on August 3, 1917. In said opinion I was placing a construction upon our constitutional provisions in reference to the referendum on a state of facts similar to those submitted by you and much that was stated in said opinion will apply to the matter now before me.

In rendering the above opinion I am not unmindful of the fact that this department has not always been uniform in reference to the effect of the referendum upon the question of change in salary. Mr. Denman, in an opinion rendered on January 10, 1910 (reports of the attorney-general for 1910-1911, page 1045), held that a change in salary made by an ordinance would not become effective as to persons whose terms began during the ten-day period during which the ordinance must be published before it would become effective. This was a much stronger holding than the one which I have made, due to the fact that everything had been done in reference to said ordinance so far as legislation was concerned that could be done because the principle of the initiative and the referendum was not in force and effect at that time.

My predecessor, Hon. Timothy S. Hogan, rendered an opinion December 29, 1911 (reports of the attorney-general for 1911-1912, page 1619), which if applied to the facts presented in your communication would permit the official, entering upon the duties of his office on January 1, 1918, to draw a salary of $1,200.00 up to the time that the ordinance would become effective and from that time on a salary of $1,500.00.

In an opinion rendered by my predecessor, Hon. Edward C. Turner, on October 15, 1915 (reports of the attorney-general for 1915, page 2005), he held practically the same as did Mr. Hogan. But notwithstanding these holdings of my predecessors it is my opinion that the conclusion reached by me in reference to the matter set out in your communication is correct.

Hence, answering your question specifically, it is my opinion that the officer taking his position on January 1, 1918, would draw the salary of $1,200.00 from the beginning of the term for which he was elected to the end thereof, and this under the principles as set out in section 4227-2 G. C.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

927.

JUDGE OF ELECTIONS—WHO SERVED AT ELECTION—INELIGIBLE TO OFFICE OF MEMBER OF BOARD OF EDUCATION—HOW VACANCY CAUSED THEREBY FILLED.

1. *A person who served as a judge of elections is ineligible to office of member of the board of education, for which position he received sufficient votes to elect him at the last election.*

2. *A person who receives a smaller number of votes than his opponent is not considered elected because of the ineligibility of the successful candidate.*

3. *Where a person receives sufficient votes to elect him as one of a group of persons who are elected members of a board of education, and such person is ineligible to hold said position, a vacancy occurs which shall be filled by the remaining members of the board.*

COLUMBUS, OHIO, January 10, 1918.

HON. WAYNE STILWELL, *Prosecuting Attorney, Millersburg, Ohio.*

DEAR SIR:—You request my opinion on the following matter:

> "A question has arisen with regard to the election of a member of the Millersburg school board and I have been asked to secure your opinion. * * * Mr. R. L. P., who received third highest vote, and whose name was on the ticket, was a judge of elections. He had, sometime previous to the election, verbally asked that his name be not printed. Knowing that he was disqualified by reason of his service as judge (section 5092) he did not file an expense account or try to qualify in any way for the office. Mr. C. R. W., who was fourth highest, filed his expense account and claims that he has been duly elected."

Section 5092 G. C. reads as follows:

> "No person, being a candidate for an office to be filled at an election, other than for committeeman or delegate or alternate to any convention, shall serve as deputy state supervisor or clerk thereof, or as a judge or clerk of elections, in any precinct at such election. *A person serving as deputy state supervisor or clerk thereof, judge or clerk of elections contrary to this section shall be ineligible to any office to which he may be elected at such election.*"

So that when Mr. R. L. P. served as a judge of elections on the election board in the Millersburg school district, he thereby became ineligible to be a candidate for member of the board of education and no certificate of election could be issued to him as such member. That Mr. C. R. W. who was a candidate and who received fewer votes than did R. L. P. at such election, filed his expense account, would not make C. R. W. the duly elected member at such election. This question was squarely passed upon in State ex rel. v. Speidel et al, 62 O. S., 156, where Davis, J., at page 159, uses the following language:

> "The election may fail altogether * * * * *by reason of ineligibility of the successful candidate* * * * * but that could not elect a man who in fact has received a smaller number of votes than his opponent."

Following the above decision, then, I must advise you that there is a vacancy in the membership of said board which is caused by the ineligibility of the candidate who was voted for and the same should be filled as other vacancies are filled and under the provisions of section 4748 of the General Code, which reads in part as follows:

> "A vacancy in any board of education * * * * shall be filled by the board at its next regular or special meeting, or as soon thereafter as possible, by election *for the unexpired term.* A majority vote of all the remaining members of the board may fill any such vacancy."

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

928.

KENNEL—AS USED IN SECTION 5652-1 G. C. DEFINED—THE PHRASE "NOT CONSTANTLY CONFINED" DOES NOT APPLY TO UNREGISTERED DOGS BELONGING TO REGISTERED KENNEL WHERE SUCH DOGS ARE TAKEN OUT FOR EXERCISE.

(1) *The term "kennel" as used in section* 5652-1 *G. C.* (107 *O. L.*, 534), *means any pack or collection of dogs, over the age of three months, kept together for the purposes of hunting or for sale.*

(2) *The phrase "not constantly confined," as used in the statutory provision designating the conditions under which unregistered dogs over the age of three months may be seized and impounded, refers to dogs at liberty without restraint, and the statutory provision requiring the seizure and impounding of such unregistered dogs has no application to unregistered dogs belonging to a registered kennel where such dogs are taken out for exercise under leash or other restraint.*

COLUMBUS, OHIO, January 10, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—This department is in receipt of a communication in which you ask an opinion as follows:

> "(1) Section 5652-1 G. C., (107 O. L. 534) provides a registration fee against every owner of a kennel of dogs of $10.00 per year. Does this apply to any person who breeds and sells dogs, or does it apply only to a professional breeder and dealer in dogs?
>
> (2) The kennel provision of this law, where a kennel is registered, provides that dogs which are constantly confined need not be registered. When a kennel keeper takes out such dogs for exercise that are in leash, are they to be considered to be confined to the extent that a sheriff could not seize them because they had no tag, while being so exercised?"

As explanatory of some of the provisions of section 5652-1 General Code I note the provisions of section 5652 General Code, which reads:

> "Sec. 5652. Every person who owns, keeps or harbors a dog more than three months of age, annually, before the first day of January of

each year, shall file together with a registration fee of one dollar for each male or spayed female dog, and a registration fee of two dollars for each female dog unspayed, in the office of the county auditor of the county in which such dog is kept or harbored, an application for registration for the following year beginning the first day of January of such year, stating the age, sex, color, character of hair, whether short or long, and breed, if known, of such dog, also the name and address of the owner of such dog."

Section 5652-1 General Code provides as follows:

"Every owner of a kennel of dogs shall in like manner as in section 5652 provided, make application for the registration of such kennel, and pay therewith to the county auditor a registration fee of ten dollars for such kennel. Provided, however, that the owner of such dog kennel shall, in addition to paying such kennel fee, comply with all of the requirements of section 5652 with respect to every dog more than three months of age belonging to such dog kennel not kept constantly confined in such kennel."

The term "kennel" has been defined as meaning the house or other shelter place provided for dogs, or as meaning a number of dogs kept together. Thus, in the Standard Dictionary the term is defined as follows:

"1. A house or other shelter for a dog or for a pack of hounds.
2. A number of dogs kept together; a pack of hounds."

In the Century Dictionary the term is defined:

"1. A house or cot for a dog, or a pack of hounds.
2. A pack of hounds; a collection of dogs of any breed or of different breeds."

The term as used in section 5652-1 General Code seems to comprehend something of the idea denoted in both definitions. However, I am inclined to the view that the major idea denoted by the use of the term "kennel" in this section is that of a pack or collection of dogs rather than the place where the dogs are kept.

In the case of *The State* v. *Tripp,* 84 Conn., 641, the court had under consideration the prosecution of the defendant on the charge of killing a couple of dogs belonging to a registered or licensed kennel registered in the name of two persons as owners, under a statute which provided that any owner or keeper of a kennel might apply, on or before the first day of May, to the town clerk of the town in which such kennel was located for a kennel license; that the town clerk should issue to such applicant a kennel license for one year from the first day of May, which license was required to specify the name of the kennel, the name of the owner and the keeper of the same, and that every dog kept in such kennel so licensed should when at large wear a collar bearing a metal tag or plate upon which should appear the number of the kennel license, the name of the town issuing such license and the year thereof, which plates or tags were to be furnished by the town clerk.

Another section of the act provided that the dog warden should take into his custody any dog found at large without the required tag or plate on its collar, and

that after notice was given of the capture of the dog, unless it was redeemed within a certain fixed time by the payment of a sum of money in no case exceeding three dollars, it should be killed by such warden. Another section applicable to dogs belonging to a licensed kennel provided that every person who should unlawfully kill or injure such a dog should be fined or imprisoned.

The court in the case above noted, in affirming a judgment of the lower court convicting defendant of an offense of unlawfully killing dogs belonging to a registered kennel, in its opinion uses the following language:

> "The fact that a part of the pack of hounds which formed the licensed kennel were kept at the house of each of the owners in the same town did not vitiate the license. The word 'kennel' as used in the statute does not mean the house or place in which the dogs are kept, but a pack or collection of dogs usually kept or bred for hunting, or for sale."

After mature consideration I am unable to arrive at a more satisfactory definition of the term "kennel" as used in this act than that given in the case of *State v. Tripp,* supra, and in answer to your first question I am of the opinion that the term "kennel" as used in this act means any pack or collection of dogs over the age of three months kept together for the purpose of hunting or for sale.

With respect to your second question I note the provisions of section 5652-7 General Code and a part of the provisions of section 5652-8 General Code, which read as follows:

> "Sec. 5652-7. County sheriffs shall seize and impound all dogs more than three months of age, except dogs kept constantly confined in a registered dog kennel found not wearing valid registration tags. Upon affidavit made before a justice of the peace, that a dog more than three months of age and not kept constantly confined in a registered dog kennel is not wearing a valid registration tag and is at large, or is kept or harbored in his township, such justice of the peace shall forthwith order the sheriff of the county to seize and impound such animal. Thereupon such sheriff shall immediately seize and impound such dog so complained of. Such sheriff shall forthwith give notice to the owner of such dog, if such owner be known to the sheriff, that such dog has been impounded, and that the same will be sold or destroyed if not redeemed within four days. If the owner of such dog be not known to the sheriff, he shall post a notice in the county court house describing the dog and place where seized, and advising the unknown owner that such dog will be sold or destroyed if not redeemed within four days."
>
> "Sec. 5652-8. County commissioners shall provide for the employment of deputy sheriffs necessary to enforce the provisions of this act, shall provide nets and other suitable devices for taking dogs in a humane manner, and, except as hereinafter provided, shall also provide a suitable place for impounding dogs, and make proper provision for feeding and caring for the same, and shall also provide humane devices and methods for destroying dogs. * * *"

Without extended discussion of the statutory provisions applicable to your second question above quoted, I am of the opinion that the phrase "not constantly confined," as used in the statutory provision designating the conditions under which unregistered dogs over the age of three months may be seized and impounded, refers to dogs at liberty without restraint, and that the statutory pro-

vision requiring the seizure and impounding of such unregistered dogs has no application to unregistered dogs belonging to a registered kennel where such dogs are taken out for exercise under leash or otherwise restrained.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

929.

ASSESSMENT—WHEN SAME NOT CERTIFIED TO AUDITOR WITHIN TWO YEARS—LIEN AGAINST PROPERTY EXTINGUISHED—PERSONAL LIABILITY RUNS SIX YEARS.

Where a village officer fails to certify an assessment for collection to the county auditor within two years after the same is payable, the lien of such assessment against the property is thereby extinguished. The owner of such property at the time such assessment was made, is personally liable to pay such assessment and where six years have not elapsed since said assessment became payable, the statute of limitations has not yet run against the personal liability of such owner.

COLUMBUS, OHIO, January 10, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Under recent date you submitted the following statement of facts and inquiry:

> "The clerk of a village of the state of Ohio, either through neglect of duty, carelessness or inefficiency, failed to certify to the county auditor for collection an assessment for a street improvement which was due and payable July 15, 1912, which certification to the county auditor has never been made up to the present time. The owner of the property against which the assessment was originally made sold said property in February, 1915.
>
> QUESTION: In view of section 3906 G. C., together with other statutes of limitation, can anybody at the present date be held liable for the amount of the assessment unpaid? If so, who, and for what remaining period of time?"

Section 3906 General Code, to which you refer, reads as follows:

> "The lien of an assessment shall continue two years from the time it is payable, and no longer, unless the corporation, before the expiration of the time, causes it to be certified to the auditor of the proper county, for entry upon the tax list for collection, or causes the proper action to be commenced in a court having jurisdiction thereof, to enforce such lien against such lots or lands, in which case the lien shall continue in force so long as the assessment remains on the tax list uncollected or so long as the action is pending, and any judgment obtained, under and by virtue thereof, remains in force and unsatisfied."

By virtue of this section the lien of the assessment continues only two years,

unless the assessment has been certified to the county auditor. It does not affect, however, the personal liability of the owner of the property at the time the assessment was made to pay such assessment.

Section 3897 General Code reads as follows:

> "Special assessments shall be payable by the owners of the property assessed personally, by the time stipulated in the ordinance providing therefor, and shall be a lien from the date of the assessment upon the respective lots or parcels of land assessed. When presented with a receipt from the contractor, in whose favor an assessment is confirmed, or his assigns, showing such assessment on any property for any improvement to have been paid, the auditor or clerk shall at once record the fact upon the margin of the record of the assessment, with the date of such presentation, from which time such property shall be released from the lien."

Under the provisions of this section the owner of the property is personally liable for the assessment.

In the case of Corry v. Gaynor, 21 O. S. 277, the first branch of the syllabus reads:

> "In an action to recover a personal judgment for the amount of an assessment for the improvement of streets, it must appear that the defendant was the owner of the lot assessed at the date of the assessment and it is not sufficient to aver that he was such owner at the commencement of the suit."

In the case of city of Toledo v. Barnes, 8 C. C. 684, a personal judgment for the collection of a special assessment was sustained.

The above authorities support the proposition that the owner of property at the time an assessment is made, is personally liable to pay such assessment. By virtue of section 3898 General Code, his liability is limited to his interest in the property assessed.

This section reads as follows:

> "If payment is not made by the time stipulated, the amount assessed, together with interest, and a penalty of five per cent. thereon, may be recovered by suit before a justice of the peace, or other court of competent jurisdiction, in the name of the corporation, against the owner or owners, but the owner shall not be liable, under any circumstances beyond his interest in the property assessed, at the time of the passage of the ordinance or resolution to improve."

As the amount of the assessment and the value of the property are not stated in your inquiry, the extent of the liability need not be further considered.

The next question to be considered is the application of the statute of limitation. If any limitations of action apply in this case, it will be the six-year limitation contained in section 11222 General Code. This section reads as follows:

> "An action upon a contract not in writing, express or implied, or upon a liability created by statute other than a forfeiture or penalty, shall be brought within six years after the cause thereof accrued."

In the case of Hartman v. Hunter, Treasurer, 56 O. S., 175, the second branch of the syllabus reads:

> "A civil action brought by the treasurer of a county under section 1104, Revised Statutes, to enforce assessments for the contruction of township ditches, is by the second clause of section 4891, Revised Statutes, barred in six years after the cause of action arises."

In the case of City of Cincinnati v. Fogarty, 13 O. N. P., N. S., 631, the syllabus reads:

> "An action for recovery of unpaid street assessments is an action upon a liability created by statute, and is therefore controlled by the six years statute of limitations."

In each of the above cases the assessment had been made prior to the amendment of section 2670 General Code, which now contains the clause

"nor shall any statute of limitations apply to such action."

This clause was inserted in this section by act shown in 95 Ohio Laws, 93, and passed on April 4, 1902.

Said section 2670 General Code reads as follows:

> "Judgment shall be rendered for such taxes and assessments, or any part thereof, as are found due and unpaid, and for penalty and costs for the payment of which the court shall order such premises to be sold without appraisement. From the proceeds of the sale the costs shall be first paid, next the judgment for taxes and assessments, and the balance shall be distributed according to law. The owner or owners of such property shall not be entitled to any exemption against such judgment, nor shall any statute of limitations apply to such action. When the lands or lots stand charged on the tax duplicate as forfeited to the state, it shall not be necessary to make the state a party, but it shall be deemed a party through and represented by the county treasurer."

This section applies to actions by a county treasurer to foreclose the lien for taxes or assessments against the property. It does not apply in the present case for the reason that the assessment in question has not been certified to the county auditor.

It appears from the statement that the assessment in question was due and payable July 15, 1912. The six-year period therefore will not expire until July 15, 1918. The statute of limitations has not yet run against the person who owned the property at the time the assessment was made.

It is my opinion, therefore, that the person or persons who owned the property in question at the time the above assessment was made, can be held personally liable for the amount of the assessment unpaid. There is no liability, however, against the property as that has been barred by virtue of the provisions of section 3906 General Code.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

930.

BOARD OF EDUCATION—WHEN MONEY IS BORROWED TO CREATE A FUND OUT OF WHICH TO PAY FOR LABOR, ETC., THEREAFTER FURNISHED IN THE COMPLETION OF SCHOOL BUILDING—DOES NOT CREATE SUCH AN INDEBTEDNESS THAT MAY BE FUNDED UNDER SECTION 5656—DISAPPROVAL BOND ISSUE—MARION CITY SCHOOL DISTRICT.

The only indebtedness that a board of education of a school district is authorized to fund under the provisions of sections 5656 *and* 5658 *G. C. is such indebtedness as represents an accrued existing, valid and binding legal obligation of the school district. Where a board of education, instead of issuing bonds for the purpose, borrows money from a bank or banks for the purpose of creating a fund out of which to pay bills or estimates for labor and material thereafter furnished in the completion of a school building, such transaction, for want of authority in the board of education to borrow money for such purpose in this manner, does not have the effect of creating a legal indebtedness to such bank or banks which the board of education is authorized to fund by the issue and sale of bonds under the provisions of the above mentioned sections of the General Code.*

COLUMBUS, OHIO, January 10, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of Marion city school district, in the sum of $45,000.00, for the purpose of funding and extending time of payment of certain indebtedness which said school district from its limits of taxation is unable to pay at maturity.

I am herewith returning, without my approval, transcript of the proceedings of the board of education of Marion city school district relating to the above bond issue.

The resolution providing for the issue of said bonds recites that said bonds are issued for the purpose of extending the time of payment of certain indebtedness of the board of education of Marion city school district heretofore incurred in the payment for the completion of a new high school building and equipment therefor.

In answer to my request for more specific information as to the nature of the indebtedness sought to be funded by the proposed bond issue the clerk of the board of education of said school district wrote me as follows:

"In the building and completion of a new high school building and the equipment for same, our funds became exhausted before same was completed and accomplished. We took the matter to our local banks and, rather than stop all until bonds could be issued (and thus lose the use of this school for perhaps this school year) the banks advanced us the money and accepted as evidence our notes—pending the issuance of bonds, upon the completion of building and installation of equipment, and in accordance with law—all expenditures having been properly authorized by a yea and nay vote at time they were authorized. These bonds are to cancel that indebtedness and that only."

The issue of the bonds here in question is provided for under the assumed authority of sections 5656 and 5658 General Code. It is clear from the provisions of these sections that before any indebtedness can be funded or the time of payment thereof extended by the issue of bonds under their provisions said indebtedness must be a present existing, valid and binding obligation of the board of education or other political subdivision therein named issuing such bonds. I do not understand from the information at hand that the money borrowed by the board of education of Marion city school district from the banks of that city was so borrowed for the purpose of paying and discharging the then existing, valid and binding obligations against the school district incurred in completing the structure and equipment of the high school building. If this were the case the act of the board of education in borrowing this money from the bank would itself be the funding of an existing indebtedness under the authority of the sections of the General Code hereinbefore noted, and the indebtedness so incurred by the board of education to the banks in the transaction would be a legal and binding obligation which, when due and payable, could be funded and the time of payment thereof extended by an issue of bonds under the authority of said sections of the General Code. As before noted, however, I do not so understand this transaction. On the contrary, it seems clear from the information given me by the clerk of the board of education that after this money was borrowed from the banks the same was used by the board of education in paying bills or estimates for labor and material thereafter furnished in completing the construction and equipment of the high school building. In other words, as stated by the clerk in his letter, instead of issuing bonds for the purpose of creating a fund out of which to complete said building the money necessary therefor was borrowed from the banks on the notes of the board of education. I know of no statutory provision authorizing a board of education to borrow money for such purpose in the manner here indicated, and for this reason I am unable to hold that the indebtedness of the board of education to the banks is a valid and binding obligation such as the board of education is authorized to fund under the provisions of sections 5656 and 5658 General Code. The obligation of the board of education to the banks is a moral obligation of the highest character which in any event should be paid, if there is any means whereby the board of education may do so. It is manifest from the provisions of sections 5656 and 5658 General Code, however, that the only obligations that can be funded under their provisions are those which represent existing, valid and binding legal indebtedness, and, as before noted, I am unable to find that the indebtedness sought to be funded by the proposed bond issue is of this character.

For this reason I am unable to approve this bond issue and am compelled to advise you not to purchase same. However, under all the circumstances I deem it advisable that your action rescinding your former resolution providing for the purchase of these bonds should be general in terms rather than upon the specific ground of illegality above noted. Very truly yours,

JOSEPH MCGHEE,
Attorney-General.

931.

BOARD OF EDUCATION—BOND ISSUE UNDER SECTION 7629 G. C.—HOW LIMITED—DISAPPROVAL—BOND ISSUE—AKRON CITY SCHOOL DISTRICT.

The authority of a board of education of a school district to issue bonds under the provisions of section 7629 General Code for the purpose of improving public

school property is limited to the issue of bonds for specific improvements determined by the board at the time the issue of the bonds is provided for; and the resolution of the board of education providing for such bond issue should indicate the fact that such bonds are issued for such specific improvements.

COLUMBUS, OHIO, January 10, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of Akron city school district in the sum of $250,000.00, for the purpose of improving property in said school district.

I am herewith returning, without my approval, transcript of the proceedings of the board of education of Akron city school district relating to the above bond issue.

The transcript shows that at a regular meeting of the board of education of said school district on November 27, 1917, the board adopted a resolution providing for the issue and sale of bonds in the sum of $125,000.00 for the purpose of purchasing sites for and erecting school buildings in such school district. Pursuant to this resolution the bonds therein provided for were offered to the board of sinking fund trustees of the city of Akron, in its capacity as the board of commissioners of the sinking fund of Akron city school district, and thereafter, pursuant to said resolution, said issue of bonds was offered to the industrial commission of Ohio and by that body accepted. Thereafter, on December 18, 1917, at a meeting of the board of education of said school district held by way of adjournment from the regular meeting of the board under date of December 11, 1917, one of the members of the board of education offered a resolution as a substitute for the $125,000.00 bond resolution adopted by the board on November 27, 1917, above noted. The resolution so offered at the meeting under date of December 18, 1917, was adopted and provided for the issue and sale of bonds of said school district in the sum of $250,000.00 "for the purpose of improving public school property, and in anticipation of income from taxes for such purpose to be levied." There is nothing in this later resolution to indicate whether or not it was intended in the issue and sale of bonds therein provided for to accomplish, in whole or in part, the purpose intended by the issue and sale of the bonds provided for in the first resolution. In the absence of a clear indication on the face of the later resolution that the same was intended to cover all of the purposes sought to be accomplished in the adoption of the first resolution, and in face of the fact that affirmative official action was taken looking to the disposition of the bonds provided for in the first resolution, it may well be doubted whether or not the adoption of the second resolution as a substitute for the first was effective to work a repeal or rescission of the first resolution. This being so, and if by the second resolution it is intended to accomplish, in whole or in part, the purpose sought to be accomplished in the adoption of the first resolution, it is manifest that the second resolution cannot be legally effective for such purpose as long as the first resolution stands without repeal or rescission.

In the second place, I am of the opinion that the second resolution is defective inasmuch as it does not indicate that the board of education in its adoption had in mind any specific improvements to public school property to be made by it. In

other words, so far as this resolution is concerned, the proceeds of bonds issued and sold pursuant thereto might be placed in a fund and improvements of school property be made by the board from such fund from time to time as the board might hereafter determine. I do not think it is legally competent for a board of education to issue bonds for any such purpose. I recognize, of course, that said resolution in providing for the issue of said bonds "for the purpose of improving public school property" uses the exact language contained in section 7629 of the General Code, under the authority of which the resolution was adopted. The fact that this general language is used in section 7629 is not, to my mind, authority for the proposition that the board of education may issue bonds under its provisions for other than specific improvements of public school property determined upon by the board at the time of the adoption of the resolution.

To further illustrate the point I have in mind, it may be noted that section 3939 of the General Code (the same being one of the sections of the Longworth act so-called), provides in general terms that a municipal corporation may issue bonds for the purpose of improving streets. Under this general language it would hardly be contended, I think, that a municipal corporation could issue bonds for the purpose of creating a fund out of which to pay the cost of street improvements that might thereafter be made from time to time. On the contrary, it was held in the case of *Heffner* v. *City of Toledo,* 75 O. S. 413, that this could not be done.

It may be further observed that if as a matter of fact the board of education in the adoption of the second resolution intended by the use of a part of the proceeds realized from the sale of these bonds to accomplish the purpose intended in the adoption of the first resolution, it is manifest that the second resolution would be defective for such purposes for the reason that by the first resolution it was intended to obtain public school property as well as to improve same within the terms of section 7629 General Code.

The transcript is defective in a number of other particulars. For instance, there is no statement in the transcript of the tax duplicate valuation of taxable real and personal property in said school district, nor of the tax rates for all purposes on the taxable property of the school district. Again, there is no statement as to the tax duplicate valuation of the taxable real and personal property in said school district for the year 1916; nor is there any statement as to the amount, if any, of other bonds issued by the board of education under section 7629 General Code during the school fiscal year 1917. It is obvious that this information would be required in order that it may be ascertaind whether said above bond issue in the sum of $250,000.00 was within the two mill limitation prescribed by said section of the General Code. Again, though the transcript shows that said bonds were offered to the trustees of the sinking fund of the city of Akron in their capacity as the board of sinking fund commissioners of said school district, there is nothing in the transcript to show that such offer was rejected, and under section 1465-58 General Code it is only bonds which have been so offered and rejected that the Industrial Commission is authorized to purchase.

The objections last noted might be cured by further information, but inasmuch as the resolution providing for the issue of these bonds is itself considered by me to be defective I have no discretion to do otherwise than to advise you not to purchase said bonds on the present legislation of the board of education.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

932.

TEACHER—ASSISTANT COMES WITHIN THAT TERM—MINIMUM SALARY MAY BE WAIVED—ASSISTANT—WHO COMPLIES WITH THE LAW RELATIVE THERETO—COMES WITHIN TEACHER'S PENSION LAW—WHEN ENTIRE SALARY IS PAID TO TEACHER—BOARD OF EDUCATION NOT LIABLE FOR PREMIUM FOR TEACHER'S PENSION FUND.

1. *A person who is employed as a teacher but is designated as an "assistant" comes within the term teacher as that term is commonly used by our school laws.*

2. *The provisions of section 7595, in relation to the minimum salary, is a provision for the teachers and may be waived by them. Where, therefore, a teacher enters into a contract to teach for a sum less than the minimum required by said section, such teacher cannot recover the difference between the amount he received and the minimum provided by law.*

3. *Persons who are hired to teach in the public schools and who comply with all of the provisions of law in relation to securing certificates, and teach in the day schools, come within the provisions of the teacher's pension laws of this state, although such persons may be designated as "assistants."*

4. *Where a teacher receives the entire amount of his salary, the board of education cannot be required to pay to the trustees of the teacher's pension fund $2.00 per month for each month of such teacher's employment, thus making an amount over and above what the teacher had contracted to receive. Such amount should be deducted from the teacher's salary and paid to the trustees of the pension fund.*

COLUMBUS, OHIO, January 10, 1918.

Hon. F. B. Pearson, Superintendent of Public Instruction, Columbus, Ohio.

DEAR SIR:—A letter from Mr. E. F. McKee, city solicitor of Springfield, Ohio, contains questions of such general interest that I am convinced the same warrant my opinion to you in relation thereto. The letter reads in part as follows:

> "A teacher who has served twenty years in the Springfield schools and who is now denied reappointment is applying for teacher's pension under the last provision of General Code section 7891. The first year of the twenty was as 'assistant' teacher on one-half the salary of regular teachers in the first year. The teacher was otherwise regularly employed, (a) having been appointed at the regular time and with all other teachers, (b) being required to have and having the teacher's certificate according to law, and (c) having taught all day and every day for the school year, though subordinate to another regular teacher. * * *
>
> It now appears that the board of education of this school district has for the past several years been employing a number of persons to teach in the public schools, who were by the school board designated as 'assistants.' These assistants were (a) appointed at the regular time and with all other teachers in the public schools, (b) required to have, and having, a teacher's certificate according to law, and (c) teaching all day and every day during the school year, though subordinate to another 'regular' teacher. The board of education considering these employes as 'assistants' only, and not regular teachers, paid them only approximately $20.00 per month during such employment, instead of the minimum of $40.00 per month required under section 7595 G. C. to be paid to any person employed to teach in any public

school in Ohio. It appears, however, that the board did not require such assistants to comply with the provisions of section 7877 G. C. and did not deduct $2.00 from the monthly salary of any such assistants."

Questions:

1. Is a person so employed as such assistant a teacher as the term is commonly used in our schools?
2. If such assistants are teachers is the board indebted to them for the difference in amount between the amount received and the minimum amount provided by law?
3. Are such assistants to be regarded as "teachers" under the provisions of the General Code which apply to teacher's pensions, to wit, sections 7875 to 7896 G. C.?
4. Is the board of education indebted to the trustees of the teacher's pension fund in the sum of $2.00 per month for each of such assistants and for each month of such employment since such law became effective?

The first question calls for a determination of the matter as to whether or not a person who is employed by a board of education as an assistant to a regular teacher can be regarded as a teacher himself, as that term is commonly used in our school laws.

The term "teacher" is not defined in the school laws except as to pension matters, but in the new Standard dictionary the term is defined as:

> "One who teaches or instructs, especially one whose business or occupation is to teach others; instructor; preceptor."

So that as far as the general definition is concerned those persons who were employed for the purpose of and whose duty it was to teach, whether they were termed assistants, regulars, or known by any other name, would within the general definition be considered teachers, unless some provision of our code prevented the application of said definition to such persons.

Section 7703 G. C. provides that the superintendent of schools may, subject to the approval and confirmation of the board of education, appoint all the *teachers.* Section 7699 G. C. provides that upon the appointment of any person to any position under the control of the board of education the clerk must promptly notify such person verbally or in writing of his appointment and the conditions thereof, and request and receive from him within a reasonable time to be determined by the board his acceptance or rejection of such appointment, and an acceptance within the time determined shall constitute a contract binding both parties thereto. The above provision applies specifically to teachers and I am informed it is the usual way of entering into the contract with teachers to teach in the public schools. That is to say, sometimes an application is filed and other times not, but the superintendent recommends or designates certain persons that he would appoint as teachers and the board of education approves or confirms the act, and the clerk notifies according to said section the teacher and the teacher accepts the appointment, thereby, under the provisions of said section, completing the contract.

Section 7690 provides that the board of education shall fix the salaries of all *teachers.*

Teachers are also required to have certificates to teach and it is provided by section 7786 that no clerk of a board of education shall draw an order on the treasury for the payment of a teacher for services until the teacher files with such clerk "a legal certificate of qualification" or a true copy thereof covering the entire time

of the service. So that, it would seem as though everything that was required to be done and performed, either by the board of education or by a teacher, in relation to a contract between such person and the board, had been done and performed in the case you mention. The persons secured certificates to teach and were appointed to certain teaching positions in the public schools. They were contracted with at a certain price and they performed their services during the entire day and for the entire term provided for the schools. Under section 4750 G. C. the board of education has a right to make such rules and regulations as it deems necessary for the government of its employes, and if under the provisions thereof the board determined that for the proper conduct of the schools it was necessary to have certain persons assist certain other persons in their work and that one should be called a regular, but all performing the services of teachers, the fact that the board did promulgate such a rule and designate certain persons as assistants would make those persons no less teachers than the persons who were called regulars, or were known by any other name, provided they were hired for and were performing the duties required of persons who teach in the public schools.

I can come to but one conclusion, then, and that is that those persons who were designated as assistants, but who were employed to teach during the full time of each and every day of the school year were no less teachers than those persons who were designated as regulars.

Coming now to the second question, viz., if such assistants are teachers, is the board of education indebted to them for the difference in amount between the amount received by them and the minimum amount which is provided for teachers by law? General Code section 7595 provides that no person shall be employed to teach in the public schools of Ohio for less than fifty (formerly forty) dollars a month and in your case that provision of law was violated. The board entered into contracts with certain persons whom they designated as assistants and the contracts provided that such persons should receive the sum of twenty dollars per month instead of the minimum salary of $40.00 which the law at that time provided. The minimum salary provision in said section 7595 of the General Code is for the benefit of teachers and it was held in Layne Admr. v. Board of Education, 83 O. S., 474, that where a teacher had waived such provision and had entered into a contract for a lesser amount, recovery could not be had of such minimum provided by law.

Following said decision, then, and in direct answer to the second question asked by Mr. McKee, I advise that the board of education is not indebted to such assistant teachers for the difference in amount between the amount received by them and the minimum amount provided by law.

The third question reads:

> Are such assistants to be regarded as "teachers" under the provisions of the General Code which applies to teacher's pensions, to wit, sections 7875 to 7896 G. C.?

The term "teacher," as above mentioned in this opinion, is defined for the purpose of the pension act in section 7881 G. C., as follows:

> "The term 'teacher' in this chapter shall include all teachers regularly employed by either of such boards in the day schools, including the superintendent of schools, all superintendents of instruction, principals, and special teachers, but in estimating years of service, only service in public day schools or day high schools, supported in whole or in part by public taxation, shall be considered."

In your case the teacher was one which was regularly employed by the board of education of the city school district and was employed to teach and did teach in the day schools of such district. Such day schools were supported in whole by public taxation and therefore such person comes squarely within the definition of "teacher" as defined by said section.

In his fourth question Mr. McKee inquires if the board of education is indebted to the trustees of the pension fund in the sum of $2.00 per month for each of such assistants and for each month of such employment since such law became effective.

Section 7877 G. C. provides that when the board of education of any school district has declared the advisability of creating a school teachers' pension fund, the clerk shall give notice to the teachers of such resolution. After the election of a board of trustees of such fund, as is provided by section 7876 G. C., the sum of $2.00 shall be deducted by the proper officers from the monthly salary of each teacher "and from the salary of all new teachers, such sum to be paid into and applied to the credit of such pension fund; and such sum shall continue so to be deducted during the term of service of such teacher." Said section further provides:

> "All persons employed for the first time as teachers by a board of education which has created such a pension fund shall be deemed new teachers for the purpose of this act, but the term new teachers shall not be construed to include teachers serving under reappointment. New teachers shall by accepting employment as such *accept the provisions of this act and thereupon become contributors to said pension fund in accordance with the terms hereof.* And the provisions of this act shall become a part of and enter into such contract of employment."

Under the provisions of the above quoted section it was the duty of the board of education to deduct from the salary of each teacher the sum of $2.00 per month and to pay the same to the trustees of the pension fund of such district. This the board of education failed to do. The money instead was paid to the teacher and the teacher instead of paying the same, as provided by law, also permitted the terms of the law, which were for the benefit of such teacher, to be violated. The question is, can such teacher secure the benefits ordinarily accruing to teachers under the provisions of said section when the teacher has been a party to the violation of the provisions of said act.

In Venable v. Schafer, et al., 7 O. C. C., n. s., 337, the plaintiff was a teacher in the schools of Cincinnati for a period aggregating twenty years. During one year of that time he was granted a leave of absence on account of ill health, during which year his son substituted for him. The son received a salary as such substitute, but contributed nothing toward the pension fund. The court held that the full time of employment had not existed and that Professor Venable could not recover pension under the provisions of the pension statutes, but "that Professor Venable is entitled to all the money he has paid into the pension fund, with interest, but that the trustees of said fund are not required to and may not pay him a regular pension."

Section 7891 G. C., referred to by you, provides that:

> "A teacher who resigns, upon application within three (3) months after such resignation takes effect, shall be entitled to receive *one-half of the total amount paid by such teacher into such fund.* If at any time a teacher who is willing to continue in the service of the board of education is not re-employed or is discharged before his term of service aggregates twenty years,

then such teacher shall be paid back at once all the money he or she may have contributed under this law. But if any teacher who has taught for a period aggregating twenty years is not re-employed by the board of education, such failure to re-employ shall be deemed his retiring, and such teacher shall be entitled to a pension according to the provisions of this act."

It is to the last sentence of said section that you particularly refer in your inquiry. Standing alone it would seem as though, no matter what the conditions were, that if a teacher had been employed for twenty years and was not re-employed by the board, then such teacher should be entitled to a pension according to the provisions of the act. But, the provisions of the act include not only the provisions of the act in 102 O. L., 445, which is the act amending said section 7891, but all the provisions of the chapter upon teachers' pensions, and before teachers are entitled to pensions under the provisions of said chapter, it is necessary that they contribute to the pension fund as is provided by the terms thereof. I do not believe that any such teachers can violate the law by accepting the entire amount of their contract price, even though that amount is below the minimum required by law, and then require the board, or a subsequent board, to make further contributions on their account and in that manner permit such teachers to become the recipients of the advantages provided by such funds.

Answering your question specifically, then, I advise you that the board of education is not indebted to the trustees of the teachers' pension fund in the sum of $2.00 per month for each of such assistants. Very truly yours,

JOSEPH MCGHEE,
Attorney-General.

933.

BALLOTS—AS USED IN SECTION 3396—DEFINED—NOT SYNONYMOUS WITH VOTES—SECTION 3395—CONSTRUED—ELECTIONS—TOWN HALLS.

1. *The word "ballots," as used in section* 3396 *G. C., means the official ballot furnished the voter on which to express his choice, and is not used synonymously with "votes."*

2. *When an election under the provisions of section* 3395 *et seq. G. C. results as follows:*

Town hall, yes	665
Town hall, no	537
Unmarked	169
Total	1,371

a majority of all the ballots has not been cast at such election in the affirmative, and the trustees therefore are not authorized to levy the necessary tax.

COLUMBUS, OHIO, January 11, 1918.

HON. CLARE CALDWELL, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR:—I have your communication submitting for opinion the following:

"In accordance with sections 3395 and 3396 of the General Code the

trustees of Liberty township, this county, gave notice of an election upon the question of building a town hall, which election was held November 6 of this year. The results were as follows:

Town hall, yes	665
Town hall, no	537
Unmarked	169
Total	1,371

Sec. 3396 G. C., provides:

'* * If a majority of all the *ballots* cast at the election are in the affirmative, the trustees shall levy the necessary tax, * *.'

The question I wish to ask is as follows: Are the words 'ballots' and 'votes' synonymous? Are the trustees to proceed with building of the town hall?

I am familiar with holding in the case of Dexter v. Raine et al., 18 W. B. 61, but in that case the statute provided 'if a majority of the *vote* cast,' and not as does section 3396, 'if a majority of the *ballots* cast.'"

The provisions of law on the submission of the construction of a town hall are found in the following sections:

"Sec. 3395. If in a township, it is desired to build, remove, improve or enlarge a town hall, at a greater cost than is otherwise authorized by law, the trustees may submit the question to the electors of the township, and shall cause the clerk to give notice thereof and of the estimated cost, by written notices, posted in not less than three public places within the township, at least ten days before election."

"Sec. 3396. At such election the electors in favor of such hall, removal, improvement, or enlargement shall place on their ballots 'Town Hall —Yes,' and those opposed 'Town Hall—No.' If a majority of all the ballots cast at the election are in the affirmative, the trustees shall levy the necessary tax, but not in any year to exceed four mills on the dollar valuation. Such tax shall not be levied under such vote for more than seven years. In anticipation of the collection of taxes, the trustees may borrow money and issue bonds for the whole or any part therefor, bearing interest not to exceed seven per cent, payable annually."

It will be noted that the question is decided in the affirmative "if a majority of all the *ballots cast at the election*" are in the affirmative.

The legislature, in the enactment of laws covering how the result of an election on different propositions submitted to the people shall be determined from the vote cast, has used varying language, but only in a few instances has the word "ballot" been used in this connection. Usually the language is:

"A majority of all the votes cast at the election";
"A majority of all the votes cast on such proposition";
"A majority of all the electors voting upon such question";
"A majority of the voters voting at such election";
"A majority of those voting thereon."

However, in a few instances, such as in section 3528 G. C., providing for an election for incorporation of a village, and section 3577-1 G. C., on the question of detachment of territory, we have language similar to that found in section 3396.

Is the word "ballots," as used in section 3396 G. C., synonymous with the word "votes" as used in other sections relating to elections, is the first question submitted by you.

Our supreme court, in State ex rel. v. Board of Elections, 80 O. S. 471, had before it the question of the constitutionality of the voting machine statute, and was called upon to determine what constitutes "ballot" as used in section 2 of article V of the Ohio constitution, which ordains that "all elections shall be by ballot."

Shauck, J., at p. 489 says:

> "In a school for the study of English, it might be both interesting and useful to consider the meanings of the word 'ballot' in primitive times, and the process by which its present meaning has been derived. But when the word was originally used as a part of the organic law of the state, the process of derivation had been completed and its meaning in the connection had become plain and well understood. It was not doubted then, nor has it ever been really doubted since, that it is a printed or written expression of the voter's choice upon some material capable of receiving and reasonably retaining it, prepared or adopted by each individual voter and passing by the act of voting from his exclusive control into that of the election officers, to be by them accepted as the expression of his choice."

So our supreme court has decided that as far as the word "ballot," as used in the constitutional provision above cited, is concerned, it means the expression of the voter's choice upon some material, rather than the material upon which such expression of choice is indicated.

The precise question, as far as I have been able to gather, has not been passed upon by our courts, nor are the courts of other jurisdictions fully in accord with the definition of the word "ballot" as given by our supreme court.

Our election laws provide for the preparation and printing of "ballots." They provide for what constitutes an "official ballot." They further provide that the election officers shall deliver the "ballot" to the elector desiring to and being qualified to vote. There are also provisions for marking the ballot, and the voter after marking same "shall fold his ballot" without displaying the marks made thereon, and after receiving the same from the qualified voter the judges deposit the "ballot" in the ballot box.

So far as our election laws are concerned, they use the term "ballot" when referring to the paper containing the names to be voted for, prior to giving same over to the voter, as well as to that paper on which is registered the voter's expression of his will.

Section 5089 G. C. provides for a proclamation of the result "when the result of the ballot is ascertained."

Section 5090 G. C. provides for the preserving and counting of disputed ballots.

In Cashman v. Entwistle, 100 N. E. 58, the supreme court of Massachusetts had before it this identical question and held that:

> "In view of the legislative policy to make an acceptance of a city charter turn upon the affirmative votes of a majority of those voting on the question, the word 'ballots' was synonymous with 'votes,' and that only the ballots carrying votes on the question of repeal were to be counted, and hence that, as there was a 'majority of the ballots cast' in favor of repeal, the old charter was repealed, and the plan receiving the larger number of votes was adopted as the new charter."

The court, in discussing the question as to whether ballots and votes were synonymous, admits that a technical construction of the words used might lead to the conclusion that the word "ballots" refers to the official ballots furnished by public authority, but states that broader and sounder considerations lead to the conclusion that the statute means that only the ballots on which were votes touching the particular question were to be counted.

At p. 59 the court says:

> "It is a fundamental principle of our system of representative government that the will of the majority expressed according to law must prevail. But the majority of those who actively participate in the affairs of state and not of the entire body of voters, controls. Elections must be settled as a practical matter by those manifesting interest enough to vote. Failure on the part of some of the electorate to take the trouble to express their views by depositing their ballots cannot stop the machinery of government. Apathy is not the equivalent of open opposition. It is the nature of our institutions that the majority of those who vote must accomplish the avowed purpose of all elections, which is the choice among candidates or the approval of policies. This principle is expressed in the provisions of our constitution to the effect that in elections of civil officers those having a plurality of the votes cast shall be elected, and that amendments of the constitution shall be adopted by the majority of those voting thereon. Those who come to an election and cast a blank ballot in principle are no more efficacious in expressing their convictions than those who absent themselves altogether. Both classes must be presumed to be willing to abide by the decision made by the majority of those voting, unless there is an express provision of law to the contrary. First Parish in Sudbury v. Stearns, 21 Pick. 148; Carroll County v. Smith, 111 U. S. 556, 563, 4 Sup. Ct. 539, 28 L. Ed. 517."

In section 3397 G. C., which follows the section in which the word "ballots" is used, will be found this significant language:

> "After such affirmative *vote,* the trustees may make all needful contracts," etc.

In section 3398 G. C. will be found the following:

> "In all cases where the trustees have been authorized by such affirmative *vote,* to purchase," etc.

It will be noted that in the case of Cashman v. Entwistle, supra, the court based its decision upon the "legislative policy" of that state, and the quotation from the opinion expressly states that the proposition as to the absent voter and the voter who deposits a blank ballot are willing to abide by the decision made by the majority of those voting, does not obtain if there is any express provision of law to the contrary.

It is a well settled principle of interpretation that an examination of the history of the legislation leading up to the enactment in question may be used to throw light upon doubtful expressions, and with this in view we will take up some, at least, of the legislative provisions on this question.

The first expression of the legislature on the subject is found in 46 O. L. 76, under date of February 24, 1848, when an act to authorize the erection of town halls was passed. The first section of this law provided that the

"* * * legal voters of any township * * * may assemble on the first Monday of April in each year at the usual place of holding elections * * * and then and there decide by ballot for or against levying a tax * * * for the purpose of erecting a town hall * * *."

This section further provided for a ten days' notice

"that the voters will be called upon to vote for or against the erection of such hall at said election."

Section 2 provided:

"That every voter who is in favor of levying a tax * * * for the erection of such hall shall indorse on his ballot 'town hall'; and if a majority of all the legal voters at such election vote 'town hall', then the trustees * * *."

Section 2 was amended in 58 O. L. 55, but did not change the mode of voting.

In 61 O. L. 58, under date of March 25, 1864, the former acts and amendments thereto were repealed, and the legislature passed a new act which, in addition to townships and incorporated towns, included certain cities, and the manner of voting under this act was identical with that provided in the prior law.

In 63 O. L. 84, under date of April 2, 1866, the prior enactments were repealed and a new act to authorize the erection, improving, enlarging or constructing additions to town halls was passed. The first section practically followed the language of section 1 of the former acts and provided:

"That the legal voters of any township * * * may assemble on the first Monday of April in any year at the usual place of holding elections * * * and then and there decide by ballot for or against levying a tax * * * for the purpose of erecting a town hall * * * ten days' notice shall be given * * *."

Section 2 of this act read:

"That every voter who is in favor of levying a tax on all the property * * * for the erection of such hall * * * shall endorse on his ballot 'town hall' * * *; and if a majority of all the ballots cast at said election *are endorsed as aforesaid* * * *."

In 66 O. L. 339, under date of May 7, 1869, sections 2 and 3 of the act of 1866 were amended, but the mode of voting remained the same, to wit:

"* * * shall endorse on his ballot 'town hall';"

and it was still provided that:

"If a majority of all the ballots cast at said election are endorsed as aforesaid," the trustees should levy the tax.

In 75 O. L. 92, under date of April 5, 1878, section 1 of the act of 1866 was amended so as to provide that:

"The voters of any township may at a regular April or October election decide by ballot for or against levying a tax on all the property subject to

taxation therein for the purpose of purchasing a site for and erecting a town hall * * * provided ten days' previous notice shall be given * * *."

In the revision of 1880, section 2 of the act found in 66 O. L. 339, and section 1 of 75 O. L. 92, appeared as section 1479 R. S., which read as follows:

"Sec.. 1479. In any township in which a town hall, or the removal, improvement, or enlarging of a town hall, costing more than is heretofore provided in this chapter, is desired, the trustees may submit the question to the electors, and for this purpose shall cause the clerk to give notice thereof, and of the estimated cost, by written notices, posted up at not less than three public places within the township, at least ten days before the spring or fall election, and at such election the electors in favor of such hall, removal, improvement, or enlargement, shall put on their ballots, 'Town Hall Yes', and those opposed 'Town Hall—No'; and if a majority of all the ballots cast at the election are in the affirmative, the trustees shall levy the necessary tax, but not in any year exceeding four mills on the dollar valuation, and such tax shall not be levied under such vote for more than seven years; and the trustees may, in anticipation of the collection of taxes, borrow money and issue bonds therefor, bearing interest not exceeding seven per centum, payable annually, for the whole or any part of the amount required."

In the act which introduced into Ohio the so-called "Australian ballot," passed April 30, 1891 (88 O. L. 449), will be found the following provision, appearing in section 14 thereof:

"Whenever the approval of a constitutional amendment or other question is to be submitted to a vote of the people, such question shall be printed on the ballot after the list of the candidates. The ballot shall be so printed as to give each elector a clear opportunity to designate by a cross mark (X) in a blank enclosed space at the left hand of or within the lines enclosing the name of each candidate, his choice of candidates and his answer to the question submitted."

The present provision concerning voting for propositions or questions submitted to the electors is found in section 5020 G. C.

In 97 O. L. 189 is an act passed in 1904 which revised the laws relating to elections. Section 1479 R. S., contained therein, read identically the same as section 1479 R. S. of the revision of 1880, quoted above, with the sole exception that immediately preceding the word "election," as first used in said section, the words "spring or fall," as found in the revision of 1880, are omitted in the act found in 97 O. L. 189.

Section 1479 R. S. became sections 3395 and 3396 G. C., supra.

From the foregoing legislative history it appears that in the first instance the voters endorsed on his ballot "town hall," and if a majority of all the legal voters at such election *voted "town hall,"* then the tax could be levied. Subsequently it was provided that the voter should endorse on his ballot "town hall," and if all the ballots cast at said election were *so endorsed,* then the tax might have been levied.

It was in the revision of the statutes by the commission created in 1875 (72 O. L. 87) and by virtue of the adoption of such revision by the legislature in the

act passed at the second session of the sixty-third general assembly on June 20, 1879, in the act to revise and consolidate the general statutes of Ohio as found in section 1479 R. S., that provision was made for a yea and nay vote, and we find that:

> "At such election the electors in favor of such hall * * * shall put on their ballots 'town hall—yes' and those opposed 'town hall—no'; and if a majority of all the ballots cast at the election are in the affirmative, the trustees shall levy the necessary tax * * *."

Prior to that time provision was only made for registering a vote for "town hall." Since that time the statutes have provided for both an affirmative and negative vote on such proposition.

The codifying commissioners of 1910 rewrote section 1479 R. S., splitting it up into two sections, viz., 3395 and 3396 G. C., with but slight changes in the wording thereof. Section 3396 G. C. provides that the electors in favor of the hall

> "shall place on their ballots 'town hall—yes' and those opposed 'town hall—no.' If a majority of all the ballots cast at the election are in the affirmative, the trustees shall levy the necessary tax * * *."

So it might seem that the retention of the term "ballots" throughout the varying changes that have been made in the statute, had some significance and that the continuing mind of the legislature carried the same concept throughout. While the terms "ballots" and "votes" are sometimes used interchangeably and in some instances synonymously, this is not always the case.

In Clary v. Hurst, 138 S. W. (Tex.) 566, at p. 569 it is stated:

> "'Ballot' and 'vote,' though sometimes used synonymously, are not synonymous and a 'ballot' is the instrument by which a voter expresses his choice between candidates or in respect to propositions; while his 'vote' is the choice or election as expressed by his ballot."

So too in Town of Eufaula v. Gibson, 98 Pac. 577, the Oklahoma supreme court held that the term "votes," in their constitution requiring a majority of the votes at a special election for the relocation of a county seat, is not the equivalent of "ballots," and that distinguished, illegal and blank ballots will not be considered in making up the aggregate number on which such majority is to be computed. In this case, which was a controversy growing out of a special election upon the location of a county seat, the primary question was as to what constituted a majority under the Oklahoma statute, and whether distinguished, illegal and blank ballots should or should not be excluded from estimation in making up the aggregate number on which such majority is to be computed. Dunn, J., in a lengthy and exhaustive opinion reviews the authorities on the question.

At p. 566 in the opinion the court says:

> "The law relating to candidates for public office requires the successful party to receive but a plurality or majority of the valid, legal, intelligible *ballots,* but not a majority of the *votes cast,* as in the county seat elections. Hence in our judgment it was proper and necessary to open the ballot boxes, as the ballots themselves are the best evidence of the ultimate fact to be established."

At p. 572 the court calls attention to the case of Gillespie v. Palmer, 20 Wis. 544, and commenting thereon says:

> "This decision is against the weight of authority in the United States and was subsequently criticised in the case of Sawyer v. Insurance Co., 37 Wis. 503-534, where the court stated that it had been subjected to the criticism, that the court decided it in accordance with 'the logic of war, rather than the logic of the law.' And in a later case, Bound v. Ry. Co., 45 Wis. 543, Mr. Chief Justice Ryan, speaking of the decision then being rendered by the court and not agreeing on one proposition decided, said:
>
> 'I deplore the decision on this point, not merely because I think it wrong, but because I am apprehensive that it will be classed with such cases as * * * Gillespie v. Palmer, 20 Wis. 544, which have long been a reproach to the court, as judgments proceeding upon policy rather than principle.'"

In Smith v. Board of Com'rs., 64 Minn. 16, the court had before it a question arising out of an election held under the county seat removal act. In its discussion of the election law the court recognized at least a technical distinction between "ballots" and "votes," using the following language:

> "From the whole tenor of the act it seems apparent that no distinction was attempted to be made between 'ballots' and 'votes,' and that the *technical difference* between 'ballots cast' and 'votes cast' was not in mind."

In State ex. rel. v. Blaisdell, 119 N. W. 300, the North Dakota supreme court considered some questions arising under an election for the creation of a new county. At p. 363 the court says:

> "A ballot as distinguished from vote in the legal sense and in a general way, is the piece of paper upon which the voter expresses his choice. Under the Australian system * * * the voter is permitted to express his choice or vote upon many offices and perhaps many questions on the same ballot. It is but an application of the same principle that prevailed when the choice of the voters was expressed *viva voce* or by any of the old methods. In other words, notwithstanding he may use but one ballot, the voter expresses as many separate votes or expresses his choice as many times as there are candidates or questions for or against which he votes."

In the above case the constitution of North Dakota provided that the question would be adopted by a majority of all the legal votes cast in each county of such election, and the court held:

> "That 'votes cast' are the totals of the separate votes or expression of voters' preference for or against the changing boundaries."

In State v. Custer, 66 Atl. 306, 308, it was held that while the terms "ballot" and "vote" are sometimes confused, and while they may sometimes be used synonymously, the "ballot" is in fact the instrument by which the voter expresses his choice between two candidates or two propositions, and his vote is his choice or election between the two, as expressed by his ballot, and when his ballot makes no choice between any two candidates or on any question, then he cast no "vote" for either of the candidates or on the question. These "ballots" are not "votes."

"The official ballot," so-called, is not complete when furnished to the elector as he enters the booth to prepare his "ballot." It is a mere form for a "ballot." When marked and prepared by a voter so as to indicate his choice or election, then, and not until then, does it become his constitutional "ballot."

It will be recalled that section 3396 G. C. still provides that the electors in favor of the hall "shall place on their ballots" their choice. Of course under the provisions of our present election law the voter does not place the words indicating his choice. The form of ballot is prepared and his choice is expressed by the prescribed marking of the "X" in the required blank space, but since originally the legislative requirement was that the elector place the words indicative of his choice on the ballot, I am inclined to the view that the ballot thus referred to was the paper or material on which he was to register his choice. If I am correct in this conclusion, then under well recognized principles the use of the same word "ballots later in the section would be construed to have the same meaning, and in the computation of what constituted the majority in the affirmative, all of the ballots cast at the election would have to be taken into consideration.

I feel that I have said too much upon the question, but the importance of the matter and the divergence of the courts' opinions on this and related questions are such that said matter is not entirely free from doubt. At the risk of being considered prolix, I have assembled such authorities as are here presented.

There seems to be, at least on the question of determining what constitutes a majority, a distinction under the election laws, when the question is one of candidates and when it is one of a vote on a proposition, but be that as it may, from a full consideration of the matter, especially in the light of the legislative history heretofore set forth, it is my view that a proper construction of the term "ballots" in section 3396 G. C. is that it was not and is not used as synonymous with "votes," and I so hold.

Your next inquiry is, are the trustees authorized to proceed with the building of the town hall, the result of the vote on the proposition being:

Town hall—Yes	665
Town hall—No	537
Unmarked	169
Total	1,371

You refer to the case of Dexter v. Raine, et al., 14 W. L. B. 61; affirmed without opinion, 18 W. L. B. 301. Under the section construed by the court in that case it was provided:

> "If a majority of the votes cast shall be in the affirmative the commissioners shall proceed," etc.

The superior court of Cincinnati in a *per curiam* decision held:

> "We are of the opinion that the words 'majority of the votes cast' in the connection in which it appears should be held to mean majority of the votes cast on the question, Com'rs. of Marion County v. Winkley, 29 Kas. 36. The fact that no other county question or election was submitted to the voters at the April election, also warrants this conclusion.
>
> Municipal and township ballots upon which both 'yes' and 'no' appeared were not votes cast upon the question. They were void and of no effect. A vote is but the expression of the will of the voter. State v. Green, 37

> Ohio St. 230. Where no will is expressed no vote is cast. The man who casts a ballot expressing no will, does not cast a vote any more than he who absents himself from the polls."

The supreme court on October 18, 1887, affirmed the judgment of the superior court without report.

This ruling might appear somewhat in conflict with the decision of the supreme court in Enyart v. Trustees, 25 O. S. 618, but an examination of that case will disclose that the language construed was "a majority of the *electors* of said township at some regular election, shall vote in favor of said levy," which is quite different from "if a majority of all the *votes* cast at the election."

So too in the case of State ex rel. v. Foraker, 46 O. S. 677, the language sought to be construed was "and if a majority of the electors voting at such election," and the court, commenting upon Gillespie v. Palmer, 20 Wis. 544, says:

> "The court, holding that 'votes' is not synonymous with voters, determined that a majority of all the votes cast on the subject was sufficient to adopt the amendment";

and continuing said:

> "But no such question can arise under our constitution on the meaning of words, the language being, 'a majority of all the *electors* voting at such election.' While 'electors' may not be the exact synonym of voters, it is in no sense synonymous with *votes.*"

In Brush v. Orgill, 9 N. P. (N. S.) 632, the common pleas court of Cuyahoga county, Ohio, had before it the question whether blank ballots are to be regarded as "votes cast on the question." The statute under consideration provided:

> "And if at such election a majority of the votes cast on such question shall be against said grant, the same shall be ineffectual and void."

Under the authority of Dexter v. Raine, et al., supra, the court held that blank ballots are not votes cast on the question and cannot be counted so as to swell the necessary number of votes for the grant, in order to make it carry. By the same logic they cannot be counted to swell the number of votes necessary to defeat the grant where it stands, unless a majority vote against it.

Under the Beal local option act, section 6131 G. C., it is provided:

> "If a majority of the votes cast at such election shall be in favor of prohibiting the sale * * * then from and after thirty days from the date of holding such election no person * * * shall sell * * *."

In the case of In re South Charleston Beal Law Election, 3 N. P. (N. S.) 373, the court held that ballots on which no choice is indicated are not votes and are not to be considered in determining what is a majority "of all votes" cast.

I have called attention to the above cases because you have cited the case of Dexter v. Raine, supra, and if my conclusion had been that the word "ballots" in the section under consideration was synonymous with "votes," these cases would be authority for casting out blank and unmarked ballots in arriving at what constituted the votes cast at the election. But in view of the fact that I have arrived at the opposite conclusion, the case of Dexter v. Raine, cited by you, and the other related cases have no application.

The question submitted to the voters is one involving the levying of a tax and the raising of funds from the taxpayers of the township, for a public building, and to my mind more caution is necessary in the determinaton of a question of that character than in ordinary cases, and any doubt that might arise should be resolved in favor of the taxpayers.

Hence, having come to the conclusion that "a majority of all the ballots cast at the election" refers to a majority of the paper writings on which opportunity is given the voter to express his choice, and which have been deposited in the ballot box, it is my view that under the canvass as shown by this election a majority of all the ballots cast at the election are not in the affirmative, and the trustees are without authority to levy the necessary tax.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

934.

CITY SOLICITOR—LEGAL ADVISER OF BOARD OF EDUCATION—WHEN BOARD MAY EMPLOY OTHER COUNSEL.

The city solicitor is the legal adviser of a board of education of a city school district and where he stands ready to perform the duties involved in the trial of a case in which he represented the adverse party before he became such solicitor, there is no authority of law for a city board of education to employ counsel other than such city solicitor at the expense of the public treasury.

Where the city solicitor refuses to act on account of his interest in a case in which the board of education is a party, the board of education may employ counsel to represent it in such case.

COLUMBUS, OHIO, January 11, 1918.

HON. F. B. PEARSON, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—Referring to your recent inquiry I note your request as follows:

> "A former superintendent of schools of the Lancaster city school district was arrested and convicted on a criminal charge. A suit is now pending against said board of education, the same having been brought by said ex-superintendent for salary claimed to be due him from said board.
>
> "The present city solicitor was attorney for the said ex-superintendent in the suit brought against him in the criminal court. On account of his former connection with this criminal case, and in view of the fact that the ousting of said former superintendent was the main issue in the election of the present school board, in which election said solicitor participated against the election of said board, it is the opinion of said board that circumstances are and will continue to be such that the said city solicitor cannot be depended upon to give the proper support to the best interests of the public in acting as counsel for the board of education as defendant in said action pending against said board wherein said ex-superintendent is the plaintiff.
>
> "Your opinion is desired as to whether or not said board of education, under the circumstances as above related, may employ outside counsel, at a reasonable fee, for services rendered or to be rendered to the board of edu-

cation, in this particular action of said ex-superintendent against said board of education, said fee to be paid out of the contingent fund of the board of education."

General Code section 4761 G. C. provides in part:

"* * * In city school districts the city solicitor shall be the legal adviser and attorney for the board of education thereof and shall perform the same services for such board as herein required of the prosecuting attorney for other boards of education of the county."

In the same section of the General Code it is provided that the prosecuting attorney of the county shall be the legal adviser of all boards of education of the county except the board of education in city school districts, and that when there is a civil action between two or more boards of education in the same county the prosecuting attorney shall not be required to act for either of them. No such provision is made to apply to a city solicitor because there is only one board of education in a city district and he is, therefore, by said section made the sole adviser of that board.

To further distinguish the rights and duties of a city solicitor and of a prosecuting attorney in relation to being the legal advisers of boards of education in their respective school districts, I desire to call attention to certain sections of the General Code in the chapter headed prosecuting attorney, and particularly to sections 2916, 2917 and 2918 thereof.

Section 2916 G. C. provides for the powers and duties of the prosecuting attorney in relation to county and state matters. Section 2917 provides that the prosecuting attorney shall be the legal adviser of the county and township officers, except that a board of township trustees may employ other counsel under certain conditions. Section 2918 provides:

"Nothing in the preceding two sections shall prevent a school board from employing counsel to represent it, but such counsel, when so employed, shall be paid by such school board from the school fund. * * *"

Without deciding whether or not this last above quoted section gives a board of education authority to employ counsel outside of the prosecuting attorney, but simply using the same by way of illustration, it is noted that no similar provision of law is found in the statutes in relation to city solicitors. In other words, that part of section 4761, above quoted, is the only statutory authority to be found which provides legal advice for a city board of education.

In opinion No. 839, annual reports of the attorney-general for 1915, volume 2, page 1778, the question was being considered as to whether or not a board of education could employ counsel other than the city solicitor in a case in which the city solicitor was representing the city and where the city and the board of education were adverse parties. After quoting that part of section 2918, above quoted, that official held:

"I am of the opinion that said provision of the statute (2918) being general in its nature, relates to those boards of education which would ordinarily be represented by the prosecuting attorney under authority of section 4761 G. C., and that said provision is not applicable to the board of education of a city school district which, under provision of the latter part of said section 4761, is ordinarily represented by the city solicitor."

While that opinion held that the board of education did have a right to employ counsel, it was only because the city solicitor was actually representing an adverse party whom the law compelled him to represent because of his official position.

In the case of Caldwell v. Marvin, et al., 8 O. N. P., n. s., 387, the court on page 390 says:

> "It is claimed in this case that no valid contract could have been made by any board of education for services of attorneys in a *quo warranto* proceedings. The city solicitor, under section 3977 R. S. (4761 G. C.) was the legally constituted attorney or legal counsel of the board, *and until he refused or failed to act, no additional legal counsel could be employed.* When, however, he elected to act for the *de facto* board and not for the board *de jure,* other counsel was necessary. The ordinary and necessary method of conducting a legal proceeding is with the assistance of legal counsel. If the right of a board of education to exercise some single power was challenged in a quo warranto proceeding, there would be no question of implied right to employ counsel in the absence of legally constituted counsel, or upon the failure or refusal of such counsel to act. Why should the rule be different where the right to exercise any power, whatever, is questioned and proper to be established? The public is interested in having its legally elected officers perform their duties, even though less interested than in having such duties performed."

In that case the contest was between a *de jure* and a *de facto* board of education. The city solicitor could only act for one board. The other board was permitted to employ counsel to represent it. I can find no case, however, which extends the same principle to a case where the city solicitor had, prior to the time he became such official, represented the adverse party.

If, however, the city solicitor, on account of his interest in any case in which the board of education is a party, desires to not act for and on behalf of the board of education, then I am of the opinion that following the rule laid down in Caldwell v. Marvin, supra, the board of education could employ counsel to represent such board because there would then exist a case where there would be "absence of legally constituted counsel" because of a "refusal of such counsel to act."

So that answering your question specifically I advise you that I know of no authority of law which will permit the board of education of a city school district to employ counsel other than the city solicitor at the expense of the district unless the city solicitor, on account of his interest in the case, refuses to act, in which event the board has the implied right to employ counsel.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

935.

APPROVAL—CONTRACT—BETWEEN SUPERINTENDENT OF PUBLIC WORKS AND FRANK TEJAN.

COLUMBUS, OHIO, January 11, 1918.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—You have submitted to this department contract entered into on

November 14, 1917, between yourself and Frank Tejan, of Dayton, Ohio, for furnishing all labor and materials necessary for repair of bank at Carthage aqueduct, in the sum of $2,543.60, together with the bond securing the same.

I have examined said contract and bond and find the same to be in substantial compliance with law and have this day approved the same and have filed the original copy of said contract and the bond in the office of the auditor of state, having received from him a certificate to the effect that there is a sum sufficient in his hands to pay the contract price.

I am herewith returning to you the extra copies of the contract submitted.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

936.

LICENSE FEES—FOR WATER CRAFTS—TO WHAT SCHOOL DISTRICT SAME SHALL BE CREDITED.

The license fee of $10.00, *required to be paid under the chapter of which section* 6330 *G. C. is a part, shall be paid into the county treasury and credited to the school fund of the local district where such boat or water craft is lying or plying at the time such license is granted.*

COLUMBUS, OHIO, January 11, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—In your request you state:

> "We respectfully request your written opinion upon the following question:
>
> Section 6330 G. C. reads as follows:
>
> 'The license fee of ten dollars, required to be paid under this chapter, shall be paid into the county treasury and credited to the school fund.'
>
> What particular school fund is meant by the above quoted section?"

Section 6330 of the General Code, which is quoted in full in your inquiry, the language of which you desire to have construed, is found in chapter 23, title 2 of part second of the General Code, which chapter is entitled "navigation." The particular subject to which said section refers in said chapter is "occupancy of water-crafts as residence" and was first enacted as a part of the statute law of this state April 21, 1896, at which time house bill No. 95 of said session of the general assembly was passed. The enactment was made to require persons who reside on boats or other water-crafts, and who engage in any business or traffic on the navigable waters of the state, to procure a license therefor. The act in its original form was carried into the General Code with no material change and its sections are now numbered 6324 to 6330, both inclusive, of the General Code.

In substance it is provided that a person who desires to occupy a boat or water-craft as a place of residence or abode, or for the purpose of engaging in business, trade or traffic, on a navigable water or its tributaries within the jurisdiction of this state, shall file an application therefor with the probate court of the county in which such boat or water-craft shall lie or ply. Said applicant must also furnish satisfactory proof to the court that he is a person of good character and must file in such probate court a statement subscribed and sworn to by him, setting forth

his legal residence, the name of the boat or water-craft on which he resides or intends to reside, the business, trade or traffic to be engaged in, and if he is the head of a family the names and ages of the members composing such family. After complying with the above and upon the payment of a license fee of $10.00, and a fee to the probate judge of $2.00, the said applicant is then entitled to a license which shall be granted to him by the probate court and shall be valid for himself and family for and during the period of one year from the date of such license. The probate judge shall record the license in a book kept for that purpose and he shall pay the license fee into the county treasury and it shall be *"credited to the school fund."* There was not at the time said act was originally enacted, nor is there now, any *county* school fund to which said license fee could be credited. There is now a fund designated as the "county board of education fund," but said fund was not established by law until section 4744-3 was enacted in 1915 (106 O. L., 396), and which was long after the enactment of section 6330 to its present form, so that when the legislature provided that said license fees should be "credited to the school fund" it could not have meant any county school fund, for there was no county school fund, nor could it have meant the "county board of education fund," for no such fund was then provided for, but there was only one school fund that was provided for and that was the school fund of a local school district.

It will be necessary to look to other sections of the General Code to ascertain which local school district fund could have been meant by the legislature when it said that said license fees should be "credited to the school fund." In the same chapter of the General Code in which section 6330 is found is also section 6321, which provides that an owner or keeper of a wharf-boat, who refuses or fails to hail or cause to be hailed a passing steamboat, upon request of a person who wishes to embark thereon, or who has freight to ship thereon, shall forfeit not less than ten dollars nor more than one hundred dollars, to be collected by an action brought before the mayor of the municipal corporation, or a justice of the peace where *such offense* was committed, and that the sum so collected shall be paid into the municipal or township treasury where such action is brought, *one-half for the use of the school fund* and the other half for the use of the municipal or township fund. That is to say, if the offense is committed within the limits of a municipal corporation, then the sum so collected shall be paid, one-half into the municipal treasury and the other half into the school treasury of the school district of such municipal corporation, but if the offense is committed without the limits of a corporation and within the limits of a township, then of the sum so collected one-half shall be paid into the township treasury and the other half into the treasury of the school district where such offense was committed. Here is a specific designation as to how and where distribution shall be made and it is the only place in said chapter in which is found such specific designation of a fund collected under any of the provisions of the sections of said chapter. It would seem, then, that, inasmuch as the legislature was speaking upon a subject in reference to which such specific designation of distribution was provided, it could have meant but one local district school fund and that is the school fund of the district in which such boat or water-craft was at the time of the granting of such license lying or plying.

Answering your question specifically, then, I advise you that the license fee of $10.00, required to be paid under the chapter of which section 6330 G. C. is a part, shall be paid into the county treasury and credited to the school fund of the local district where such boat or water-craft is lying or plying at the time such license is granted.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

937.

NOTICE—REQUIRED BY SECTION 6252—LEGALITY OF SAME WHEN PUBLISHED IN THE ONLY NEWSPAPER OF A CITY (OTHER THAN COUNTY SEAT) OF 8,000 POPULATION.

Where in a city in a county, other than the county seat, which contains a population of eight thousand or more, there is but one paper which comes within the terms of section 6252 General Code, as to the publication of the notices therein provided for, in such city, the publication of such notices in the one newspaper so qualified, will be in compliance with the provisions of section 6252 General Code, and it is not necessary to publish such notice in another newspaper published outside of said city, but having general circulation therein.

COLUMBUS, OHIO, January 11, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Under date of November 28th, you ask opinion upon the following:

> "The next to the last sentence of section 6252 G. C., reads as follows:
> 'In counties having cities of eight thousand inhabitants or more, not the county seat of such counties, additional publication of such notices shall be made in two newspapers of opposite politics in such city.'
> We find opinions in the Annual Reports of the Attorney-General for 1910-1911, page 437, and in the Annual Reports of 1911-1912, Vol. 2, page 1281, construing this section, especially as to the question of the census, but what is now confronting us is this:
> In a city in a county other than the county seat which contains a population of 8,000 or more there are not two papers of opposite politics, but only one paper is published (either democratic or republican as the case may be), hence, is this law complied with if any advertisement mentioned in section 6252 G. C., be published in said one newspaper, or does it require two newspapers of opposite politics in order to make such publication legal in such city?"

You call attention to two opinions of the attorney-general. Neither of the opinions touch upon the question which you now submit.

Section 6252 General Code, to which you call attention, reads as follows:

> "A proclamation for an election, an order fixing the times for holding court, notice of the rates of taxation, bridge and pike notices, notice to contractors and such other advertisements of general interest to the taxpayers as the auditor, treasurer, probate judge or commissioners may deem proper, shall be published in two newspapers of opposite politics at the county seat, if there be such newspapers published thereat. In counties having cities of eight thousand inhabitants or more, not the county seat of such counties, additional publication of such notices shall be made in two newspapers of opposite politics in such city. This chapter shall not apply to the publication of notices of delinquent tax and forfeited land sales."

Your question pertains to a construction of the following sentence in said section, to wit:

> "In counties having cities of eight thousand inhabitants or more, not the county seats of such counties, additional publication of such notices shall be made in two newspapers of opposite politics in such city."

From your statement of facts it appears that there is only one paper published in the city in question which can meet the requirements of the above provisions.

In the case of Village of Elmwood Place v. Schanzle, 91 Ohio State, 354, a like question as to publication of ordinances of a municipality was under consideration. The syllabus in that case reads as follows:

> "In a municipality where there is only one newspaper published and of general circulation, the publication in that paper of ordinances of a general nature, in the manner and for the period required by section 422 et seq. General Code, is a compliance with the requirements of those sections."

The court, through Johnson, J., in the opinion, quotes the pertinent parts of the statutes then under consideration. At page 355 he says:

> "The statutory requirements touching the subject are included in section 4227 et seq., General Code. Pertinent parts are as follows:
>
> In section 4227, 'Ordinances of a general nature, or providing for improvements shall be published as hereinafter provided before going into operation,' and section 4228, 'Ordinances and resolutions requiring publication shall be published in two newspapers of opposite politics, published and of general circulation in such municipality, if such there be.' Section 4229 provides the number of times ordinances, resolutions, etc., 'shall be published in two newspapers of opposite politics of general circulation therein, if there are such in the municipality' and section 4232 provides that 'in municipal corporations in which no newspaper is published, it shall be sufficient publication of ordinances * * to post up copies thereof at not less than five of the most public places in the corporation, to be determined by the council, for a period of not less than fifteen days prior to the taking effect thereof.'
>
> It will be observed that the existing statutes contain no express provision on the subject with reference to a municipality in which but one newspaper is published."

The above sections pertain to publication by municipal corporations and do not apply to publications which are authoried by section 6252 General Code. The language of the statutes, however, is similar and the same principles of law will apply.

Since the rendering of the above opinion, one of the sections of the General Code under consideration has been substantially amended. This is section 6255, General Code.

This section at that time read as follows:

> "For sufficient publication of a notice of advertisement, required by law to be published for a definite period, at least one side of the newspaper in

which such publication is made shall be printed in the county or municipal corporation in which such notice or advertisement is required to be published."

This section has since been amended to read as follows:

"Whenever any legal publication is required by law to be made in a newspaper or newspapers published or printed in a municipality, county, or other political subdivision, the newspaper or newspapers used shall have at least one side thereof printed in such municipality, county or other political subdivision; and whenever any legal publication is required by law to be made in a newspaper or newspapers of general circulation in a municipality, county, or other political subdivision, without further restriction or limitation upon a selection of the newspaper or newspapers used, such publication shall be made in a newspaper or newspapers at least one side of which is printed in such municipality, county, or other political subdivision, unless there be no such newspaper or newspapers so printed, in which event, only, such publication shall be made in any newspaper or newspapers of general circulation therein."

The language of the original section has been changed and additional matter inserted. It is now provided therein that "whenever any legal publication is required by law to be made in a newspaper or newspapers of general circulation in a municipality, etc., without further restriction or limitation upon a selection of the newspaper to be used," then such publication shall be made as therein provided.

In the case now submitted, section 6252 General Code, does restrict and limit the selection of the newspaper in which such publication shall be made to those having a political preference, and these must be of opposite politics. Therefore, the provisions of section 6255 General Code as above amended and quoted do not apply to the publications now under consideration.

The ruling therefore contained in the case of Village of Elmwood Place v. Schanzle, supra, will apply.

It is my opinion, therefore, that where in a city in a county other than the county seat, which contains a population of eight thousand or more, there is but one paper which comes within the terms of section 6252 General Code, as to the publication of the notices therein provided for, in such city, the publication of such notices in the one newspaper so qualified will be in compliance with the provisions of section 6252 General Code, and it is not necessary to publish such notice in another newspaper published outside of said city but having general circulation therein.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

938.

RIGHT OF WAY—SECURED BY COUNTY COMMISSIONERS—IN WHOSE NAME TITLE SHOULD BE TAKEN—ROADS AND HIGHWAYS—COMMISSIONERS SHOULD VACATE UNDER SECTION 6860 G. C.

1. *Where the county commissioners, under the provisions of section* 1201 *G. C., secure right of way by means of a deed, the title in and to the easement or right of way should be taken in the name of the board of county commissioners, their successors and assigns forever.*

2. To avoid unnecessary misunderstandings relative to that part of the road which is abandoned because of the direction of the road having been changed, the county commissioners should vacate the same under sections 6860 et seq. G. C.; that is, if they no longer desire to keep the same open as a public highway.

COLUMBUS, OHIO, January 12, 1918.

HON. DEAN E. STANLEY, *Prosecuting Attorney, Lebanon, Ohio.*

DEAR SIR:—I have your communication of December 12, 1917, enclosing form of deed, which communication reads as follows:

"It is proposed that a part of one of the roads in our county be improved by the state highway commissioner with the co-operation of the county commissioners.

Section 1201 of the General Code provides that in such cases county commissioners shall procure necessary rights of way.

I am herewith enclosing form of deed for your approval. Of course, this deed should be acknowledged and the acknowledgment clause added.

I am sending this to you for the reason that I am in doubt as to whom the grantee in the deed should be and the exact form of the deed, in view of the fact that the county commissioners make the purchase, but the improvement is to be done by the state highway commissioner.

I would also be glad for you to give any other directions in regard to the matter that may seem proper."

The form of deed submitted reads as follows:

"Know all men by these presents that

WHEREAS, It is proposed by the state of Ohio, by and through Clinton Cowen, State Highway Commissioner of said state, to improve Main Market Road No. ------ in Franklin township, Warren county, state of Ohio; and

WHEREAS, Said improvement is to be constructed with the co-operation of the county commissioners of said county; and

WHEREAS, The line of said proposed improvement deviates from said existing highway; and

WHEREAS, Section 1201 of the General Code provides that the county commissioners shall provide requisite right of way for such improvements;

Now, therefore, ----------, the grantor ----, in consideration of ---------- Dollars ($----------) to ---------- paid by Warren county, Ohio, acting by and through the board of county commissioners of said county, the receipt of which is hereby acknowledged, do ---- hereby grant and release unto the state of Ohio, its successors and assigns forever, the right of way for said proposed highway improvement on, over and upon and across a piece of land owned by ----------, said grantor; the right of way herein granted being situated in the township of Franklin, county of Warren and state of Ohio, and being described as follows: (Space for description).

The state of Ohio, grantee, to have and to hold said right of way unto itself and its successors and assigns forever, and to have the right to construct and forever maintain thereon a public highway and the said grantor ----, for ----------, -------- heirs, executors and administrators, hereby covenant with the said grantee, its successors and assigns,

that said grantor ____ is the true and lawful owner of said premises, and is well seized of same in fee simple and has good right and full power to bargain, sell and convey the same in manner aforesaid, and that the same are clear and free from all incumbrances, and further that said grantor ____ will warrant and defend the same against all claims of all persons whatsoever.

In witness whereof, said _____, grantor ____, and _____, his wife, have hereunto set their hands this _____ day of _____, A. D. 1917.

_____

_____

Signed in the presence of:

_____

_____."

Under section 1201 G. C. the county commissioners, if they cannot agree relative to securing lands for a right of way, must take steps in the way of appropriation proceedings, as set out in said section. Evidently in your case an agreement has been reached and a deed would be the proper form of instrument by which to reduce this agreement to writing.

I desire to make a few suggestions in reference to the form of deed.

(1) While the recitals of any instrument are not to very vital, yet in this case I believe I would insert a recital to the effect that the state highway department has made the necessary surveys, maps, plans, profiles and specifications relative to the proposed improvement, which said surveys, etc., change the direction of the highway from that which it now takes; also a recital stating that said surveys, maps, plans, profiles, specifications, etc., have been adopted by the county commissioners of the county of Warren, under and by virtue of the provisions of section 1200 G. C. These recitals logically would come after thesecond recital set out in the form of deed.

(2) It is my opinion that the grantee of the deed should be the board of county commissioners of Warren county, Ohio, its successors and assigns forever. I am aware that under the provisions of sections 7464 and 7467 G. C. the state, after the completion of this particular road, will be required to maintain the same, but this applies merely to the maintenance and repair of the road and has nothing in particular to do with the easement. It is my view that the easement or right of way remains in the county, and that if there were any additional burden to be placed upon the highways of the state, in the way of a telephone, telegraph or pipe line, etc., the county commissioners would be the proper authorities to grant this right, due to the fact that the easement in the highway, so far as the public is concerned, rests in the board of county commissioners of the various counties.

(3) It might be well to provide in the deed for the release of dower, providing, of course, the grantor is a married person. Undoubtedly it was your intention to carry the names of both parties through the deed, but even with this, a clause releasing dower would be altogether proper as well as legal.

(4) It might also be well for your county commissioners, under sections 6860 et seq. G. C., to take such steps as would enable them to vacate the part of the road which will be abandoned by virtue of the change in the direction of the road. While section 6860 G. C. provides that said act shall not enable the county commissioners to vacate an inter-county highway or main market road, yet after the direction of the highway has been changed and the road completed, the part of the road abandoned will no longer be an inter-county highway or main market

road. Of course, this suggestion is made upon the theory that your county commissioners will no longer desire to keep open that part of the road abandoned by virtue of the change in the direction of the road.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

939.

COUNTY AUDITOR—WHEN SAID OFFICIAL CERTIFIES THAT MONEY IS IN TREASURY SUBJECT TO A CERTAIN USE—MONEY CANNOT BE USED FOR ANY PURPOSE UNTIL OBLIGATION ENTERED INTO BY COMMISSIONERS IS FULLY SATISFIED.

Under the provisions of section 5660 G. C., when the certificate of the county auditor is filed with the county commissioners, to the effect that there is money in the treasury subject to a certain use, and the county commissioners entered into a contract providing for the use of said money, the money in reference to which the certificate is made and to the amount of the certificate is appropriated and set aside for a special purpose and cannot be used for any other purpose until the county is fully discharged from the obligation entered into by it under said contract or final resolution.

COLUMBUS, OHIO, January 12, 1918.

HON. DEAN E. STANLEY, *Prosecuting Attorney, Lebanon, Ohio.*

DEAR SIR:—I have your communication of December 18, 1917, which reads as follows:

> "The law, as I understand it, provides that roads may be improved by the state highway commissioner with the co-operation of the county commissioners and the cost thereof paid partly by the state and the balance by assessments made on the property. The law, however, provides that in the first instance the county shall pay the amount which will afterward be assessed and be reimbursed upon the collection of the assessments or the sale of bonds in anticipation of such collection.
>
> In a county in which contracts have been made under these provisions of law and in which it has been certified by the auditor that sums of money aggregating approximately $10,000.00 are in the treasury to the credit of the proper fund (with which to pay in the first instance the cost of the improvement other than that paid by the state) and in which county there is now in the process of collection additional funds for road purposes, would it be proper for the auditor to certify contracts or draw warrants upon the money now in the treasury (which has been certified as above stated) for the payment of necessary improvements and repairs and then use the money now in the process of collection to fulfill the county's obligations under contract made by the highway commissioner after the first of March, when such money will be available.
>
> I might further state that in this particular case the contracts made by the highway commissioner probably cannot be performed or even started before the money now in the process of collection will be collected."

As I understand them, the facts upon which you desire an opinion are as follows:

The commissioners of your county have entered into a contract, or rather adopted final resolutions, to the effect that they will stand good in the first instance for the payment of $10,000.00 toward the cost and expense of a certain road improvement over which the state highway commissioner has assumed jurisdiction. As a basis for this final resolution, and preliminary thereto, the county auditor has certified to the county commissioners that there is $10,000.00 in the county treasury subject to be used for the purposes of said improvement.

The question arises as to whether the county commissioners could use a part or all of this $10,000.00 for other road improvements, provided they would replenish the fund from moneys to be collected by taxation and otherwise, before the same would be needed for the road improvement over which the state highway commissioner has assumed jurisdiction. You state that neither said $10,000.00 nor any part of it will be needed before some time next spring or summer.

In order to answer this question it will be necessary to note the provisions of but one section, viz., section 5660 G. C., which reads in part as follows:

> "Sec. 5660. The commissioners of county * * * shall not enter into any contract, agreement or obligation involving the expenditure of money, or pass any resolution or order for the appropriation or expenditure of money, unless the auditor * * * first certifies that the money required for the payment of such obligation or appropriation is in the treasury to the credit of the fund from which it is to be drawn * * *. Such certificate shall be filed and forthwith recorded, and the sums so certified shall not thereafter be considered unappropriated until the county * * * is fully discharged from the contract, agreement or obligation, or as long as the order or resolution is in force."

It will be seen from this section that whether we call this final resolution, which is entered into upon the part of the county commissioners, a mere resolution, or a contract which it really is, the provisions of said section apply. The final resolution or agreement as entered into is of no force or effect unless the auditor certifies that the money is in the treasury. This is a jurisdictional step in the whole proceeding. The statute further provides that when this certificate is made and the resolution or contract entered into, the sums so certified shall not thereafter be considered unappropriated until the county is fully discharged from the contract or resolution. In other words, the funds, in regard to which a certificate is made, are practically appropriated or set aside for a special purpose, this purpose being set out in the contract or resolution which is entered into, in view of the certificate.

Said section 5660 practically provides that this money cannot be again appropriated or used for any purpose until the county is fully discharged from the obligations of the resolution or contract. Of course in your case the county is not discharged from the obligation. It still remains, and from the provisions of the statute and the evident intention of the legislature this money cannot be used for any purpose other than that for which it has practically been set aside by the action of the county auditor and the county commissioners, unless the county is first discharged from the obligation into which it has entered, and a part or all of the money so appropriated still remains.

This, as I understand it, answers your question specifically.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

940.

PROSECUTIONS UNDER SECTION 13008—COSTS—JUSTICES OF THE PEACE, ETC., HAVE FINAL JURISDICTION IN PROSECUTIONS BROUGHT UNDER SECTION 13423—SECTION 13008 DOES NOT REPEAL SECTION 12970 BY IMPLICATION.

1. *The provisions of section* 13439 *G. C., relative to costs, do not apply to prosecutions brought under section* 13008 *G. C. The provisions of section* 3019, *covering costs, do apply to prosecutions brought under said section* 13008, *provided the state fails to convict.*

2. *In those prosecutions brought under section* 13423 *G. C., a justice of the peace, mayor or police judge has final jurisdiction to try the accused and said officers do not sit as examining magistrates and hence have no authority to bind the accused over to the court of common pleas or the probate court.*

3. *The provisions of section* 13008 *G. C. do not repeal by implication any part of the provisions of section* 12970 *G. C.*

COLUMBUS, OHIO, January 14, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I have your communication of December 17, 1917, in which you ask my opinion on the following questions:

"(1) In cases under section 13008 G. C., brought before a justice of the peace, a mayor or a police judge, as examining magistrate, if the defendant is bound over to the grand jury, or be dismissed for lack of sufficient evidence, are the minor court costs payable under section 13439 G. C., or do they follow the case as a felony, and in the event of ultimate failure to convict, or because of dismissal by the magistrate, become payable under and within the limitations of section 3019 G. C.?

(2) Should a justice of the peace, a mayor, or a police judge, decide not to exercise final jurisdiction in any case brought before him under section 13423 G. C., but bind same over to the common pleas court, or probate court, may the county auditor pay the minor court costs under the provisions of section 13439 G. C., or is the auditor's authority to pay such costs limited strictly to cases where the magistrate has exercised final jurisdiction?

(3) Do the provisions of section 13008 G. C. repeal by implication any portion of section 12970 G. C.?"

Section 13423 G. C. provides that:

"Justices of the peace, police judges and mayors of cities and villages shall have jurisdiction, within their respective counties, in all cases of violation of any law relating to;" (Then follows an enumeration of fifteen cases over which the said officials have jurisdiction.)

This section is closely related to section 13432 G. C. and the chapter of which said section 13432 is a part. Said section reads as follows:

"Sec. 13432. In prosecutions before a justice, police judge or mayor,

when imprisonment is a part of the punishment, if a trial by jury is not waived, the magistrate, not less than three days nor more than five days before the time fixed for trial, shall certify to the clerk of the court of common pleas of the county that such prosecution is pending before him."

These two sections formed but one section in the Revised Statutes, viz., section 3718a R. S. Said section of the Revised Statutes began as follows:

"Any justice of the peace, police judge or mayor of any city or village shall each have jurisdiction within his county (then follows enumeration of a list of cases after which the section proceeds as follows:)

In any such prosecution where imprisonment may be a part of the punishment, if a trial by jury be not waived, the said justice of the peace shall, not less than three nor more than five days before the time fixed for trial, certify to the clerk of the court of common pleas of his county that such prosecution is pending before him." (Then follows provisions for a jury and trial.)

I desire to call particular attention to the words "any such prosecution;" that is, the prosecutions for those offenses enumerated in the first part of said section. From these two provisions of section 3718a R. S. it is quite evident that the officers mentioned had jurisdiction finally to try prosecutions for those causes set out in the section.

In the General Code, the codifying commission made the first part of said section 3718a R. S. to be section 13423 G. C., and the latter part to be section 13432 et seq., placing said sections in different chapters and also dropping the words "any such" as found in the section of the Revised Statutes.

However, there is nothing whatever to indicate that there was any intention on the part of the legislature that the provisions of section 13432 et seq. should no longer apply to prosecutions under section 13423. So that we must still read section 13432 as being vitally related to and connected with section 13423. That is, section 13423 enumerates the class of cases over which justices of the peace, judges of the police court and mayors have jurisdiction as provided in section 13432.

Inasmuch as the words "any such" are no longer in the section, the question might be raised as to whether the provisions of section 13432 et seq. might not be made to apply to all prosecutions in which imprisonment may be part of the penalty, limited, of course, to misdemeanors. Indeed, some lower courts have so held.

In State v. Pohlman, 13 N. P. (N. S.) 254, the court held:

"Section 13432 G. C. gives final jurisdiction to justices of the peace in cases in which imprisonment is a part of the punishment, and a jury is not waived, and where it is attempted to carry such a case to the probate court, a motion to discharge the accused will lie."

However, this holding of the probate court was overruled in State ex rel. v. Renz, 5 Ohio Appellate 421, 425. But you limit your question to prosecutions brought under section 13423 G. C. Under section 13432 G. C., the officers therein named are given jurisdiction, as said before, to try prosecutions brought under section 13423, whether imprisonment is a part of the penalty or not. If a jury is not waived by the accused in a case where imprisonment may be a part of the penalty, so as to enable the said officers to try the accused without a jury, he shall then proceed, as set out in section 13432 et seq., to impanel a jury.

The officer has no power to declare whether or not he will assume jurisdiction, for he must assume it. He has no power or authority, in prosecutions brought under section 13423, to bind the accused over to the probate court or to the court of common pleas. In such cases he is not an examining magistrate, nor can he become one. He is a trial court, either trying the case with or without a jury, and mandamus will lie to compel him to exercise such jurisdiction. This was distinctly held in the case of:

State ex rel. v. Smith, 69 O. S. 196.

The officer before whom a person is prosecuted, for a matter set out in section 13423, has no greater warrant to bind over the accused in those cases where imprisonment may be a part of the penalty than he has where the penalty is merely a fine. The statute states that he shall proceed to trial, as therein set out.

Another general observation I desire to make, before proceeding to answer your questions specifically, is that the chapter, of which section 13432 is a part, relates only to misdemeanors and not to felonies. Of course if the offense charged is a felony, the officers mentioned in section 13432 could act in no other capacity than that of examining magistrates, hearing the evidence with a view to binding the accused over to the proper court.

Your first question has to do with section 13008 as well as other sections of the General Code. Said section 13008 reads as follows:

> "Sec. 13008. Whoever, being the father, or when charged by law with the maintenance thereof, the mother, of a legitimate or illegitimate child under sixteen years of age, or the husband of a pregnant woman, living in this state, being able by reason of property, or by labor or earnings, to provide such child or such woman with necessary or proper home, care, food, and clothing, neglects or refuses so to do, shall be imprisoned in a jail or workhouse at hard labor not less than six months nor more than one year, or in the penitentiary not less than one year nor more than three years."

Section 13439 G. C. reads as follows:

> "In such prosecutions, no costs shall be required to be advanced or secured by a person authorized by law to prosecute. If the defendant be acquitted or discharged from custody by nolle or otherwise, or convicted and committed in default of paying fine and costs, all costs of such case shall be certified under oath by the trial magistrate to the county auditor, who, after correcting errors therein, shall issue a warrant on the county treasury in favor of the person to whom such costs and fees are payable. All moneys which are to be paid by the county treasurer as provided in this chapter shall be paid out of the general revenue fund of such county."

It will be noted that the crime set forth in section 13008 is a felony, in that imprisonment in the penitentiary may be a part of the penalty.

As said before, the chapter of which section 13439 is a part, applies only to those cases in which the offense charged is a misdemeanor and in reference to which the officers therein set out have final jurisdiction. With this in mind we will consider exactly to what section 13439 applies in reference to costs. It provides that if the defendant *be acquitted or discharged from custody,* or *convicted and committed* in default of paying fine and costs, then in such cases the costs are paid as therein set out.

However, it must be remembered that this section states: "in such prosecutions;" that is, the prosecutions provided for in this chapter. The words "trial magistrate" are also used in said section. Hence it is clearly evident that section 13439 does not apply to costs, excepting in those cases wherein the justice has final jurisdiction to hear and determine. Hence if a person charged with an offense under section 13008 is bound over to the proper court, the provisions of this section would not take care of the costs, neither would they if he be dismissed for lack of sufficient evidence.

You then ask whether the provisions of section 3019 G. C. would apply as to costs in such a prosecution. This section reads, so far as felonies are concerned, "In felonies wherein the state fails," the costs may be taken care of as provided in said section. That is, if a person is charged with the offense set out in said section 13008 G. C., and an affidavit is filed with a justice of the peace, a police judge or mayor, and the accused is either dismissed for lack of evidence by the examining magistrate, or if he is bound over and the grand jury fails to indict, or if he is brought to trial and is found not guilty by the jury, or, in other words, in any case where the state fails to convict, the provisions of section 3019 G. C., relative to costs, would apply. I think this fully answers your first question.

Your second question is to the effect that if a justice of the peace, mayor or police judge should decide not to exercise final jurisdiction in any case brought before him under section 13423, but should bind the same over to the common pleas or probate court, would section 13439 apply as to costs?

This question has been answered in the general observations I have made. Said officers have no authority to decide whether or not they will exercise final jurisdiction in those prosecutions brought under section 13423 G. C. They must exercise final jurisdiction. Hence they have no authority to bind the accused over to the common pleas or probate court. Therefore the provisions of section 13439 G. C. would apply to such cases as you suggest in your second question, in that said officers would necessarily be compelled to exercise final jurisdiction.

I am aware that under section 4533 G. C. it might be held that the mayor of a city, if he felt it to be for the best interests of the public, could inquire into the complaint with a view either to discharging the accused or recognizing him to the proper court; that is, it might be held that in prosecutions under section 13423 G. C. the mayor of a city would not be compelled to exercise final jurisdiction in the matter, but might sit as an examining, rather than a trial, magistrate.

However, it is my opinion that such is not the case. The provisions of sections 13423 and 13432 are of a later enactment than those of section 4533, relative to the matter under consideration. The provisions of section 4533 are general, relating to all misdemeanors prosecuted in the name of the state, while those of section 13423 are special and hence should control in this matter.

In Martindale v. State of Ohio, 2 O. C. C. 2, at p. 3 the court seems to have had this principle in mind when it used the following language:

> "But the prosecution in the present case is under a special statute, which gives a justice jurisdiction not to examine into the offense but to 'hear the prosecution' and 'if a trial by jury be not waived' said justice shall proceed to impanel a jury."

Hence it is my opinion that section 13432 G. C. would apply equally as well to a mayor as to a judge of a police court or justice of the peace, and that all of said officers would sit as trial magistrates in those prosecutions brought under section 13423 G. C., and not examining magistrates.

In your third question you ask whether the provisions of section 13008 G. C. repeal by implication any portion of section 12970 G. C.

I have already quoted section 13008 G. C. in answer to your first question.

Section 12970 G. C. reads as follows:

> "Whoever, having the control of or being the parent or guardian of a child under the age of sixteen years, wilfully abandons such child, or tortures, torments, or cruelly or unlawfully punishes it, or wilfully, unlawfully or negligently fails to furnish it necessary and proper food, clothing or shelter, shall be fined not less than ten dollars nor more than two hundred dollars or imprisoned not more than six months, or both."

In noting the provisions of these two sections, it is clearly apparent that the offense charged in section 12970 G. C. is a misdemeanor, while that charged in section 13008 G. C. is a felony. The question now is as to whether section 13008, in so far as it covers the same subject matter as set out in section 12970, repeals section 12970. As a general proposition we can say that it would so repeal section 12970 which covers the same subject matter.

In Sherman v. State, 17 Fla. 888, the court was considering an act of the legislature of 1832, which made an "assault with intent to kill" a misdemeanor, together with an act of the legislature of 1868, which made the same offense a felony. The court held that:

> "The law of 1832 is therefore superseded and repealed by the act of 1868."

In Hayes v. State, 55 Ind. 99, the court was considering an act of the legislature or 1852 making "the keeping of gaming apparatus" under certain conditions a felony, and a later act of 1875, making the same offense a misdemeanor. ***Held:***

> "The two provisions cannot stand together. So much of the act herein first set out as makes it a felony to be keeper of any gaming apparatus, for the purpose indicated, is impliedly repealed by the amendment of 1875 which makes the offense a misdemeanor only and punishes it accordingly."

In Commonwealth v. McGowan et al., 2 Parsons Eq. Cas. 341, the court lays down the following proposition:

> "Where a statute makes that a felony which before was only a misdemeanor, the misdemeanor is merged and there can afterwards be no prosecution for the misdemeanor."

Other cases might be cited along this same line, but the above is sufficient to establish the proposition as above set out.

However, I desire to call attention to a certain matter in connection with the two sections about which you inquire, which it seems to me would prevent the general rule from being applied to these two sections. There is a condition set out in section 13008 G. C., entirely different from anything found in section 12970, and which tends very much to aggravate the offense of a father or mother in not providing for his or her child. This provision is as follows:

> "Sec. 13008. * * * being able by reason of property, or by labor or earnings, to provide such child * * * with necessary or proper home, care, food and clothing * * *."

Neither this provision nor anything like it is found in section 12970 G. C. This provision very much aggravates the offense and for this reason it seems the legislature saw fit to make it a felony, rather than a mere misdemeanor. I am aware that section 12970 uses the words "wilfully, unlawfully or negligently," but it is my opinion that these words are not as strong as those found in section 13008, and I feel that the provisions set out in section 13008 had something to do with the legislature's providing a more severe penalty in the one case than in the other. Hence it is my opinion that section 13008 G. C. does not in any respect impliedly repeal any of the provisions found in section 12970 G. C.

Bishop in his Work on Statutory Crimes, section 168, lays down the following proposition:

> "Two different punishments, for precisely the same offense, with no variation in its elements and no modifying discretion in the court, cannot, in the nature of things, subsist together."

It will be noted that the author makes it clear that it would be different if there were a variation in the elements of the crime.

In section 171 the same author says:

> "If the new statute adds aggravations not in the old law of the offense and creates a higher penalty; or omits an aggravating quality and provides a lower penalty; or if the new statute is applicable to a particular class only of persons who owe special duties in the matter, the new punishment does not supersede the old."

It is my opinion that the conclusions of the author substantiate the conclusion drawn by me.

There is a case reported in 25 C. C. (N. S.) 447, styled State of Ohio v. Bone, in which the court held as follows in the syllabus:

> "The father could have been prosecuted under either section 12970 or section 13008 of the General Code, but prosecution under the latter section could not be had in the municipal court."

In the opinion on p. 448 the court held as follows:

> "There can be no question but that the father could have been prosecuted under either section 12970 or section 13008 of the General Code, although prosecution under the latter section could not be had in the municipal court."

While this case was not fully considered by the court and it did not have under particular consideration the question as to whether section 13008 G. C. repeals section 12970 G. C., yet the finding of the court in said case goes to the effect at least that section 13008 does not in any respect repeal the provisions of section 12970. In this case the supreme court overruled a motion for an order directing the court of appeals to certify its record to the supreme court.

Whether a person is prosecuted under section 12970 or section 13008 G. C., must be determined from the charge made against him, as set forth in the affidavit which is filed with the proper official. While it might under a loosely drawn affidavit be difficult to determine whether a person is being prosecuted under the

one section or under the other, yet ordinarily the form of an affidavit would readily disclose the section under which the accused is being prosecuted. To be sure, if it is under section 13008, the officials mentioned in section 13432 would have no power other than as examining magistrate, who could hear the evidence with a view to binding the accused over to the proper court.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

941.

COUNTY COMMISSIONERS—RESIGNATION—TO WHOM PRESENTED.

A member of a board of county commissioners who wishes to resign should present his resignation to the probate judge, auditor and recorder, those officials being designated to fill a vacancy in such board.

COLUMBUS, OHIO, January 14, 1918.

HON. JAMES F. FLYNN, *Prosecuting Attorney, Sandusky, Ohio.*

DEAR SIR:—In your recent request for my opinion you say:

> "One of the members of our board of county commissioners contemplates resigning to join the service. Section 2397 G. C. provides that the probate judge, auditor and recorder shall appoint a successor, but there is no provision of the statute which I am able to find stating further to whom the resignation should be sent. It is my opinion that it should be sent to the governor and upon receipt of the same that he notify each of the above named officers of the vacancy so that a successor may be named.
>
> Kindly advise me as to what is your opinion with reference to the question as to whom the resignation of the county commissioner should be sent, also give me your opinion as to when the three above named officers should take action with reference to a successor and whether or not the governor should send them notice if he is the one to whom the resignation should be sent."

Section 2395 G. C. provides that the board of county commissioners of a county shall consist of three persons, who shall be elected biennially and shall hold their respective offices for two years commencing on the third Monday of September next after their election.

Section 2396 G. C. provides that when a county commissioner is elected to fill a vacancy occasioned by death, *"resignation"* or removal, he shall hold his office for the unexpired term for which his predecessor was elected.

Section 2397 G. C. provides that if a vacancy occurs more than thirty days before the next election for state or county officers, or within thirty days from that time, and the interest of the county requires that the vacancy be filled before the election, "the probate judge, auditor and recorder of the county, or a majority of them, shall appoint a commissioner who shall hold his office until his successor is elected and qualified."

There is no other special provision to be found in the statute law of this state which grants a county commissioner the right to resign or which provides to whom a resignation shall be made, or in any way other than the above makes any reference to a resignation by a county commissioner. The decisions of the several states are somewhat at variance in reference to the question of the time when a resignation will take effect, but they seem to be united on the proposition that a person who holds an office has a right to resign, and especially when the power is given to the appointing board to fill a vacancy caused by a resignation.

Throop, in his work on Public Officers, section 704, says: That an office may be resigned either expressly or by implication; that where no particular mode of resignation is prescribed by law, an express resignation may be made by parol or in writing. If by parol, as by the incumbent declaring to the appointing power that he resigns his office or will continue to serve no longer and requests an acceptance of his resignation. A resignation by implication is by the same author held to be practically a forfeiture of the office and occurs where the incumbent commits some act or omission which clearly indicates an intent to abandon the office or which disqualifies him from continuing longer to hold it. So that granting for the purposes of this opinion that it is permissible for a county commissioner to resign, your question is, to whom should such resignation be handed or made. There is nothing in our statutes which provides that the resignation may be made to any particular person or board, but it is held in Mechem's Public Offices and Officers, section 413, that:

> "Statutes usually prescribe to whom the resignation of a public officer is to be made, *but in the absence of such a provision it is properly made to that officer or body which is by law authorized to act upon it by appointing a successor* * * * * * to fill the vacancy."

In Edwards v. United States, 103 U. S., 471, Edwards had been duly elected as supervisor of St. Joseph township. He resigned by handing his written resignation to the clerk of the township. There was nothing to show that the clerk ever presented said resignation to the appointing board, and on page 478 the court says:

> "According to the common-law rule, the resignation would not be complete, so as to take effect in vacating the office, until it was presented to the township board, and either accepted by them or *acted upon by making a new appointment.* A new appointment would probably be necessary in this case, because the township board was not the original appointing board. The supervisor is not their officer, representative, or appointee. *They only represent the township in exercising the power, vested in them, of filling a vacancy when it occurs. THIS MAKES THEM THE PROPER BODY TO RECEIVE THE RESIGNATION, BECAUSE THEY ARE THE FUNCTIONARIES WHOSE DUTY IT IS TO ACT UPON IT."*

In State ex rel. Kirtley v. Augustine, 113 Mo. 21, a county treasurer presented his resignation to the county court under the misapprehension that the county court was the proper tribunal to receive it, and the resignation was accepted and the fact certified to the governor, who in that case was the appointing power, to fill a vacancy, and a successor was designated. The resigning officer attempted to recall the resignation, but as to that question the court held that

after a successor was designated the resignation was beyond recall, even though made to the wrong person. But on page 24 McFarlane, J., quoting with approval from the court of appeals, says:

> *"It is well established law, that, in the absence of express statutory enactment, the authority to accept the resignation of a public officer rests with the power to appoint a successor to fill the vacancy. The right to accept a resignation is set up incidental to the power of appointment."*

In Dillon on Municipal Corporations, 5th edition, Vol. 1, section 416, the author says:

> "It is also a common law principle that the right to accept the resignation of an officer is incidental to the power of appointing him."

In Van Orsdall v. Hazzard, 3d Hill (N. Y.) 243, a member of a regimental court martial got permission to be excused from serving because of the dangerous illness of a member of his family, and the question was as to whether or not this was such a resignation as would permit another to be appointed in his place, in other words, whether or not there was a vacancy within the meaning of the militia law. After determining that a vacancy did exist, the court held that such resignation was properly made to the appointing power.

In State ex rel. v. Boecker, 56 Mo., 17, the clerk of a county court tendered his resignation to take effect at a future date. The paper was filed in the office of the court and afterward, and before the day the resignation was to take effect, the clerk forwarded to the county court his written withdrawal, but in the meantime, and without the consent of the clerk, and against his express directions, the resignation had been forwarded to the governor, who had power to fill the vacancy, and another person had been appointed clerk.

HELD:

> "That under a proper construction of the state constitution such resignation was not legal and complete unless sent to the governor and accepted by him with the knowledge and consent of the clerk; that the filing of the document with the county court was a nullity, giving that body no jurisdiction; that the paper was constructively still in the possession of the clerk; that in law the office of the county clerk did not become vacant; and that with the sanction of the court the clerk might at the same term legally withdraw his resignation notwithstanding the new appointment of the governor."

Other decisions along the same line as the above have been examined and the same principle is enunciated as in these. So that, it would seem from all the above that the county commissioner referred to in your inquiry should deliver or make his resignation to the three officials whose duty it is to fill a vacancy. No formal acceptance of said resignation is necessary, but an acceptance by the appointing board, or a filling of a vacancy, being equivalent to an acceptance of such resignation, is all that is required.

So that, answering your first question, I advise you that a member of a board of county commissioners, who desires to resign, shall direct or make such resignation to the probate judge, auditor and recorder of the county in which such commissioner holds his office.

In your second question you inquire when the three above named officers

should take action with reference to a successor of such commissioner. There is nothing in the statute by which provision is made for any form or method of procedure in the selecting of such successor, but where a duty devolves upon a public official, it is a well established principle that such duty should be performed, if no time is mentioned, promptly.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

942.

OFFICES INCOMPATIBLE—SHERIFF—PROBATION OFFICER.

The sheriff of a county may not be appointed or act as probation officer.

COLUMBUS, OHIO, January 14, 1918.

HON. C. W. PALMER, *Probate Judge, Defiance, Ohio.*

DEAR SIR:—I have your letter of recent date as follows:

> "If it is not presumptuous, I should like to have your opinion as to whether the sheriff of the county may be appointed and act as probation officer for the juvenile court, and whether or not the compensation as such probation officer should be turned into the sheriff's fee fund."

On December 8, 1910, former Attorney-General U. G. Denman rendered an opinion to the bureau of inspection and supervision of public offices, found at page 446 of the Annual Report of the Attorney-General for 1910-1911, in which he held that a sherff may not act as probation officer or receive any compensation or fees of any kind in the capacity of probation officer. In that opinion Mr. Denman stated:

> "It appears, from a review of the history of the juvenile court law, that the purpose of having probation officers was to secure individuals, other than the then existing officers, to assist in the handling of juvenile cases. Among such officers who have, under the juvenile court law, been largely supplanted in the handling of these cases by such probation officers, are the sheriffs and their deputies. The section above quoted shows that a probation officer, in the serving of 'warrants and other process of the court,' is 'clothed with the powers and authority of sheriffs.' A probation officer not only performs all the duties in such cases which were formerly performed by the sheriffs, but he performs additional duties, such as making 'examination and investigation into the facts and circumstances,' being 'present in court to represent the interests of the child,' furnishing 'to the judge such information and assistance as he may require,' etc. In other words, the probation officer may perform all duties of the sheriff in such cases, and also a number of additional duties. The law provides that 'sheriffs * * * * shall render assistance to probation officers in the performance of their duties, when requested so to do,' but the law does not specifically state that a sheriff may be a probation officer.
>
> It appears to me from the above that a probation officer must perform certain duties in addition to those which are to be performed by the sheriff, and that the performance of all the duties of a probation officer by a

sheriff would at least interfere with the faithful performance of the duties of his office as sheriff. Since section 1663 requires a sheriff to render assistance to a probation officer, it would seem that the statute differentiates the two positions and considers them as positions which should be held by different persons. Such differentiation is also emphasized by section 1660, which provides that:

'The warrants * * * * may issue to a probation officers of any court or to the sheriff of any county, * * *.'

It appears to me, therefore, that it is the policy of the juvenile court law that probation officers should be persons other than regular officers of the law such as sheriffs. If, however, a sheriff could also act as a probation officer, in such case, under section 1660, warrants, etc., should issue to him as sheriff because he is a regular officer of the county for the serving of such warrants, etc., and since practically the only reason for issuing such warrants, etc., to a probation officer, under the changed conditions of the law, is to procure a person other than the sheriff to serve such warrants, etc., A further reason for this conclusion arises from the fact that if the warrants issued to the sheriff, as such, he must, under section 2977 of the General Code, pay all fees, costs, etc., arising therefrom into the treasury of the county, whereas is such warrants issued to the sheriff not as sheriff but as probation officer, he could, as probation officer, retain to his own personal use such fees or expenses as might be incurred in the handling of such warrants, etc. In other words, if the sheriff could act as a probation officer in such matters, he could evade the provisions of the county salary law.

As to your third question, it might be argued that a sheriff could act as probation officer to the extent that he would perform services not required of a sheriff but rather the additional services which are required of a probation officer and that he could, under section 1662, General Code, receive some compensation for such additional services. To argue thus would be to say that a person, namely a sheriff, may be appointed as probation officer, but may not perform all the duties of such position of probation officer, for the reason that he would be compelled to perform some of such duties as sheriff. Such a condition is so inconsistent as to be impossible for the reason that one probation officer, must have as much power and be able to perform as many duties as another."

I agree with the reasoning of the above opinion and in the conclusion arrived at, and therefore advise you that the sheriff of a county may not be appointed or act as probation officer.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

943.

ADOPTION—MOTHER MAY CONSENT TO SAME—WHEN DIVORCED HUSBAND CONCEALS HIS WHEREABOUTS FOR PERIOD OF ONE YEAR.

A woman obtained a divorce from her husband. By the terms of the decree she was awarded the custody of their child and he was required to contribute to its support. This he did, residing in the same community for one year, when he left and concealed his whereabouts and has not been heard from.

HELD, that this constitutes an abandonment by him of his child and that the mother is qualified, under section 8024, *to give the legal consent to the adoption of the child.*

COLUMBUS, OHIO, January 14, 1918.

Board of State Charities, Columbus, Ohio.

GENTLEMEN:—On August 17, 1917, the following communication was received at this department from Mr. A. C. Crouse, chief probation officer, division of domestic relations, court of common pleas of Hamilton county, Ohio:

> "We have an interesting case here which I am referring to you at the suggestion of Mr. Williams, of the board of state charities.
>
> Five years ago Mrs. H. secured a divorce from her husband in the insolvency court in this county. In the decree the two children, Alice and Mary, were placed in the custody of the mother. The father was ordered to pay $5.00 per week for the support of the two children. One year later the father left the city and the state and has never since been heard of by members of his family. About this time the mother placed Mary with a relative. This relative has cared for the little girl since that time and now desires to adopt the girl so that she may be made an heir to the relative's estate. The mother is willing to consent to the adoption.
>
> When the relative went to Judge Lueders, of the probate court, to have the adoption papers prepared, Judge Lueders refused to consent to the adoption unless the case was brought to his court, the child declared a dependent and committed to an institution which has the right to consent to an adoption. The judge said that in no other way could the adoption be made legally so long as there was no evidence of the death of the father.
>
> The case was thereupon brought to my attention. When I learned that the family had been in the divorce court and the custody of the children had been fixed by the insolvency court, I refused to bring the case into this court because of the decisions of the courts for many years holding that a court which fixes the custody of a child has continuing jurisdiction. The latest opinion on this matter I have in mind is that of the court of appeals, for Sandusky county, in the case of the Cleveland Protestant Orphan Asylum et al. v. Hazel Taylor Soule, found on page 151, 24th Ohio Circuit Court Reports, new series.
>
> The relative who desired to adopt the child thereupon appealed to Judge Jos. B. Kelly, of the insolvency court. Judge Kelly said that he would put on an entry consenting to the adoption. Judge Lueders, of the probate court, however, holds that he has no right to recognize such an order from the insolvency court. The result is that the child is being deprived of a privilege which she should be permitted to enjoy.
>
> I had a talk with Judge Lueders the other day about the matter, and he suggested that we bring the child into this court and declare it to have been abandoned, commit it to the children's home, and permit the children's home to consent to the adoption. We are willing to do this but we have some doubt as to its legality.
>
> I would be very glad to have an opinion from your department as to how this case might be handled under our laws and decisions."

This inquiry purports to be made at your suggestion, and the answer, therefore, is directed to you.

The inquiry upon examination is found to involve two questions: First, where

is lodged the authority to consent to an adoption in accordance with section 8024 General Code under the circumstances above set out. Second, how is the above question, if at all, affected by the order of the insolvency court in a divorce case whereby the custody of the child in question was decreed to the mother?

The proceedings for the adoption are contained in the section above mentioned, which is as follows:

> "Sec. 8024. Any proper person not married, or a husband and wife jointly, may petition the probate court of their proper county, or the probate court of the county in which the child resides, for leave to adopt a minor child not theirs by birth, and for a change of the name of such child. A written consent must be given to such adoption by the child, if of the age of fourteen years, and by each of his or her living parents who is not hopelessly insane, intemperate, or has not abondoned such child, or if there are no such parents, or if the parents are unknown, or have abandoned the child, or if they are hopelessly insane or intemperate, then by the legal guardian, or if there is no such guardian, then by a suitable person appointed by the court to act in the proceedings as the next friend of the child."

By the above the written consent of each parent is required unless coming within the exceptions mentioned in the section, the one here applicable being included in the phrase "or has not abandoned such child." If the father has abandoned the child, the consent of the mother alone is sufficient as is indicated by the phrase after the provision for the consent of the parent:

> "Or if the parents are unknown, or have abandoned the child, or if they are hopelessly insane or intemperate, then by the legal guardian."

This means if both of the parents are unknown, or if both have abandoned the child, and it is the plain intent of the section that as long as there is one parent qualified to give the consent it is to be given by such parent before resorting to the other sources of consent therein provided.

We have then to examine the question as to whether this father has abandoned his child. In the ordinary sense such abandonment is understood to be leaving a child with whom he stands in the ordinary relation and has the ordinary authority of a parent; that is, a child which is living with him. This, however, is not a necessary interpretation, and it is submitted that the language does not require such restricted meaning.

The definition of "abandon" in Century Dictionary is as follows:

> "1. To detach or withdraw oneself from; leave.
>
> (a) To desert; forsake utterly; as to abandon one's home; to abandon one's duty.
>
> (b) To give up, cease to occupy oneself with; cease to use, follow, etc.;
>
> (c) To resign, forego, or renounce, relinquish concern in;
>
> (d) To relinquish the control of; yield up without restraint;
>
> 2. * * * * * * * * *
>
> 3. To relinquish or renounce."

"Abandonment" is defined as follows:

> 1. Act of abandoning or the state of being abandoned; absolute relinquishment; total desertion.

2. * * * * * * * * *
3. In law:
   (a) * * *
   (b) The voluntary leaving of a person to whom one is bound by a relationship of obligation, as a wife, husband, or child; desertion."

There is a question, and different minds reach a different conclusion as to whether there could be an abandonment of a child by a father who has been deprived of its custody by the decree of a court. The facts are not all given in this case as they actually existed, either as to the cause of the divorce or the terms of the decree. If, as a matter of fact, this father had abandoned his child before the divorce there is no question as to the mother's right to give the consent. The decree of the court probably gave the father a right to visit the child at certain times and under certain conditions, as such decrees usually do, and the final answer might determine upon this ground. At any rate we have in the opinion one connection left between this father and child—he had the privilege which he should have been willing and anxious to accept, of contributing to its support. This duty he has utterly ceased to perform, and in a manner which shows him regardless not only of his natural obligation, but of the respect he owes to the law and to the judgment of the court. If it had been impossible for him to comply with this order, it was his duty to make it known to the court in order to escape the guilt of contempt of court. If he is dead he cannot do this, of course, but in that event his consent is not necessary; if he is living he has certainly abandoned his child as far as it is possible for a parent to do so.

In the first place, this divorce was granted for his aggression, so that he himself by his own wilful conduct and his failure to meet this obligation as a member of society and the head of a family has resulted in his separation from the child and the loss of its custody and control; and this, under the purview of this statute which should have a liberal construction, may well be considered as the beginning of the abandonment. This he has supplemented by severing the last tie and neglecting the last obligation to which he was bound to his child, not only by the order of the court pronounced against him, but by the natural obligations of humanity and parental affection. He had, as shown above, a portion of the parental connection left; just how far it extended depends upon the decree of the court, but it was at least something and that something quite substantial. It is therefore submitted that he has to all intents and purposes and in legal contemplation, abandoned his child.

This conclusion is announced with diffidence and with respect for the opinion of the learned court, from whose judgment it seems to differ, as it is probably upon this ground that the probate judge declined to decree the adoption, although this does not absolutely appear from the inquiry. Unless, then, the right to this consent has been in some manner affected by the proceedings or decree of some of the courts in which this unfortunate family has appeared, the mother is qualified to give the consent alone upon the ground that the father has abandoned the child.

Proceeding now to the second branch of the inquiry as to what if any effect upon the above conclusion the proceedings in any of the courts may have, there has been no actual proceeding in any but the insolvency court in the divorce case in which the custody of the child was fixed. This decree of the court is not *ipso facto* sufficient to give the mother the right to consent to this adoption. The decree of the court gives the mother the custody of the child, subject to be modified by a further order of the court, which under such circumstances always retains continu-

ing jurisdiction. This right to the custody and the decree giving it are not sufficient to supersede or set aside the authority of the statute in reference to the adoption. Section 8024 must be complied with under all circumstances, as it is an absolute, positive and clear requirement necessary to the jurisdiction of the court to establish the new status.

It is true, as stated above and as suggested in the inquiry, that the court still has jursdiction. It is the practice for it to retain jurisdiction and have what is called "continuing jurisdiction," and this continuing jurisdiction has the effect of *lis pendens* so far as any other proceeding in any other court may be attempted. The decree you cite is only declaratory of a well established principle established by a line of decisions going back so far that its origin is lost in antiquity. It is, however, a good example of the application of the principle.

Orphan Asylum v. Soule, 24 C. C. N. S., 161.

The same principle is applied by the probate court of Lucas county in a case practically on "all fours" with the instant case. In re Maud Faye Olson 3 N. P. 305, the syllabus of which is as follows:

> "Where, in a proceeding in the probate court to set aside the adoption of a child on account of failure to secure the consent of the mother who is under none of the disabilities to consent prescribed by Sec. 3137, Rev. Stat., the court would have to grant such request, but by such proceeding the child has once been brought under the jurisdiction of the court under this section, the court will have jurisdiction over such child for all the purposes which this section has in view, and which the best interest of the child demand."

This awkward syllabus not only ratifies the principle above mentioned and shows its application to the exact case, but is also pertinent as bearing upon the right of the parent to have a consent, and furnishes an instance of the fact that if the jurisdiction of the court appears on the face of its record from the necessary facts therein cited, yet if the statements thereof be untrue and be shown so afterward the court is without jurisdiction and the order voidable. It was in that case set aside by direct attack.

It is apparent that the highest degree of care should be taken by the court in determining this question of consent to the adoption when the proposed consent comes from other than the parents of the subject. It is, however, true beyond question that under the state of facts in the present case the authority to give this consent is not complicated by any previous act of the court touching these parties.

The more extended the consideration given the question and the more complete the examination of authorities, the more the above conclusion becomes settled.

The courts have gone the limit in giving continuing jurisdiction over the person and property of children to that court which first acquires or assumes jurisdiction—this, however, without additional legislation, and in no case extends to the subject of adoption. While this subject seems to call for the exercise of the highest authority of any, and is the most closely associated with the interests of the child, fixing or changing as it does its name and identity, its relation to the world and to its environment—in short, going further and changing the life of the child—than any other proceeding or measure that is taken with reference to such child, yet, in another sense it has no connection with the custody or control of the child. That is to say, that even though such child be adopted and changes its parentage and position and relationship to the world in general thereby, it is still subject to

the same laws and the same authority by which such custody and control are taken over by the public as is every child under other circumstances; and the same as another child having natural parents. *Adoption* is entirely artificial, wholly statutory. While it effects the most important change possible in the affairs and career of him who is the subject of it, yet it is a creature of technicality and is only accomplished by strict performance of certain statutory requirements, which are created only by reason of the force of legislation regardless of any natural reason or any other control whatever.

The supreme court in a recent case has held that where a court granting a divorce awards the custody and control of children such children become the wards of that court and the jurisdiction of the court over the custody and control is a continuing jurisdiction, and such decree for the custody and control of the minor children cannot be affected by the appointment of a guardian by a probate court, and that no other court can, by proceedings in habeas corpus, acquire any jurisdiction further than to enforce the decree of the first court.

In re: Angeline E. Crist, 89 O. S., 33.

It is apparent that this decision goes to the last limit and leaves no further distance to be traveled by any other in the same direction.

It is conceived, however, that by the expression "wards of that court" it is not meant that the court intends to assume and perform the ordinary duties of guardianship, but that the term is used in a more general sense like that in which it is stated in English books, that is, orphans are wards of chancery. The statement is not that the probate court cannot appoint a guardian, but that the custody and control of the children cannot be affected by such appointment; that is, the power would still remain in the court granting the original decree to make any order touching such custody.

The suggestion arises in a discussion of this question that this disposition of it results in curtailing the desired effect of an adoption; that the person adopting a child does so principally to have the custody and control of the child and that by giving the above effect to the statutes and the decision above cited, the adoption would become an idle and empty ceremony and in many cases might deter parties from such adoption. This argument, however, is not really reached. The interpretation of the statutes in question is plain and is arrived at by reference to well known rules without reaching the question of the effect and consequence of the act, Such consequences rest with the legislature enacting the statutes and with the court rendering the decision. However, as is generally the case with this argument *ab inconvenienti* the difficulty in more imaginary than real or it will disappear upon an application of the law to actual cases. There is a point where the powers of these two courts meet and changing it to the one side or the other in nowise removes the difficulty or the apparent conflict. There is no kind of doubt of the jurisdiction of the probate court in everything pretaining to adoption. It is equally well settled that the court rendering a decree under the divorce and alimony statutes has continuing jurisdiction over the custody of children. You therefore necessarily have in the probate court the right to establish the adoption and in the common pleas court the right to prevent its full consummation. The same thing is true of guardianship. It would indeed be a far cry to say that this *per curiam* opinion in the case of in re Crist has deprived the probate court of its jurisdiction to appoint guardians even guardians of the person, yet such guardian of the person cannot get the custody of the child under and by virtue of his appointment because the other court has the jurisdiction and power continuing in it over the subject. This difficulty as has been stated, will be found an imaginary one because always

and universally, with only the rarest exception, would there be a conflict or difference of opinion. When the probate court decided that a person was proper to become the parent of a child by adoption, the common pleas court would always recognize that situation and award such person the custody; likewise in the case of the appointment of a guardian of the person. But whether this be true or not, you have positive power and authority in two different courts in reference to these two subjects and there seems to be no difficulty about fixing the line of demarcation as between them.

This matter cannot properly be disposed of without further reference to the suggestion made by the probate judge that a commitment be made to the children's home for the purpose of giving some one unquestioned authority to consent to this adoption. This plan looks feasible and certain upon casual inspection but will not stand the test of examination. In reality it would be found most precarious and dangerous. As has already been stated this decree of adoption may be collaterally attacked. It is true it may be said to have the force of a judgment to bind parties and privies. It would not, however, bind one of the parties. The infant upon coming of age might collaterally attack it, or directly either, by showing that the legal consent was not obtained. This commitment would not be legal or binding to fix any status on this child or confer any authority upon the children's home officials to give the consent because it would be really a false commitment made upon a false showing, not for the purpose of providing for the wants of the child, but for the ulterior purpose of disposing of the child itself and changing its status and its identity in life. It is doubtful whether it may not be directly or collaterally attacked by those who would be otherwise the heirs of the adopting parent, and in every aspect of the case would be most ill-advised and improper. This is in no manner intended as a criticism upon the opinion of the learned judge who makes the suggestion, but rather a suggestion to him of the objections to the course proposed.

You are therefore informed that it is my opinion that the consent to the adoption in the case set out in this inquiry can be given by the mother alone.

This opinion is given with hesitation and caution, as it seems probable that it may differ from that of the learned court, although his refusal may proceed upon other grounds.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

944.

APPROVAL—SALE OF LAND IN CITY OF CLEVELAND—TO C. H. GALE.

COLUMBUS, OHIO, January 14, 1918.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of December 27, 1917, in which you enclose record of proceedings had relative to the sale of a certain tract of land in the city of Cleveland, Cuyahoga county, Ohio, to C. H. Gale, said Gale being lessee of this land from the state.

The proceedings leading up to the sale and the sale itself are being conducted under an act found in 107 O. L. 620, which relates to this one particular transac-

tion. I have examined said proceedings, in view of the provisions of said act, and find the same in conformity with said provisions. I therefore approve the appraisement placed upon said land, namely, $4,320.00, and am endorsing my approval on said resolutions and forwarding the same to Hon. James M. Cox, governor of Ohio, for his consideration.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

945.

APPROVAL—BOND ISSUE—VILLAGE OF WEST CARROLLTON.

COLUMBUS, OHIO, January 16, 1918.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

IN RE: Bonds of the village of West Carrollton, Ohio, in the sum of $3,800.00, in anticipation of assessments to pay the cost and expense of improving Central avenue in said village over and above the cost and expense of said improvement to be paid by the county commissioners.

I have carefully examined the corrected transcript of the proceedings relating to the above bond issue, and find said proceedings to be in accordance with the provisions of the General Code of Ohio relative to bond issues of this kind.

I am, therefore, of the opinion that properly prepared bonds covering said issue will, when the same are signed and delivered, constitute valid and subsisting obligations of said village.

No bond form accompanied said transcript, and I am this day instructing the clerk of the village to have same prepared and forwarded to this department for approval before the bonds covering said issue are printed. The transcript relating to this bond issue will be retained until a copy of such bond form is received.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

946.

APPROVAL—BOND ISSUE—VILLAGE OF WEST CARROLLTON.

COLUMBUS, OHIO, January 16, 1918.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

IN RE: Bonds of the village of West Carrollton, Ohio, in the sum

of $4,000.00, to pay the village's share of the cost and expense of paving Central avenue in said village over and above the cost and expense of said improvement to be paid by the county commissioners.

I have carefully examined the corrected transcript of the proceedings relating to the above bond issue, and find said proceedings to be in accordance with the provisions of the General Code of Ohio relative to bond issues of this kind.

I am, therefore, of the opinion that properly prepared bonds covering said issue will, when the same are signed and delivered, constitute valid and subsisting obligations of said village.

No bond form accompanied said transcript, and I am this day instructing the clerk of the village to have same prepared and forwarded to this department for approval before the bonds covering said issue are printed. The transcript relating to this bond issue will be retained until a copy of such bond form is received.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

947.

APPROVAL—SALE OF CANAL LANDS TO SAMUEL F. VAN VOORHIS, NEWARK, OHIO.

COLUMBUS, OHIO, January 16, 1918.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of January 12, 1918, in which you enclose, in duplicate, certain resolutions having to do with the sale of a portion of the old North Fork feeder of the Ohio canal in the city of Newark, Ohio, to Samuel F. Van Voorhis, who now holds a lease from the state for said lands, the appraised value of the lands being five thousand dollars ($5,000.00).

This sale is sought to be made under and by virtue of section 3 of an act of the general assembly, passed March 21, 1917 (107 O. L. 512). This section reads as follows:

> "Any lessee of the state occupying any portion of the canal feeder, herein abandoned, may surrender his lease to the superintendent of public works for cancellation, and take a deed for the same by paying into the state treasury the amount of the appraisement as fixed by the superintendent of public works at the time of such sale."

I have carefully examined the proceedings had by you in reference to the sale of the property therein described to said Samuel F. Van Voorhis, and I find the same regular and in conformity to the provisions of said special act.

I have, therefore, approved the same and am placing my endorsement upon the said resolutions, and have forwarded the same to the governor of the state for his consideration.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

948.

TOWNSHIP BOARD OF HEALTH—JURISDICTION IN VILLAGES WHEN NO OFFICERS ELECTED IN VILLAGE—FAILURE TO ELECT OFFICERS DOES NOT DISSOLVE MUNICIPAL CORPORATION.

1. *The mere fact that a municipal corporation fails to elect the necessary officers of the corporation and to make use of the powers granted in its charter, does not dissolve the corporation; neither does such failure cause a forfeiture of its right to be a corporation.*

2. *In case a village ceases to elect officials and there is no one with authority to levy taxes and carry on the functions of the village, the township board of health has jurisdiction over matters pertaining to health within said village and may pay the expenses thereof out of the proper township fund.*

COLUMBUS, OHIO, January 16, 1918.

HON. A. W. FREEMAN, *Commissioner of Health, Columbus, Ohio.*

DEAR SIR:—I have your communication of January 8, 1918, which reads as follows:

> "We have in Ohio several communities which have heretofore been incorporated as villages. In two of these municipalities, i. e., Calais, Monroe county, and Centerville, Gallia county, no officers have been elected for several years and to all intents and purposes the municipal charter has been vacated, but this has not been done in accordance with the provisions of the statutes for the surrender of incorporation privileges.
>
> In the village of Calais at the present time there is an outbreak of scarlet fever with no legally organized board of health or health officer. The state department of health has the authority to appoint a health officer in a municipal corporation where the local authorities fail or refuse to make such an appointment, but the compensation of the health officer and any expense incurred must be paid by the local community. In this village there is no fund for the payment of such expense and we have been unable to find anyone who will accept the responsibility of acting as health officer without compensation and without the authority to create expense.
>
> Please inform me if there is any way whereby such communities as have heretofore been incorporated, and because of non-use such incorporation has practically been nullified, the incorporation can be declared void, thereby placing such community under the supervision and jurisdiction of the township trustees."

The question involved in your communication is practically as to whether the mere neglect or failure of a municipality to elect officials would in and of itself dissolve the corporation, or whether the failure of the officials of a municipal corporation to perform the duties devolving upon them would give rise to such conditions that the charter of the corporation might be declared forfeited.

We will first consider whether the neglect or failure on the part of a municipality to elect officials would in and of itself dissolve the corporation.

Dillon in his Work on Municipal Corporations, in section 331, uses the following language, relative to this matter:

> "Here (that is in the United States) it is the *people* of the locality who are erected into a corporation, not for private, but for public or *quasi*

public purposes. The corporation is mainly and primarily if not wholly an instrument of government.. The officers do not constitute the corporation, or an integral part of it. The existence of the corporation does not depend upon the existence of officers. * * * but the mere neglect or mere failure to elect officers will not *dissolve* the corporation, certainly not while the right or capacity to elect remains. In this respect municipal corporations resemble ordinary private corporations, which exist *per se,* and consist of the stockholders who compose the company. The officers are their agents or servants, but do not constitute an integral part of their corporation, the failure to elect whom may suspend the functions, but will not dissolve the corporation."

In Buford et al. v. State of Texas, 72 Tex. 182, the court say in the syllabus:

"The failure to elect officers by a municipal corporation does not dissolve the corporation."

In State ex rel. v. Dunson et al., 71 Tex. 65, it is stated in the syllabus:

"A municipal corporation is not dissolved by the failure to elect officers."

On p. 70 in the opinion the court say:

"The inhabitants of a given territory have no inherent power to create therein a municipal corporation. This can be done only by a special act of the legislature, or by compliance with the general law providing the manner in which the inhabitants may give life to such a corporation. The inhabitants of a municipal corporation are as powerless to dissolve it, unless this be done in the mode prescribed by law, as they are to create such a corporation in a mode not prescribed by law. The petition shows that the town of Nacogdoches was duly incorporated under the act of January 27, 1858, and that corporation must be deemed to exist until in some manner known to the law it is dissolved. The inhabitants may have failed to elect proper officers since the year 1882, but under the great weight of authority this does not operate a dissolution."

From all the above it seems clearly evident that the mere fact that a municipal corporation ceases to elect officers and fails to make use of the charter rights granted to it under the law, does not from that fact alone dissolve the corporation.

The next question that might be asked is as to whether such acts would work a forfeiture of the rights of a corporation to exist.

Dillon in his Work on Municipal Corporations, in section 333 thereof, says:

"The doctrine of a *forfeiture of the right to be a corporation* has also, it is believed by the author, no just or proper application to our *municipal* corporations. * * * In short, unless otherwise specially provided by the legislature, the nature and constitution of our municipal corporations, as well as the purposes they are created to subserve, are such that they can, in the author's judgment, only be dissolved by the legislature, or pursuant to legislative enactment. They may become inert or dormant, or their func-

tions may be suspended for want of officers or of inhabitants; but *dissolved,* when created by an act of the legislature, and once in existence, they cannot be, by reason of any default or abuse of the powers conferred, either on the part of the officers or inhabitants of the incorporated place. As they can exist only by legislative sanction, so they cannot be dissolved or cease to exist except by legislative consent or pursuant to legislative provision."

In Butler et al. v. Walker et al., 98 Ala. 358, the court say:

"A municipal charter is not forfeited by non-user for any period of time, and such charter can be forfeited only by legislative action by repeal, or judicial action adjudging a forfeiture."

In Swamp Land Dist. v. Silver, 98 Calif. 51, the court say in the syllabus:

"A municipal corporation cannot be deprived of its existence by non-user of its powers or a failure on the part of its officers to act as a corporation. It can be deprived of its charter only by act of the legislature or a judicial sentence based upon legislative provision and sufficient facts."

In the opinion on p. 54 the court reasons as follows:

"It is claimed by the appellant that the district 'lost its corporate existence by reason of the non-user of its functions and by reason of the total failure on the part of its officers and land owners to act as a corporation;' but there is no such thing in this country as forfeiture of a charter of a municipal corporation through the acts or misconduct of its agents or officers. Any neglect to use the powers in which the public or individuals have an interest may be corrected by the courts."

From all the above it is clear that a municipal corporation does not forfeit its right to exist from the mere fact that it no longer elects officers for the same, or that the officers do not perform their duties.

This being the case, we will go one step further and inquire how a municipal corporation may be dissolved. In answering this question your inquiry will be answered both positively and negatively.

In Hambleton v. Town of Dexter, 89 Mo. 188, the court say:

"Towns incorporated under 2 Wagner Statutes, pages 1319 and 1320, can be disincorporated only in the manner authorized by said statutes."

In the opinion on p. 192 the court say:

"These towns when they are once incorporated can only become disincorporated by resorting to the proceeding pointed out by the statute."

In State ex rel. v. Dunson et al., supra, the court held in the opinion as above quoted:

"The inhabitants of a municipal corporation are as powerless to dissolve it, unless this be done in the mode prescribed by law, as they are to create such a corporation in a mode not prescribed by law."

The legislature of our state has provided a specific method by which villages may be dissolved. This method is set out in sections 3513 and 3514 G. C., and in view of the above authorities, the legislature having provided a distinct method by which villages may be dissolved, this is the only method that could be followed in the dissolution of villages. This method in brief consists of filing a petition, signed by at least forty per cent of the electors, with the village council, which shall call an election, and upon an affirmative vote of the majority of such electors at a special election which shall be provided for by council, the corporate powers of such village shall cease.

This really fully complies with your request in that you do not inquire what course you could follow if the corporation should be held still to be in existence by me. However, I desire to make a suggestion or two. You state that you could appoint some person as health officer of said village, if it were not for the fact that there is no money in the treasury and no means provided for his salary and the necessary expense incurred by him after appointment, in the performance of his duties. That you could appoint such health officer is clear from the provisions of section 4405 G. C.

Section 4451 G. C. provides as follows, relative to the expenses incurred:

> "When expenses are incurred by the board of health under the provisions of this chapter, upon application and certificate from such board, the council shall pass the necessary appropriation ordinances to pay the expenses so incurred and certified. The council may levy and set apart the necessary sum to pay such expenses and to carry into effect the provisions of this chapter * * *."

The courts are unanimous upon the proposition that mandamus would lie to compel the council to provide the necessary funds and pass the necessary appropriation ordinances to pay the expenses so incurred. This of course brings us to the question as to whether there is a council in the village of Calais.

Section 4215 G. C. provides that the members of the council of a village shall be elected "for terms of two years and shall serve until their successors are elected and qualified." Unless Calais has been without an election for a great length of time, it is possible that a sufficient number of the old members of council are still remaining to enable the council to transact business. If so, they could be compelled to make provision for the necessary expense incurred in the matter about which you inquire.

In the event there are not a sufficient number of persons holding over under and by virtue of a former election, to enable the council to transact business, of course we would be up against another proposition.

The courts have pretty generally held in this country, as well as in England, that the proper officials of a municipality may be mandamused to hold an election for the purpose of electing municipal officers. This might afford a remedy or solution of the question submitted by you.

I am aware, however, that these latter suggestions are of no assistance to you, for the reason that there is no council existing in Calais, which can be mandamused to make the necessary levy to take care of the expense incident to the matter in hand. So we will turn from the village of Calais and make a few suggestions along other lines.

I will first call your attention to section 1237 G. C., which may help out until you can make arrangements for the proper local officials to act.

The question then arises as to who are the proper local officials to act under the circumstances in the matter submitted by you. I desire to make the following

observations relative thereto: The questions with which the board of health has to do are of vital concern to the people of the state as a whole, and not merely to the people of the local subdivisions thereof. While the law making power of the state has seen fit to delegate much power and authority relative to questions of health, yet much power and authority is retained in the possession of the state agencies which have to do with the matter of health. This clearly shows that the legislature considered the matters pertaining to the health of the different communities to be of great interest and concern to the state as a whole.

Another general observation I desire to make is that all villages are, for many purposes, at least integral parts of the township in which they are located. The electors thereof vote for all township officials. The property within the village is taxed for township purposes. Whatever vitally affects the village, to a certain extent affects the township in which the village is located, and if the village for any reason decides to disorganize as a corporation, the inhabitants thereof and the property therein immediately, and from the fact of this disorganization alone, become a part of the township in which said village is located.

With these general observations before us, we will consider the provisions of two sections of the General Code.

Section 3391 G. C. provides that in each township the trustees thereof shall constitute a board of health which shall be for the township outside the limits of any municipality.

Section 4404 G. C. provides:

> "The council of each municipality shall establish a board of health, composed of five members to be appointed by the mayor and confirmed by council who shall serve without compensation and a majority of whom shall be a quorum. * * * But in villages the council, if it deems advisable, may appoint a health officer, to be approved by the state board of health who shall act instead of a board of health, and fix his salary and term of office. * * *"

It is evident from these sections that the legislature saw fit to confer upon municipalities the jurisdiction in reference to health matters within their limits, and upon the townships jurisdiction of health matters outside the limits of municipalities. But it seems to me that when the legislature saw fit to delegate these important powers to the villages and townships of the state, it must have had in mind that said subdivisions would be acting, living, vital things, and not dormant, sleeping, inactive things. It further appears to me that the legislature must have had in mind that in all cases there would be somebody with power and jurisdiction to look after health matters which so vitally concern the people of the state as a whole.

What is the condition of the village of Cailais? It has held no election for years. In all probability it has no council. It has no one with power to levy a tax. It has no fund, therefore, from which to pay the salary and expenses of a health officer. To all intents and purposes, so far as things vital to itself are concerned, it no longer exists.

In view of all the above, it is my opinion that under such circumstances the township board of health would have authority in law to take charge of matters relating to health, within the limits of said dormant corporation. As said before, the village is a part of the township and the taxes levied by the township trustees, to take care of matters of health, are levied upon the property of the municipality, as well as upon the property of the township outside of the municipality.

Hence answering your question specifically, while the corporation of Calais is not dissolved from the mere fact that it no longer elects officials, yet it is dormant and inactive and therefore the board of health of the township in which the village is located would have authority to take charge of matters pertaining to the health of the community within said village, and pay the necessary expenses thereof out of the proper fund of the township. To be sure, as soon as the village of Cailais elects officers and makes it possible to carry on the functions of the village, the jurisdiction of the township board of health would cease, in so far as it pertains to matters within the corporate limits of said village.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General

949.

DOG LAW—PERSONS PURCHASING OR TRADING REGISTERED DOGS—MUST HAVE SAME REGISTERED IN THEIR OWN NAMES—PERSON MOVING TO ANOTHER COUNTY MUST HAVE DOG REGISTERED IN LATTER COUNTY.

(1) *A person registers his dog on or before January* 1, 1918, *and thereafter sells same;*

HELD: That the party purchasing such dog is required to again register the same in his own name and pay the prescribed fee therefor.

(2) *A person who registers a dog on or before January* 1, 1918, *and thereafter during the year moves to another county, taking said dog with him, is required to register said dog again in the second county for the year* 1918.

(3) *Where two persons, who have registered their respective dogs for* 1918, *make a trade of such dogs during the year they are required to again register the same and pay the prescribed fee.*

COLUMBUS, OHIO, January 18, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I am in receipt of a letter from you under date of December 20, 1917, asking an opinion of me as follows:

"We would respectfully request your written opinion upon the following questions touching the new dog law to be found in 107 O. L. 534:

(1) A person engaged in the buying and selling of dogs, not having a dog kennel, registers his dogs on or before January 1, 1918. He then sells the reigstered dogs. Will the party, or parties, purchasing such dogs be required to again register the same under the new owner's name and pay the same fee?

(2) A party who registers his dogs on or before January 1, 1918, and afterwards during the year moves to another county, will he be required to register the dogs again in the other county during the year 1918?

(3) To parties who have registered their dogs for 1918 make a trade during the year. Will they be required to again register the same and pay the regular fee?"

The questions presented by you call for a consideration of the provisions of sections 5652 and 5652-2 General Code, as amended and enacted in the act referred to in your communication. Said sections read as follows:

"Sec. 5652. Every person who owns, keeps or harbors a dog more than three months of age, annually, before the first day of January of each year, shall file together with a registration fee of one dollar for each male or spayed female dog, and a registration fee of two dollars for each female dog unspayed, in the office of the county auditor of the county in which such dog is kept or harbored, an application for registration for the following year beginning the first day of January of such year, stating the age, sex, color, character of hair, whether short or long, and breed, if known, of such dog, also the name and address of the owner of such dog."

"Sec. 5652-2. Every person immediately upon becoming the owner, keeper or harborer of any dog more than three months of age or becoming the owner of a dog kennel, during any year, shall file like applications, with fees, as required by sections 5652 and 5652-1 for registration for the year beginning January first prior to the date of becoming the owner, keeper or harborer of such dog or owner of such dog kennel."

Without discussion of the provisions of section 5652-2 General Code, it is evident that said provisions require your first question to be answered in the affirmative if the dog or dogs involved in the transaction are more than three months of age.

From the provisions of section 5652 General Code it appears that the registration of dogs and the payment of fees therefor must be done in the office of the county auditor of the county in which such dogs are kept or harbored, and these provisions require your second question to be answered in the affirmative if the dog or dogs involved in the transaction are of the required age, and the registration of such dog or dogs in one county will not exempt them from liability to registration in another county where they may be taken and kept.

With respect to your third question it is apparent that if the dogs traded remain in the county where registered the provisions of section 5652-2 General Code would alone require an affirmative answer to said question; while if the trade involved the removal of the dogs from the county where respectively registered, the provisions of both the above quoted sections of the General Code would likewise compel an affirmative answer to this question.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

950.

APPROVAL—LEASE OF CANAL LANDS TO E. R. DEFENBAUGH—C. J. CHANDLER—J. M. COVERDALE—THE BUCKEYE CEREAL CO.—JOHN C. PETTIT.

COLUMBUS, OHIO, January 18, 1918.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of January 12, 1918, in which you enclose, in triplicate, for my approval, leases of canal lands as follows:

	Valuation.
To E. R. Defenbaugh, for strip of marsh land on north shore of Buckeye Lake	$1,100 00
To Clarence J. Chandler, portion of the berme embankment, Miami and Erie in the city of Defiance	1,000 00
To J. M. Coverdale, 2.3 acres, part of canal basin at Adams Mills	300 00
To The Buckeye Cereal Company, railway crossing over Ohio Canal in Massillon, Ohio	1,666 00
To John C. Pettit, portion of abandoned Hocking Canal in Logan, Ohio	100 00

I have carefully examined these leases, find them correct in form and legal, and have therefore endorsed my approval upon the same and forwarded them to for governor of Ohio for his consideration.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

951.

TAXES AND TAXATION—DUTY OF COUNTY AUDITOR AND COMMISSIONERS UNDER 5548 G. C.—REAPPRAISEMENT OF SEVEN TAXING DISTRICTS IN FRANKLIN COUNTY IN 1917 IMPROPER.

1. *Under section* 5548 *G. C.* (107 *O. L.* 38), *it is the duty of the county auditor to make a finding covering each of the taxing districts of his county, and it is likewise the duty of the county commissioners under said section to make an order confirming, modifying or setting aside such finding of the county auditor as to each of the taxing districts aforesaid. An order confirming merely a part of the county auditor's finding and being silent as to the remainder of such finding does not authorize the auditor to proceed under said section.*

2. *The duty of the county auditor under the tax law is to ascertain from the best sources of information within his reach and determine as near as practicable the true value in money of each separate tract and lot of real property in each and every taxing district in his county, and then, acting under section* 5548, *supra, make a finding which he shall submit to the county commissioners. It is neither within the letter nor the spirit of the law for a county auditor to submit a finding which he knows and at the time admits has no basis in fact.*

3. *Under all the facts that have come to hand in relation to the reappraisement of the real property in seven certain taxing districts of Franklin county, Ohio, in* 1917, *HELD: Such reappraisement of said real estate in said seven taxing districts of said county possesses such infirmities as to warrant the tax commission of Ohio in advising such county auditor to restore the valuations of the real property in said seven districts to the valuations and assessments as they stood immediately prior to the reappraisement by the auditor in* 1917.

COLUMBUS, OHIO, January 19, 1918.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your communication enclosing a letter from Hon. H. Sage Valentine, county auditor of Franklin county, asking advice as to

whether or not his action and the action of the other officers in the assessment of real estate in certain wards of the city of Columbus and in certain townships of Franklin county was legal, and whether or not the act of the board of revision, in ordering the postponement of the reappraisement of real estate in the several taxing districts until such time as all the real estate in Franklin county might be appraised, was proper.

The communication sets out in detail and by copies from the records of the respective officers the action of the auditor in making his findings under section 5548 G. C., the action of the county commissioners in making their order as provided in that section, the action of the board of revision on the report of the reappraisement as made by the county auditor, the filing by A. J. Kiner, as treasurer of the county, of a complaint against said reappraisement, on the ground of illegality, and the action of the board of revision on said complaint, together with the certificate sent by the board of revision to the county auditor.

As you have all of this record before you and as it is somewhat voluminous, I have not deemed it necessary to set same out herein, but will address myself to a general consideration of the serious entanglement in the taxation work arising under all the circumstances.

The situation presented is that the county auditor has been ordered by the board of revision, as shown by the certificate of said board, under date of January 5, 1918:

> "to strike from the tax list and duplicate of said county the valuations or assessments of lots and lands, exclusive of new buildings, within the first, third, eleventh and sixteenth wards of the city of Columbus and the townships of Marion, Prairie and Clinton within said county, made for the current year and to restore to said tax list and duplicate, for the purpose of taxation in the current year, the valuations of said lots and lands in said wards and townships appearing on the tax list and duplicate for the year next preceding the current year."

This certificate was the result of the finding made by the board of revision upon the blanket complaint filed by Kiner as treasurer, alleging that the reappraisement was illegal.

In considering the questions involved, it will be necessary for us to refer to certain sections of the statute relating to taxation.

Section 5548 G. C. (107 O. L. 38) among other things makes the county auditor the assessor for all the real estate in his county, for purposes of taxation. It became his duty, on or before the second Monday in April, 1917, and annually thereafter, between certain dates, to ascertain whether the real property in the different taxing districts was—

> "assessed for taxation at its true value in money as the same then appears on the tax duplicate."

This section further provides that if he finds that it is assessed at its true value in money he should, subject to further provisions, enter such valuation upon the tax list and duplicate for the current year. This section also states:

> "In such event, and unless he finds that such property is not assessed at its true value in money, in each such subdivision, such assessments shall constitute the valuation for taxation for the current year, subject to the provisions hereinafter made. Said county auditor shall submit his findings concerning the valuation of such real estate to the board of county commis-

sioners of his county, and said board shall, at a hearing fixed within not less than ten nor more than twenty days thereafter, confirm, modify, or set aside the same by order entered on the journal of said board. * * If by such order it is determined that the real estate in any such subdivision is not on the duplicate at its true value in money, then such county auditor shall proceed to assess such real estate in such subdivision or subdivisions."

Acting under authority of this section, the county auditor made certain findings and determined that the real property in all of the taxing districts, except seven, was on the duplicate at its true value in money. This finding was duly filed with the county commissioners, and, as shown by the record, under date of April 20, 1917, the commissioners made an order, but it is my opinion that they did not make the order that they were authorized by law to make. Instead of making an order on the findings as filed by the county auditor, they confined themselves in their order to that part of the finding of the auditor that related to the seven districts in which he found that the real property was not on the tax duplicate at its true value in money, and made no finding as to the real property in those districts which he had found to be on the duplicate at its true value in money. This was not the order that should have been made under section 5548, supra, and it is my view of the law that a lawful and proper order of the board of commissioners is jurisdictional, and without same the county auditor would not be authorized to proceed with any reappraisement.

Assuming that he was duly authorized, the auditor proceeded with the reappraisement of the seven taxing districts referred to, and reported such reappraisement to the board of revision under date of November 9, 1917. On November 10, 1917, such board ordered:

"That the reappraisement as submitted to the board of revision be retransmitted to the county auditor according to section 5605-6 of the General Code."

I take it that the sections referred to are sections 5605 and 5606 G. C. The auditor, assuming that all steps had been taken according to law, added the valuations in the reappraised districts for 1917 to the county real estate duplicate and such values as reappraised were entered upon the tax lists for Franklin county, and the taxes thereon figured at the current rate, and the extensions were made on the books of the treasurer of the county, and all of this was completed by the auditor and the books turned over to the treasurer prior to December 21, 1917.

The record shows that the blanket complaint made by Kiner as treasurer, complaining against the valuation and assessments made of the real estate in the seven taxing districts referred to, because same were made in a manner contrary to the statute providing therefor, was filed with the board of revision on December 21, 1917. This complaint of Kiner, treasurer, was filed under authority of section 5609 G. C. (107 O. L. 43). Under this section one of the things provided is that any taxpayer may file such complaint as to the valuation or assessment of his own or another's property, and gives the same right to the county treasurer. These complaints may be made within any year and filed on or before the time limited for the payment of taxes for the first half year.

It will be noted that under section 5609 G. C. certain officials of the various subdivisions, including the county treasurer, are authorized to file complaints. This must give to the officer the right to file such complaint in a representative capacity; otherwise the provision would have little or no meaning, for he would have a

right as an individual to file a complaint. In a representative capacity, since the property of his district would be exempt from taxation, he would not have to file a complaint on account of the property of that subdivision.

So it is my conclusion that the authority given him is to file such complaint as he deems proper as a representative of the taxpayers of the particular subdivision that he represents. This complaint among other things, as provided in this section, can be for an "illegal valuation," and, as I understand the complaint filed by Kiner as treasurer, it charges that the valuation complained of, to wit, these seven districts, was made contrary to law and therefore was illegally valued.

In this complaint of the treasurer he avers that the county auditor in his finding of the valuation of property within Franklin county in April 1917, to the commissioners of said county—

> "alleged or made it appear that only the real estate in said wards and townships within said county was not appraised at its true value in money, whereas in fact the real estate of all the subdivisions within said city of Columbus and county of Franklin is valued at an amount substantially less than its true value in money, all of which was known to the auditor of Franklin county at the time he made his finding to said county commissioners, and which fact he admits to be true."

From the statements in this complaint as well as from various sources, it is apparent that the auditor at the time he filed his findings with the county commissioners, from all the examination he had made was satisfied that the real property in all of the taxing districts of Franklin county was not assessed at its true value in money, but that for convenience he concluded to take up the work in the manner as found, to wit, in the seven taxing districts where the reappraisement was made. Both our constitution and the legislative enactments thereunder provide for assessments of property for taxing purposes by a uniform rule and at a true value in money. A procedure such as is evidenced in this case certainly would offend against such rule.

So it seems to me, keeping in mind the spirit of our taxation system, that the county auditor in making the representations he did in the findings presented to the commissioners, wandered outside the pale of his authority. The incorrectness of the finding of the auditor, as I understand it, was known to him at the time he presented it to the commissioners, and it has been admitted all the time that all of the taxing districts of Franklin county, as far as the real estate therein being appraised at less than its true value in money was concerned, were in identically the same shape as the seven districts which were reappraised.

Believing as I do that a proper and legal order on behalf of the commissioners was jurisdictional, and that the finding of the county auditor was one of convenience, rather than of correctness, and further being of the opinion that if this entire matter was before a tribunal duly authorized to decide it, an order would issue restoring the valuations assessed on the real property of these seven subdivisions to the valuation as appeared on the tax list prior to this reappraisement by the county auditor, I will suggest that the tax commission advise the county auditor that under all the peculiar circumstances of this case was that the assessed value of the real property in the seven taxing districts under discussion be corrected so as to appear on the taxing lists at the same valuation as it did prior to the reappraisement by the auditor.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

952.

SCHOOL DISTRICTS—ITEMS OF INDEBTEDNESS THAT MAY BE FUNDED UNDER AN ACT OF THE LEGISLATURE (107 O. L. 575)—WHERE THERE IS AN EXISTING, OUTSTANDING, BOUNDED INDEBTEDNESS, THE BOARD OF EDUCATION OF SUCH DISTRICT MUST PROVIDE A SINKING FUND—HOW SAID FUND MANAGED AND CONTROLLED—BONDS MUST BE OFFERED TO SINKING FUND COMMISSION—RESOLUTION OF BOARD OF EDUCATION FOR BOND ISSUE—WHAT SAME MUST CONTAIN.

The only items of indebtedness which can be funded by a school district under the act of the legislature of March 21, 1917, *entitled, "An act to authorize municipal corporations and school districts to adjust their fiscal operations to the limitation on tax levies by funding existing deficiencies,"* 107 *O. L.* 575, *are those due and payable on or before July* 1, 1917, *or thereafter coming due during the current fiscal school year ending August* 31, 1917.

Where a school district has an existing outstanding bonded indebtedness the board of education of such school district is required by the provisions of section 7614 *General Code to provide a sinking fund for the extinguishment of the same, said fund to be managed and controlled by a board of commissioners to be appointed in the manner provided in said section; and bonds thereafter issued by the board of education of such school district for the purpose of funding deficiencies in the funds of the school district under the provisions of the above act must be offered to the board of commissioners of the sinking fund of the school district and by such board rejected before they can be legally purchased by the Industrial Commission of Ohio under the provisions of section* 1465-58 *G. C.*

Conformable to the requirements of section 11 *of article XII of the state constitution, the resolution of the board of education providing for the issue of bonds of a school district should make provision for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds and to provide a sinking fund for their final redemption at maturity.*

COLUMBUS, OHIO, January 21, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of Washington township rural school district, Logan county, Ohio, in the sum of $15,000.00, for the purpose of funding *certain deficiencies of said school district.*

I am herewith returning, without my approval, transcript of the proceedings of the board of education and other officers of Washington township rural school district, Logan county, Ohio, relating to the above bond issue.

The issue of said bonds is provided for for the purpose of funding a certain alleged deficiency of said school district under the authority of the "Terrell Act" so-called, passed March 21, 1917, and entitled "An act to authorize municipal corporations and school districts to adjust their fiscal operations to the limitation on tax levies by funding existing deficiencies." (107 O. L. 575.)

So far as applicable to the consideration of the proceedings relating to this bond issue this act, in section 1 thereof, provides that the board of education, by resolution passed not later than the second Monday in July, 1917, may direct the

clerk of the board of education and the board of commissioners of the sinking fund of the school district, if there be such board, to make up a financial statement of such school district as of the first day of July, 1917. The officers so directed shall immediately examine the records, books and accounts of their respective offices and make a financial statement and file the same with the clerk of the board of education not later than the second Monday in August, 1917. If they find that a deficiency exists in any funds under their respective supervision they shall certify the amount thereof, together with the various funds affected, and the deficiency in cash, under oath, on such statement.

Section 2 of said act provides that thereupon the board of education, by resolution passed by an affirmative vote of a majority of all the members elected or appointed thereto not later than the first Monday in October, 1917, may declare it necessary to issue and sells bonds of the school district for the purpose of funding the existing deficiency of such school district in the amount certified.

Section 6 of the act defines a "deficiency" for the purposs of said act, and, so far as applicable to school districts, provides that a "deficiency" shall be the aggregate sum

(1) of all obligations of the school district outstanding on July 1, 1917, and due on or before said date, or to become due thereafter during the then current fiscal year, whether in contracting such obligations the provisions of section 5660 of the General Code were complied with or not, for the payment of which sufficient funds are not in the treasury on July 1, 1917, or estimated to come into the treasury thereafter during the then current fiscal year from taxes or other sources of revenue, to the extent of the excess of such obligations over and above such funds on hand and estimated future receipts, applicable to the payment thereof and not needed to pay the ordinary fixed charges against the appropriate funds and the normal current expenses therefrom for the remainder of the fiscal year.

(2) The difference, if any, between the amount which should be in the sinking fund on July 1, 1917, to provide for the payment of interest falling due thereafter during the current fiscal year and as an accumulation to provide for the redemption of all outstanding bonds as they mature according to the plan of maturity thereof and the amount actually held in such sinking fund or otherwise available for such purpose on said date.

The act provides for the issue of bonds by the board of education for the purpose of funding deficiencies on a vote of the electors of the school district, and other provisions of said act prescribe the procedure for submitting the question of a bond issue for such purpose to the electors at the regular election for municipal and school officers in the year 1917.

The transcript shows that at a special meeting of the board of education of said school district on September 19, 1917, called in apparent compliance with the provisions of the General Code providing for such meetings, the clerk of the board of education submitted a report in writing of the financial condition of the school district on July 1, 1917, as follows:

"At the request of the president of the board of education I have made careful examination of the records, books and accounts of your board of this Washington township with the view of making and spreading upon the records the financial statement of the conditions of the finances of said

school district as of July 1, 1917; I beg leave to report that contracts have been made in pursuance of the instructions given by the voters in said township in ordering an issue and sale of bonds for the construction of the school building at Lewistown in said township necessary to carry out the instructions of said voters and made necessary for the increase in the cost of all material and all above the amount of said bond issue, as follows:

Heating and ventilating	$4,890 00
Plumbing and sewerage	2,725 00
Septic plant for sewerage	1,500 00
Thermostats	700 00
Auditorium and equipment	1,200 00
Walks and grades	1,000 00
Money borrowed from bank in Lewistown	1,000 00
Money to pay interest on bonds March 1, 1918	1,000 00
Expense of laboratory equipment, gymnasium equipment, for domestic science and manual training	985 00
Total	$15,000 00

and I spread the same on the record in your office as of August 1st, 1917.

Respectfuly submitted,

OLAF HOUSE,

Clerk of the Board of Education of Washington Township, Logan County, Ohio."

Thereupon at said meeting the board of education adopted a resolution reciting the facts stated in the report of the clerk, and finding that by the financial report made by the clerk at the request of the board there was shown to be an indebtedness of the school district in the sum of $15,000.00. Said resolution further ratified the action of the president in calling for said report, and found and determined the necessity of issuing and selling bonds of said school district "for the purpose of funding the deficiency of said school district that now exists by reason of said contracts and expenditures in the sum of $15,000.00." This resolution further provided for the submission of the question of the issue of said bonds to the electors of the school district at the general election to be held November 6, 1917. Notice of said election was published in the manner provided for in said act, said notice advising the electors that at said election there would be submitted to said electors the question of granting authority to the board of education "*of said township* to issue and sell school bonds of said township in the sum of fifteen thousand dollars ($15,000.00), the proceeds from such issue and sale to be used by the board of education of said township in furnishing and fully equipping by heating, ventilating, plumbing, sewerage, including septic plant for sewerage, thermostats, auditorium, laboratory, domestic science, manual training, walks and grades for the new school building now being erected by said board of education at Lewistown in said township," under and by virtue of the act of the legislature above noted. The returns of the vote at said election were duly canvassed by the board of education, the same showing a majority of sixty-seven votes in favor of the issue of said bonds. Thereafter, the board of education adopted a resolution providing for the issue of the bonds in question.

It is apparent from the report filed by the clerk that some time prior to July 1, 1917, the board of education of said school district had issued and sold bonds for the construction of this school building, and in this connection I may state that

the records in the office of the superintendent of public instruction show that in the school year 1916-17 the board of education issued and sold bonds in the sum of $41,000.00, for the purpose, I presume of constructing said school building at Lewistown.

It further appears from said report that the items of indebtedness represented by the contracts set out in said report are not items of indebtedness covered by the proceeds of the bonds issued and sold by the board of education for the purpose of constructing said building, but are outside and in excess thereof.

By reason of the fact that there are other vital defects in the proceedings relating to this bond issue which compel my rejection of the same, I do not find it necessary to discuss some of the questions arising on a consideration of this transcript with respect to the procedure of the board of education under the act of the legislature above noted. For instance, I do not feel that I am called upon at this time to consider the question whether or not the provisions of the Terrell act, in so far as the prescribed time within which the board of education and all other officers of the school district therein named shall act in arriving at the fact and amount of the deficiency of the school district and in submitting to the electors the question of a bond issue to fund the same, are mandatory or directory, only.

Looking to other matters presented on consideration of this transcript it may well be doubted whether or not the request of the president of the board of education made to the clerk to prepare the financial statement made by him was a legal equivalent to the direction of the board of education to the clerk in that behalf prescribed by section 1 of the act above noted, and this though it appears that the act of the president in making such request was afterwards ratified by the board.

With respect to the alleged items of indebtedness making up the deficiency sought to be funded by the proposed bond issue, it is apparent that at least one item, to wit, that of money to pay interest on bonds March 1, 1918, has no proper place in said statement. Under said act it is only obligations of the school district outstanding on July 1, 1917, and due on or before said date or to become due thereafter during the current fiscal year of the school district, which can be included within items of indebtedness going to make up the "deficiency" which may be funded under the provisions of said act.

Sufficient facts do not appear in the transcript to enable me to determine whether or not the money borrowed from bank in the sum of $1000.00 has any proper place in the items making up the deficiency sought to be funded by this bond issue.

With respect to the other items going to make up the reported deficiency it may be doubted on a consideration of the statutory provision that only claims against the school district due and payable on or before July 1, 1917, or thereafter coming due during the current fiscal year of the school district, can be considered in the aggregate making up the deficiency to be funded under this act, whether they have any proper place in the report filed by the clerk. These contracts are for furnishing and equipping the school building and property, and as a general rule it may be stated that no obligation would arise against the school district on such contracts until the same have been performed, and only to the extent of performance on or before August 31, 1917, could said contracts under ordinary circumstances be said to represent an obligation of the school district within the purview of this act. At any rate, I do not feel that I can sustain any of the items going to make up reported deficiency as matters proper to be incorporated in said report without further information, which, of course, might be supplied. Inasmuch, however, as previously indicated herein, as this issue of bonds on the present legislation of the board of education must be rejected for other reasons no useful purpose will be served by requesting further information on the matters just considered.

The transcript states that there is no board of commissioners of the sinking fund of this school district. It appears, however, that the school district has a present outstanding bonded indebtedness, and for this reason under the terms of section 7614 General Code, it is the mandatory duty of the board of education to provide a sinking fund for the extinguishment of said bonded indebtedness to be managed and controlled by a board of commissioners of such sinking fund, and under the provisions of section 7619 General Code, it is the duty of the board of education to offer the bonds provided for in the present issue to such board of commissioners of the sinking fund of said school district before otherwise disposing of the same; while under the provisions of section 1465-58 General Code, which is specially made applicable to the sale of bonds issued under authority of the Terrell act, before the Industrial Commission of Ohio is authorized to purchase bonds issued by a school district such bonds must be first offered to the board of commissioners of the sinking fund of the school district and by such board rejected. Of course, if a school district has no existing and outstanding bonded indebtedness, the appointment of such board of commissioners of the sinking fund is not necessary and bonds issued by the school district may be offered direct in the first instance to the Industrial Commission of Ohio, but that is not the case here.

Again, the proceedings relating to this bond issue are vitally defective for the reason that the resolution providing for the issue of said bonds does not provide for an annual levy by the board of education for the purpose of paying interest on said bonds and for the purpose of providing a sinking fund for the redemption of the bonds at maturity, as required by section 11 of article XII of the state constitution, as adopted September 3, 1912.

On the considerations above noted I am of the opinion that said bond issue is invalid and that you should not purchase the same.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

953.

OFFICES COMPATIBLE—SUPERINTENDENT OF A DETENTION HOME AND PROBATION OFFICER.

The superintendent of a detention home may also be appointed probation officer.

COLUMBUS, OHIO, January 21, 1918.

HON. E. O. DILLEY, *Probate Judge, Warren, Ohio.*

DEAR SIR:—I have your letter of recent date as follows:

> "Would you be kind enough to give me your thought as to whether or not a superintendent of a detention home, having been appointed by the probate court, could likewise be appointed a probation officer, filling both positions at one and the same time? Will you kindly advise me at your earliest convenience?"

Section 1662, as amended in 107 O. L., page 19, reads:

> "The judge designated to exercise jurisdiction may appoint one or more discreet persons of good moral character, one or more of whom may be a woman, to serve as probation officers, during the pleasure of the

judge. One of such officers shall be known as chief probation officer and there may be one or more assistants. Such chief probation officer and assistants shall receive such compensation as the judge appointing them may designate at the time of the appointment, but the compensation of the chief probation officer shall not exceed three thousand dollars per annum and that of the assistants shall not exceed fifteen hundred dollars per annum. The judge may appoint other probation officers, with or without compensation, but the entire compensation of all probation officers in any county shall not exceed the sum of forty dollars for each full thousand inhabitants of the county at the last preceding federal census. The compensation of the probation officers shall be paid by the county treasurer from the county treasury upon the warrant of the county auditor, which shall be issued upon itemized vouchers sworn to by the probation officers and certified to by the judge of the juvenile court. The county auditor shall issue his warrant upon the treasury and the treasurer shall honor and pay the same, for all salaries, compensation and expenses provided for in this act, in the order in which proper vouchers therefor are presented to him."

Section 1663 G. C. reads:

"When a complaint is made or filed against a minor, the probation officer shall inquire into and make examination and investigation into the facts and circumstances surrounding the alleged delinquency, neglect or dependency, the parentage and surroundings of such minor, his exact age, habits, school record, and every fact that will tend to throw light upon his life and character. He shall be present in court to represent the interests of the child when the case is heard, furnish to the judge such information and assistance as he may require, and take charge of any child before and after the trial as the judge may direct. He shall serve the warrants and other process of the court within or without the county, and in that respect is hereby clothed with the powers and authority of sheriffs. He may make arrests without warrant upon reasonable information or upon view of the violation of any of the provisions of this chapter, detain the person so arrested pending the issuance of a warrant, and perform such other duties, incident to their offices, as the judge directs. All sheriffs, deputy sheriffs, constables, marshals and police officers shall render assistance to probation officers in the performance of their duties, when requested so to do."

Section 1670 G. C. reads:

"Upon the advise and recommendation of the judge exercising the jurisdiction provided herein, the county commissioners shall provide by purchase or lease, a place to be known as a 'detention home' within a convenient distance of the court house, not used for the confinement of adult persons charged with criminal offenses, where delinquent, dependent or neglected minors under the age of eighteen years may be detained until final disposition, which place shall be maintained by the county as in other like cases. In counties having a population in excess of forty thousand, the judge may appoint a superintendent and matron who shall have charge of said home and of the delinquent, dependent and neglected minors detained therein. Such superintendent and matron shall be suitable and discreet per-

sons, qualified as teachers of children. Such home shall be furnished in a comfortable manner as nearly as may be as a family home. So far as possible delinquent children shall be kept separate from dependent children in such home. The compensation of the superintendent and matron shall be fixed by the county commissoners. Such compensation and the expense of maintaining the home shall be paid from the county treasury upon the warrant of the county auditor, which shall be issued upon the itemized voucher, sworn to by the superintendent and certified by the judge. In all such homes the sexes shall be kept separate, so far as practicable."

In the case of State of Ohio ex rel. v.Gebert, 12 O. C. C., n. s., 274, the common rule of incompatibility is stated as follows:

"Officer are considered incompatible when one is subordinate to, or in any way a check upon, the other; or when it is physically impossible for one person to discharge the duties of both."

After careful examination of the statutes above quoted I am unable to find any incompatibility between the two offices you refer to and therefore advise you that they may be held by one and the same persons, provided that in making appointment compliance is had with the civil service laws of the state.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

954.

VOTING PLACES—HOW RENT PAID IN COUNTIES NOT HAVING REGISTRATION CITY—CITY MAY NOT CHARGE COUNTY RENT FOR VOTING PLACES.

1. *The bill for rent of voting places in counties having no registration city or cities should be paid by the county and charged back to the city as other expenses in odd numbered years.*

2. *There being no provision of law providing that a city may charge the county rent for the use of its buildings for voting places, such city cannot charge said rent to the county for the use of same in the even numbered years.*

COLUMBUS, OHIO, January 21, 1918.

HON. CHARLES L. BERMONT, *Prosecuting Attorney, Mt. Vernon, Ohio.*

DEAR SIR:—Under recent date you ask an opinion of this department as follows:

"In the city of Mt. Vernon, Ohio, there are three voting precincts in which voting places must be rented.

"The city has been paying the rent for these places until this fall, when one of the examiners from the bureau of accounting instructed the city auditor not to pay the bill, that it was a bill for the county.

"The county auditor took the matter up with two of the county examiners from the state department and they instructed him not to pay the bill, that it was a city bill.

"I desire your ruling on this matter as to whether this bill should be

paid by the county and charged back to the city as other election expenses in odd numbered years or whether it should be paid by the city.

"In case it should be paid by the county what is to prevent the city from charging the county rent for the use of their buildings for voting places in the even numbered years?"

Under date of July 8, 1912, the bureau of inspection and supervision of public offices requested an opinion from one of my predecessors, Hon. Timothy S. Hogan, which opinion (No. 504) is found in attorney general's reports for 1912, vol. 1, at page 301. At that time the bureau submitted certain schedules relating to the payment of election expenses and asked for a review of same. Such schedules purported to be made up in conformity to an opinion of the attorney general under date of February 27, 1912, attorney-general's report, 1912, vol. 1, page 200. In the schedule submitted, as shown at page 303, it will be seen that the bureau sought to provide that the expenses of room for voting place in a municipality having no registration city was never to be paid by the county. The attorney-general did not approve that portion of the schedule and called attention to the fact that in the opinion of February 27th the question of rent in registration cities had been covered.

On the question of rent of voting place in counties having no registration city or cities, in which class I take it your county is to be placed, the attorney-general, in opinion No. 504, supra, says at page 309:

"Section 4844, General Code, provides that the township trustees shall select the place of voting in the township precinct; that the council of the corporation shall select the place in municipalities; and that the board of elections shall designate the place in registration cities. Nothing is said in this section as to who shall pay for such rooms or places. The payment of the rent of voting places is specifically provided for in registration cities and has been covered in the opinion of February 27.

"There is no specific provision of statutes directing how the rent for voting places in a township or in a municipality other than a registration city, shall be paid. In the absence of such specific provision, any necessary expense incurred for renting rooms for elections in such places would constitute a proper and necessary expense of the election to be paid as provided in sections 4821 and 5052, General Code, by the county, and to be charged back in odd numbered years as provided in section 5053, General Code.

"You refer to the report of the attorney-general of 1906, at page 109. An opposite holding is apparently made by the attorney-general in the opinion of 1909-1910 at page 602. A question will arise as to the right of a township or municipal corporation to charge the county rental for the use of its public hall or building for holding election therein. I find no authority to make such charge. Said buildings are provided for public purposes and it adds no expense to the township or municipality to permit the use of such building for elections.."

I concur with the ruling of my predecessor, Mr. Hogan, and, answering your questions specifically, hold:

1. That the bill for rent of voting places in counties having no registration city or cities should be paid by the county and charged back to the city as other expenses in odd numbered years.

2. There being no provision of law providing that a city may charge the county rent for the use of their buildings for voting places, such city

cannot charge said rent to the county for the use of same in the even numbered years.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

955.

COUNTY AUDITOR—ENTITLED TO EXPENSES INCURRED IN ASSESSING PROPERTY UNDER SECTION 5548 G. C.—NOT ENTITLED TO BE PAID FOR USE OF HIS OWN CONVEYANCE.

Where the county auditor, as assessor of real property in his county under the provisions of section 5548 *General Code, finds it necessary to assess particular property in any taxing district to be assessed on a view of such property, and to that end necessarily incurs expenses by way of car fare, automobile hire, etc., such expenses so incurred are "contingent expenses" within the meaning of section* 5585 *General Code as amended* 107 *O. L.* 40 *and may be paid on the allowance of the board of county commissioners as provided for in said section. The expenses of the county auditor as assessor of real property thus payable do not comprehend such as are personal to the officer, such as board, etc., nor would such officer be entitled to be paid for the use of his own conveyance in assessing real property under the provisions of said section* 5548 *G. C.*

COLUMBUS, OHIO, January 21, 1918.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—This department is in receipt of a communication from you in which you say:

> "Will you please render the commission your opinion on the following:
>
> Section 5548, in part, says: '* * * The county auditor in addition to his other duties, shall be the assessor for all the real estate in his county for purposes of taxation. * * * The county auditor is empowered to appoint and employ such expert assistants and clerks, or other employes, as he may deem necessary to the performance of his duties as such assessor; * * *'
>
> Section 5554, in part, says: 'The county auditor in all cases, from the best sources of information within his reach, shall determine, as near as practicable, the true value of each separate tract and lot of real property in each and every district, according to the rules prescribed by this chapter for valuing real property. * * *'
>
> If in carrying out the provisions of these sections, the county auditor should find it necessary to visit different parts of his county to view property and supervise the work of assessing, would the law permit the county commissioners to allow the county auditor his actual or necessary expense in doing this work?
>
> The opinion rendered by your predecessor, Mr. Turner, on section 5585 G. C. on April 6, 1916, page 623, vol. 1, A. G. R. does not fully cover the above question, and we find it necessary to have your construction of same."

I do not deem it necessary to discuss at any length the sections of the General Code noted in your communication. It will be sufficient for the purpose of this opinion to note that section 5548 General Code, among other things, authorizes and requires the county auditor to make an assessment of the real property within any tax assessment district or subdivision in this county when required to do so by

an order of the board of county commissioners made on a consideration of the findings of the county auditor, or when such assessment is petitioned for by not less than twenty-five freeholders in such tax assessment district or subdivision; while section 5554 General Code prescribes a rule or method governing the auditor as the assessor of real estate in arriving at the proper tax valuation of the real property in the assessment district or subdivision so assessed.

From the context of your letter I assume that the expenses of the county auditor concerning which you inquire are those incurred by him in assessing real property under the provisions of the sections of the General Code above noted. As a principle applicable to the consideration of the question made by you it may be observed that neither the right of a public official to compensation for services rendered nor to reimbursement out of the public funds for expenses incurred in the discharge of official duties can be extended beyond the clear and reasonable import of the statutory provisions authorizing the same.

Debolt v. Trustee, 7 O. S. 237;
Jones v. Commissioners, 57 O. S. 189;
Clark v. Commissioners, 58 O. S. 107;
Richardson v. State, 66 O. S. 108.

Authority for the payment of the expenses mentioned in your communication, or any of them, is to be found, if at all, in the provisions of section 5585 General Code as amended 107 O. L. 40. This section in so far as it applies to the question at hand reads as follows:

> "The contingent expenses of the county auditor and county board of revision, including postage and express charges, their actual and necessary traveling expenses and those of their deputies, experts, clerks or employes on official business outside of the county, when required by orders issued by the tax commission of Ohio, shall be allowed and paid as other claims against the county."

My predecessor, Hon. Timothy S. Hogan, in an opinion under date of April 24, 1914 (report of attorney-general 1914, volume 1, page 514), had occasion to consider the quite identical provisions of section 35 of the Warnes law (sec. 5614 G. C.) in their application to expenses incurred by district assessors and deputy assessors provided for in said law. Mr. Hogan held that the legislature, in specifically enacting that postage, express charges and traveling expenses incurred in traveling outside of the county in the discharge of official business on order of the tax commission should be included within the purview of the term "contingent expenses," had made it plain that such charges and expenses would not without the provision have been contemplated within the meaning of the term and that, therefore, traveling expenses incurred by the district assessors and their deputies in the discharge of their duties within the county were not to be considered as being included within the meaning of the term "contingent expenses."

I do not find myself able to follow Mr. Hogan in his application of the rule of construction involved in the conclusion reached by him that traveling expenses incurred by the assessing officers in the discharge of their duties within the county were not within the purview of the term "contingent expenses" as used in the statute there under consideration and which is found also in the provisions of section 5585 General Code, above quoted. This rule of construction stated in general terms is that where the legislature has expressly included certain things within the meaning of the general terms of an act a presumption of legislature intention arises that but for such express inclusion the particular things mentioned would be excluded from the meaning of the general terms. It is clear, however, that this rule

of construction has no application where the particular things included within the meaning of the general provisions of the act are mentioned by way of abundant caution, and this, to my mind, is the case with respect to the matter of postage and express charges expressly included within the meaning of the term "contingent expenses" both in the section of the General Code under consideration in Mr. Hogan's opinion and in section 5585 General Code, for it seems obvious to me that without express inclusion the matter of postage and express charges would come within a reasonable interpretation of the term "contingent expenses" as used in the connection indicated by the statutory provision.

With respect to the matter of traveling expenses it may be observed as a limitation or modification of the rule of construction above noted that where there is some special reason for mentioning one thing and none for mentioning a second, which is otherwise within the statute, the absence of any mention of the latter will not exclude it. In the consideration of the provisions of section 35 of the Warnes law, as well as those of section 5585 General Code, I think there were obvious reasons for making special inclusion of traveling expenses incurred by the assessing officer outside of his county which would not apply to the matter of traveling expenses in the discharge of his duties within the county. The matter of traveling outside of his county in the discharge of his duties as an assessor of real estate is one so exceptional in nature that the legislature may well have concluded that on no reasonable interpretation could expenses so incurred be considered as within the terms of the statute, the primary and main purpose of which was to provide for the payment of expenses incurred by the assessor of real property in the discharge of his duties within the county, without such express inclusion within the provisions of the section.

I do not think, therefore, that either under the provisions of section 35 of the Warnes law or of section 5585 General Code the matter of traveling expenses of the district assessor, in the one case, and the county auditor, in the other, is to be necessarily excluded from the meaning of the term "contingent expenses" as used in either of these sections by force of the rule of construction above discussed and applied by Attorney-General Hogan in the opinion above referred to.

Irrespective of this question, however, I am inclined to the view that Mr. Hogan was correct in his conclusion under the statutory provisions under consideration in said opinion that traveling expenses incurred by the district assessor and his deputies in the assessment of real property within the county were not "contingent expenses" within the meaning of the term as used in section 35 of the Warnes law. Section 5554 General Code as it then read required real estate to be valued on actual view, and this circumstance necessarily required the assessor to travel in some way to and from the property to be assessed. Now "contingent expenses" are such as are possible or liable to be incurred, but which are not in any sense certain to be incurred; and measuring the question by this rule it might well be that expenses incurred by the assessor of real estate in traveling to and from the real property to be assessed could not be justly considered as "contingent expenses" where it appeared reasonably certain that in the nature of the case such expenses must be incurred; and upon this view, and it further appearing that the legislature had made no special provision for the payment of traveling expenses within the county incurred by district assessors and their deputies in the discharge of their duties in assessing real property, Mr. Hogan was correct in holding that such traveling expenses could not be paid. However, section 5554 General Code has been since amended so as to read as follows:

> "The county auditor, in all cases, from the best sources of information within his reach, shall determine, as near as practicable, the true value of

each separate tract and lot of real property in each and every district, according to the rules prescribed by this chapter for valuing real property. * * *"

It will be observed that the county auditor as the assessor of real estate is not now required to assess real property on a view of the same, and although in special instances it may be both desirable and necessary for the county auditor as such assessing officer to assess particular properties on a view of the same, and thus incur expenses in traveling in some way for the purpose of viewing said properties, such view, as above noted, is not now required and it can no longer be said that the matter of expenses incurred in traveling within the county for the purpose of viewing property to be assessed is one of such certainty as to be excluded from the essential meaning of the term "contingent expenses."

On consideration of the whole question I am inclined to the view that the reasonable official expenses incurred by the county auditor as the assessor of real property in the discharge of his duties in the assessment of such property may be said to be fairly authorized by the provisions of section 5585 of the General Code. This would include the matter of street car fare, automobile hire and expenses of like kind necessarily incurred in the discharge of his duties. The expenses authorized by the statute would not include such as are personal to the officer, such as board, nor can this section be said to authorize the payment to the county auditor as such assessor of real estate charges made by him for the use of his own conveyance in traveling within the county in the discharge of his duties as such real estate assessor.

Within the limitations above mentioned the question made by you is one to be determined by the county commissioners in passing upon bills rendered for such expenses, and it is to be presumed that they will allow such expenses only as are necessary and reasonable in amount.

The answer made by me in this opinion to the question submitted by you is as specific as the nature of the question permits, and is not, as I view it, in conflict with the opinion of Hon. Edward C. Turner referred to in your communication, if said opinion be confined to the decision made therein on the questions there under consideration.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

956.

VILLAGE COUNCIL—MAY MODIFY CONTRACT FOR LIGHTING STREETS—SALE OF LIGHT PLANT, ETC., BY ONE COMPANY TO ANOTHER—IN SUCH CASE CONTRACT OF SALE DETERMINES LIABILITY OF PURCHASER TO PERFORM CONTRACTS OF SELLER—CONTRACTS UNDER SEC. 3809 NOT REQUIRED TO BE LET UPON COMPETITIVE BID AFTER ADVERTISEMENT.

A village council has authority to modify a contract for lighting the streets of such village, or it may substitute a new contract for the original contract.

Where a corporation purchases the business and plant of another corporation, its liability to perform the contracts and obligations of the selling company, will depend upon the terms of the contract of sale.

Contracts entered into under authority of section 3809 General Code are not required to be let upon competitive bids after advertisement as provided in section 4221 General Code as to villages, and section 432 General Code, as to cities.

COLUMBUS, OHIO, January 21, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your letter in which you submit the following inquiries:

> "A contract has existed in the village of Hicksville, Ohio, by which The Hicksville Electric Light Company agreed to furnish current to the village for a period of ten years for street lighting at certain prices. While this contract had approximately four years before expiration the above mentioned company sold its plant and business to The Northwestern Ohio Electric Light Company. Shortly after this sale the council of the village made a new contract for a period of ten years with the new company for current for lighting the streets upon a different basis and at different prices.
>
> QUESTION 1. Has such village council authority of law to abrogate the first contract in this manner and enter into another,
>
> QUESTION 2. Is not the new company bound to fill the contracts of the company whose plant it purchased, and could such new company be held liable for any loss entailed by the abrogation of the original contract?
>
> We also desire to call your attention to section 4221 G. C., relative to letting contracts by the council of a village, and to an opinion of a former attorney-general under date of January 26, 1911, which may be found in the Annual Reports 1911-1912, page 1045.
>
> QUESTION: Do you concur in this opinion that bids must be received upon advertisement for a street lighting contract?"

Further information has been requested from you and you inform us that you are not able to secure a copy of the contract of sale between the two lighting companies. It will not therefore be possible to give a definite answer to either your first or second question.

It may be that the vendee company, by the terms of the contract of sale, assumed all the obligations of the vendor, in which event a right might accrue to the village to claim the benefits of this contract, and derivatively those of the original contract as against the vendee on the theory that the contract of sale was made for its benefit. If no such stipulation is entered into between the two companies, however, the contract between the vendor company and the village was abrogated not by the act of the village in entering into the subsequent contract, but by the act of the vendor itself. The subsequent contract entered into between the village and the vendee would in no way impair or prejudice the right of the village against the vendor company accruing by reason of the breach of its contract with the village. On the contrary, the new contract, if made at a higher rate, would afford a measure of damages which the city might still be able to recover from the vendor company for a breach of its contract with that company.

So far from there being any impropriety in entering into the second contract under the above circumstances, it is obvious that such a course is the only one open to the village and was extremely advisable to protect its interests.

These considerations make it apparent that your first question is itself a conclusion of law inasmuch as it does not fully appear that the village council has attempted to abrogate a contract beneficial to the village. I do not feel called upon, therefore, to consider the very interesting question of whether council has authority to do this, provided that a new contract is entered into in compliance with the law relative to such contracts.

Your second question has really been answered by the statement that it is legally possible for one person or corporation to purchase all the business assets of another person or corporation without being charged by operation of law with

obligations pertinent to the business existing against the vendor. It is quite probable, of course, in the case you have in mind, that contracts between the two companies did provide that the vendee discharge the obligations of the vendor and save it harmless on its existing contract with the village. Inasmuch, however, as you are unable to state the facts with respect to this point or to supply a copy of the contract between the two companies, I cannot answer your second question with greater precision.

In your third inquiry you ask whether I concur in the opinion of Honorable Timothy S. Hogan, attorney-general, under date of January 26, 1911, and shown at page 1045 of Vol. II, of the Report of the Attorney-General for 1911-1912. The syllabus of this opinion reads as follows:

> "Contracts for the furnishing of electric light to a municipality amounting to over $500 must be advertised and let to the lowest and best bidder as provided by statute. Before such contract may be entered into by a public service director, however, it must be authorized by ordinance of council."

The above opinion is based upon the provisions of sections 4221, 4328, 3809 General Code.

Section 4221 General Code reads as follows:

> "All contracts made by the council of a village shall be executed in the name of the village and signed on behalf of the village by the mayor and clerk. When any expenditure other than the compensation of persons employed therein exceeds five hundred dollars, such contracts shall be in writing and made with the lowest and best bidder after advertising for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the village. The bids shall be opened at twelve o'clock noon on the last day for filing them, by the clerk of the village and publicly read by him."

Section 4328 General Code reads:

> "The director of public service may make any contract or purchase supplies or material or provide labor for any work under the supervision of that department not involving more than five hundred dollars. When an expenditure within the department, other than the compensation of persons employed therein, exceeds five hundred dollars, such expenditure shall first be authorized and directed by ordinance of council. When so authorized and directed, the director of public service shall make a written contract with the lowest and best bidder after advertisement for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the city."

In each of these sections it is provided that expenditures in excess of $500 shall be made with the lowest and best bidder after advertisement. Section 4221, General Code, applies to village contracts and section 4328 General Code applies to contracts entered into by the director of public service.

Section 3809 General Code reads as follows:

> "The council of a city may authorize, and the council of a village may make, a contract with any person, firm or company for lighting the streets, alleys, lands, lanes, squares and public places in the municipal corporation, or for furnishing water to such corporation, or for the collection and disposal of garbage in such corporation, or for the leasing of the electric light

plant and equipment, or the waterworks plant, or both, of any person, firm, company or municipality or for the purchase of electric current for furnishing light, heat or power to such municipality or the inhabitants thereof for a period not exceeding ten years, and the requirement of a certificate that the necessary money is in the treasury, shall not apply to such contract, and such requirement shall not apply to street improvement contracts extending for one year or more, nor to contracts made by the board of health, nor to contrats made by a village for the employment of legal counsel, nor to contracts by a municipality for the leasing or acquisition of the electric light plant and equipment, or the waterworks plant, or both, of any person, firm or corporation therein situated."

This section authorizes a city or village to enter into a contract for lighting streets, etc. It contains a specific provision that a certificate from the county auditor or village clerk as to funds being in the treasury is not required. There is no exemption, however, from the provisions of sections 4221 and 4328 General Code as to advertisement for bids where the expenditure exceeds five hundred dollars.

Section 3994 General Code also authorizes a municipal corporation to enter into contracts for supplying electric light, natural or artificial gas for the purpose of lighting and heating streets, etc. This section reads as follows:

"A municipal corporation may contract with any company for supplying, with electric light, natural or artificial gas, for the purpose of lighting or heating the streets, squares and other public places and buildings in the corporation limits."

The above section does not provide the manner in which contracts may be entered into, nor does it exempt such contracts from the provisions of sections 4221 and 4328, General Code.

The opinion of the attorney-general referred to by you and above quoted from was not adhered to in a later opinion by Honorable Timothy S. Hogan, attorney-general. This latter opinion was given to Honorable W. C. Baldwin, city solicitor, under date of May 13, 1911, reported in Annual Reports of the Attorney-General for 1911-1912, page 1549. The syllabus in this opinion reads as follows:

"A contract by a municipality with a water and light company is expressly authorized by statute, and there is no requirement that said contract should be let upon advertisements and bids, and as municipalities seldom or never have more than one such company, there is no reason for such requirement.

As section 4328 General Code authorizes the director of public service to enter only into contracts for work 'under the supervision of the department,' the contract aforesaid is not included therein. Therefore, the contract may be entered into between the council and the company directly without advertising for bids."

After careful consideration of the above opinion I agree with the conclusion reached by my predecessor.

Therefore, contracts entered into under authority of section 3809 General Code are not required to be let upon competitive bids after advertisement as provided in section 4221 General Code, as to villages, and section 4328 General Code, as to cities.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

957.

COUNTY COMMISSIONERS—MAY ORDER PAYMENT OF EXPENSES INCURRED FOR MEDICAL ATTENTION REQUIRED FOR PERSON BITTEN BY ANIMAL AFFLICTED WITH RABIES—NOT COMPELLED TO PAY SUCH BILL.

A board of county commissioners are permitted to order the payment, in whole or in part, of a bill which they find correct and just, for an expenditure of money on account of medical or surgical treatment required for a person who was bitten or injured by an animal afflicted with rabies, but the statute being permissive in form the board cannot be compelled to pay such bill.

COLUMBUS, OHIO, January 22, 1918.

HON. ROGER D. HAY, *Prosecuting Attorney, Defiance, Ohio.*

DEAR SIR:—Your request for my opinion reads as follows:

"Mr. J. S. H. has filed a bill with the county commissioners for expenses in undergoing treatments in Chicago for the purpose of preventing hydrophobia; said J. S. H. having been bitten by a dog which by affidavits is shown to have suffered from rabies.

The commissioners are familiar with the statute under which this bill was filed but in spite of that fact are inclined against the payment of the same. The commissioners have paid one bill and since then two or three others have come in from the same village. I will enclose the bill as filed and you will then understand the facts thoroughly and can advise us as to the disposition of this matter."

Section 5851 G. C. reads:

"A person bitten or injured by a dog, cat or other animal afflicted with rabies, if such injury has caused him to employ medical or surgical treatment or required the expenditure of money, within four months after such injury, and at a regular meeting of the county commissioners of the county where such injury was received, may present an itemized account of the expenses incurred and amount paid by him for medical and surgical attendance, verified by his own affidavit or that of his attending physician; or the administrator or executor of a deceased person may present such claim and make such affidavit. If the person so bitten or injured is a minor such affidavit may be made by his parent or guardian."

Section 5852 G. C. reads:

"The county commissioners not later than the third regular meeting, after it is so presented, shall examine such account, and, if found in whole or part correct and just, may order the payment thereof in whole or in part, out of the general fund of the county; but a person shall not receive for one injury a sum exceeding five hundred dollars."

The language of the latter above quoted section, which provides that the county commissioners *"may"* order the payment of the account of a person who has been compelled to expend money for medical or surgical treatment on account of having been bitten by a dog or other animal afflicted with rabies, is permissive only and is

not mandatory; that is, it is within the discretion of the board of commissioners as to whether or not they will order the payment of said bill in whole or in part, and if the board, exercising a sound discretion, decides that the bill or bills, as presented, shall not be paid, they cannot be forced to pay the same. This matter has been passed upon by several of my predecessors, who have arrived at a similar conclusion in relation thereto. To illustrate:

In opinion No. 144, Annual Report of the Attorney-General, 1913, page 1163, it is held:

> "Under section 5852 G. C. the allowance of damages to a person bitten by an animal afflicted with rabies *rests with the discretion of the county commissioners* and the commissioners may make such reasonable requirements for the purpose of investigation of the facts as they deem necessary."

Again, in opinion No. 964, Annual Report of the Attorney-General, 1915, page 2091, it is held:

> "The allowance of an account presented to a board of county commissioners under the provision of section 5852 G. C. *is discretionary with said board.*"

In opinion No. 1315, Opinions of the Attorney General for 1916, page 381, it is held:

> "*The statute is permissive in form and not mandatory.*"

I agree with the above quoted language in each of said opinions, and answering your question advise you that the board of county commissioners are permitted to order the payment, in whole or in part, of a bill which they find correct and just, for an expenditure of money on account of medical or surgical treatment required for a person who was bitten or injured by an animal afflicted with rabies, but the statute being permissive in form the board cannot be compelled to pay such bill.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

958.

DISAPPROVAL—LEASE OF CANAL LANDS TO THE MASSILLON ELECTRIC & GAS COMPANY.

COLUMBUS, OHIO, January 22, 1918.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of January 19, 1918, enclosing two leases, in triplicate, of canal lands to The Massillon Electric & Gas Company, of Massillon, Ohio, for my approval.

I desire to call your attention to the fact that said leases, entered into by and between your department and said The Massillon Electric & Gas Company, are signed by "The Massillon Electric & Gas Company, per W. O. Custer, vice-president and general manager", while the power of attorney adopted by the board of directors of

The Massillon Electric & Gas Company empowered W. O. Custer, vice-president, and F. W. McKenzie, secretary, of said company, to execute a lease on behalf of said company.

The signing of these contracts of lease varies so much from the authority granted by the board of directors of said company, that it is my opinion the same should not be approved in their present form and I am therfore returning them to you for correction.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

959.

COSTS—INCURRED IN FISH AND GAME CASE BEFORE JUSTICE OF THE PEACE—HOW CERTIFIED TO COUNTY AUDITOR, WHEN COMMON PLEAS COURT REVERSES JUSTICE AND DISCHARGES DEFENDANT.

Where the defendant, convicted in the justice of the peace court for a violation of the fish and game laws, has been discharged by the court of common pleas, in a proceeding in error, the court of common pleas should send down a special mandate to the justice of the peace, advising him of such discharge. The justice of the peace may then certify all the costs in the case to the county auditor for payment.

COLUMBUS, OHIO, January 23, 1918.

HON. DON C. PORTER, *Prosecuting Attorney, Coshocton, Ohio.*

DEAR SIR:—I have your letters of August 21st and December 12, 1917, with reference to the costs in the case of Lang v. State. In your first letter you advise me that one Lang, who had been convicted of a violation of the fish and game laws, had taken this case on error to the court of common pleas and that the court of common pleas had reversed the judgment of the justice. In reply to that inquiry I wrote you as follows:

> "Replying to your letter of the 21st inst. I am sending you, enclosed herewith, copy of opinion No. 2016, addressed by my predecessor Hon. E. C. Turner, to Hon. F. A. Saylor, prosecuting attorney, Eaton, Ohio, under date of November 10, 1916, which opinion, I think, will give you the information desired."

In the opinion of Mr. Turner, referred to, it was held that where a fish and game case was remanded by the court of common pleas to the justice of the peace, with instructions to discharge the defendant, the justice of the peace can certify the costs to the county auditor for payment.

However, you advise and inquire in your letter of December 12th, as follows:

> "In the Lang case Judge Glenn of Coshocton county court of common pleas, under authority of section 13755 of the General Code did not remand the case to the justice of the peace, but instead, he reversed the judgment of the justice and discharged the defendant, as the journal entry which I enclosed with my letter of August 21, 1917, shows. The judge has since directed the clerk of court to file the cost bill in the Lang case with the county commissioners.

Does the fact that the defendant in the instant case was discharged by the court of common pleas instead of being remanded and discharged by the justice, change your view of the proper manner to pay these costs or are you of the opinion that they should in all events be paid in accordance with Mr. Turner's opinion No. 2016?"

Section 1404 of the General Code reads:

"A person authorized by law to prosecute a case under the provisions of this chapter shall not be required to advance or secure costs therein. If the defendant be acquitted or discharged from custody, or if he be convicted and committed in default of payment of fine and costs, such costs shall be certified, under oath by the justice to the county auditor who shall correct all errors therein and issue his warrant on the county treasurer payable to the person or persons entitled thereto."

In the opinion referred to (No. 2016, Opinions of the Attorney General for 1916, Vol. 2) Mr. Turner stated:

"After the justice of the peace had pronounced judgment of conviction in the instant case the matter was taken on error to the court of common pleas and I assume that a bond was given to stay the execution of the sentence. The court of common pleas having reversed the decision of the justice of the peace undoubtedly a mandate to that effect was sent to the justice of the peace, provided, of course, no further proceedings were taken in the court of common pleas. It therefore became the duty of the justice of the peace to discharge from custody the person charged with the offense and upon the justice discharging the defendant from custody he is authorized to certify the costs to the county auditor for payment."

Section 13755 of the General Code reads:

"Upon the hearing of a petition in error, the court may affirm the judgment or reverse it, in whole or in part, and order the accused to be discharged or grant a new trial. In capital cases, when the judgment is affirmed, and the day fixed for the execution of the sentence is passed, the court shall appoint a day therefor, and the clerk thereof shall issue a warrant, under the seal of such court, to the sheriff of the proper county, commanding him to carry the sentence into execution at the day so appointed. Such sheriff shall execute and return such warrant, and such clerk shall record such warrant and return as provided in this title."

By virtue of this section the common pleas court in the Lang case, instead of remanding the case to the justice of the peace, discharged the defendant. Under section 1404 of the General Code the justice of the peace is to certify the costs in a fish and game case "if the defendant be acquitted or discharged from custody or if he be convicted and committed in default of payment of fine and costs." Since the common pleas court did not remand the Lang case back to the justice of the peace, but saw fit to terminate the case in that court, the justice of the peace is without any official knowledge of the discharge of the defendant, since the statute requires a justice of the peace to certify the costs when the defendant has been discharged. It is evident that the justice of the peace should receive some official knowledge of the discharge of the defendant before he can make the certificate. For this reason a special mandate should be sent down from the court of common pleas to the trial court advising

the trial court of the discharge of the defendant. When this mandate is received by the justice of the peace, he may certify all the costs in the case to the county auditor for payment, as is provided by section 1404 of the General Code.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General

960.

TRIAL—UNDER JUVENILE COURT LAWS—MUST BE COMMENCED WITHIN FOUR DAYS, WHEN ACCUSED COMMITTED TO JAIL PENDING DISPOSITION OF CASE.

It is necessary that the trial of the accused, under the juvenile court laws, who has been committed pending the final disposition of the case, be commenced within four days of such commitment, unless otherwise requested by the defendant.

COLUMBUS, OHIO, January 23, 1918.

HON. CHARLES G. WHITE, *Prosecuting Attorney, Batavia, Ohio.*

DEAR SIR:—My opinion is requested by you on the following statement of facts:

> "Section 1657 of the General Code provides that a person may be committed pending final disposition of a case.
>
> 1. Is it necessary in all cases that the trial of the accused be commenced within four days after his arrest in juvenile cases, provided, of course, that the defendant does not consent to a continuance?
>
> 2. Suppose the prosecuting witness, or a very important witness, should be taken violently ill, or was unable to attend trial for some other cause, and that the court should continue the case without the consent of the defendant, and before the trial could be set and tried, or because a material witness could not be secured, and that four days should elapse, would a motion to discharge the prisoner on the grounds that he was not brought to trial within four days limit, be well taken?"

Section 1657 of the General Code provides:

> "Pending final disposition of a case. the judge may commit any person arrested or cited to appear, except a minor under fourteen years of age, to the county jail until the case is disposed of, *but such trial shall be commenced within four days of such commitment unless upon the request of the defendant.* Pending final disposition, the judge may direct that the minor in question be left in the possession of the person having charge of him, or that he be kept in some suitable place provided by the county or city authorities."

The case referred to in the above quoted section is a criminal case or a proceeding wherein a person has been cited to appear before the juvenile judge and in either event as is provided by the juvenile court laws of this state. If a person is arrested, say for failing to furnish care, support, maintenance or education to a minor under the age of eighteen years, and is brought before the juvenile court and arraigned upon said charge, then under the provisions of section 1657, supra, pending the trial and

final disposition of the case, the judge may commit such person to the county jail until the case is disposed of. If, on the other hand, instead of entering a plea of not guilty the defendant enters a plea of guilty, and an investigation might be necessary before the court could pass sentence intelligently, then and in that event, pending the final disposition of the case, the defendant might be committed to the county jail until the case is thus finally disposed of. But if in the first instance, above mentioned, a plea of not guilty is entered, and a trial is to be had, whether before the court or a jury, such trial shall be commenced within four days of the time such commitment takes place, unless the defendant requests otherwise.

It is said in Arrest and Prosecution, by Laning, that:

> "The trial must be commenced within four days of the commitment, but may be extended over some period in case time is needed to gather evidence."

That is, it would not be necessary to proceed continuously with the trial after it has once been commenced, but that it might be adjourned from time to time as the occasion requires, and if, as referred to in your letter a very important witness should become violently ill, and for that reason was unable to attend the trial, the court has a right to continue the case without the consent of the defendant, after such trial has so been commenced.

In 38 Cyc., 1299, it is held that it is within the discretion of the court whether it shall adjourn a case to wait for witnesses to arrive and allow the case to stand open and permit the evidence to be introduced after the witnesses so arrive, or, to wait for a witness who has not been subpoenaed but who has merely promised to attend the trial, or to adjourn after other testimony has been given to enable a party to procure the testimony of an expert or other witnesses, or to enable the defendant to obtain or produce a paper in evidence, or to permit a party to get a copy of a document where proof of the substance of the document was sufficient on the question involved, and many other instances therein related and referred to by said author. But the fact that the court can continue the cause from time to time does not in my opinion give the court a right to continue the time for the commencement of the trial beyond the four days.

Limitations of time for the holding of prisoners pending examination and trial are mentioned in other sections of the General Code and reference to those sections may assist in a measure to ascertain the intention of the legislature when section 1657 was enacted. In this instance no preliminary examination is provided for. An affidavit is filed, a warrant is issued, the defendant is arrested and arraigned, and if he pleads not guilty then the court must proceed to try the cause, taking it for granted of course, that it is a cause in which the court has jurisdiction. Pending the trial it is provided that the defendant may be committed to the county jail. In this effect the section is very similar to the section 13507 G. C. In the latter section it is provided that if it is necessary for just cause to adjourn the examination of an accused, the magistrate before whom the proceeding was begun may order such adjournment and commit the defendant to the jail of the county until such cause of delay is removed, *but the entire time of such confinement in jail shall not exceed four days.* While the language of the latter section is not exactly like the language of the first, yet there is a marked similarity; in the latter instance, the entire time of the confinement shall not be more than four days, in the former instance the trial shall be commenced within four days. In both instances the object is to bring the defendant to a speedy trial or hearing. In the case before the magistrate it is to be ascertained whether a crime has been committed, and if so, if the defendant is probably the guilty party, and to recognize him to the grand jury. In the case before the juvenile court the object to be ascertained is whether the charge made against the defendant is a proper one, and if so that the trial shall be had upon said charge.

In considering that part of section 13507, above referred to, it was held in Washer v. Iler, 19 Cir. Dec., 319, affirmed without report in 75 O. S., p. 638, that "it is unlawful for the magistrate to commit the accused for safe keeping for more than four days" pending an investigation.

In section 13685 of the General Code it is provided that a person shall not be detained in jail without a trial on an indictment for a continuous period of more than two terms after his arrest and commitment thereon, or if he was in jail at the time the indictment was found, more than two terms after the term at which the indictment was presented, and section 13686 provides that a person shall not be held by recognizance, without trial, for a period of more than three terms, not including a term at which a recognizance was first taken thereon if taken in term time. In either of the aforesaid cases it is provided that the defendant shall be discharged unless a continuance is had on his motion or the delay is caused by his act, but under section 13687 of the General Code it is provided that when application is made for the discharge of the defendant under either of the two preceding sections, "if the court is satisfied that there is material evidence for the state which cannot then be had, that reasonable effort has been made to procure it, and that there is just ground to believe that such evidence can be had at the next term, the cause can be continued or the prisoner remanded or committed to jail." If, however, he is not brought to trial at the next term thereafter, he shall then be discharged.

It was held in State v. Brown, 15 O. N. P., n. s., 401, that in the absence of material evidence to procure which the state has exercised reasonable efforts and a showing that there is just ground for believing that such evidence can be procured at the next term of court, a continuance would not be justified.

The scheme of legislation thus seems to be that a defendant be brought to trial as speedily as possible and so when it is provided in section 1657 that the trial shall commence within four days, it is my opinion that that is a limitation which is jurisdictional and that unless something is done toward the commencing of such trial within four days, the court has no jurisdiction to try the same thereafter.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

961.

DEPUTY OIL INSPECTORS—MAY NOT INSPECT OIL OUTSIDE OF STATE OF OHIO.

Deputy oil inspectors are not authorized to go into neighboring state to inspect oil sold to Ohio consumers.

COLUMBUS, OHIO, January 23, 1918.

HON. CHARLES L. RESCH, *State Oil Inspector, Columbus, Ohio.*

DEAR SIR:—I have your letter advising me of a communication that you have received from a certain oil refining company outside of Ohio, asking that your inspector at Marietta be permitted to come over into West Virginia and inspect the oil manufactured by such company in West Virginia so that the same can be shipped from the refining plant in West Virginia to various customers in Ohio without embarrassing such customers with any further inspections.

The communication from the refining company to you concludes as follows:

"We would expect, of course, to pay the Ohio rate for inspecting this

oil and the inspector could easily come here and return in a half day at any time."

In reply to your request I beg to advise you that your jurisdiction as state oil inspector and the jurisdiction of your various deputies as deputy oil inspectors is coextensive with the state lines. Your deputy inspector would, therefore, be without any authority to inspect oil in the state of West Virginia. If this oil manufactured in West Virginia is to be sold in Ohio, it must be inspected by your department before being offered for sale. This by reason of section 854 of the General Code.

However, the inspection must be made within this state where your deputies may exercise the proper jurisdiction of their office.

I would therefore advise you, in connection with this situation, that the refining company in West Virginia, if it desires its oil inspected for the purpose of sale in Ohio, must submit that oil to your inspector somewhere in this state.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

962.

STATE HIGHWAY COMMISSIONER—NO AUTHORITY TO ACCEPT A NEW BOND FROM CONTRACTOR IN SUBSTITUTION FOR ORIGINAL AFTER CONTRACT HAS BEEN ENTERED INTO FOR ROAD IMPROVEMENT.

After a contract for a road improvement has been entered into by and between the state highway commissioner and the contractor, there is no authority in law warranting the state highway commissioner in accepting a bond as a substitution for that originally given by the contractor.

COLUMBUS, OHIO, January 23, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of December 29, 1917, which reads as follows:

"The highway advisory board at its meeting yesterday, authorized me to request your opinion on the legality of complying with the following request of Mr. C. H. Bancroft. I am also authorized to request your advice, if you find that this department may legally comply with Mr. Bancroft's request, as to what steps, if any, would be necessary to protect the interests of this department. The letter is as follows:

'CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—

IN RE: Bond No. 16299—A. W. McDonald, Steubenville, Ohio, contract with the highway department for the improvement of Jefferson county, section N-2, Steubenville-Cambridge road, Cross Creek township.

This is to advise you that we are the representatives and attorney-in-fact for both the London and Lancashire Indemnity Company of America and The Aetna Casualty and Surety Company of Hartford, Connecticut.

In the execution of the above contractor's bond on the above described

contract, our office erred in placing this bond in the London & Lancashire Indemnity Company of America. This should have been The Aetna Casualty and Surety Company.

We respectfully ask you to permit us to substitute the name of The Aetna Casualty & Surety Company for that of the London & Lancashire Indemnity Company.

Yours very truly,

(Signed) C. H. BANCROFT.' "

Possibly the matters about which you inquire are not so very vital in view of the provisions of the General Code in reference to the same, and yet as a general proposition it seems to me that the law, as well as public policy, would be against the idea of substituting one surety in the place of another, which became bound upon a bond by virtue of which a contract was entered into for a certain road improvement.

In the first place it must be said that the laws pertaining to the construction and improvement of highways make no provision whatever for an additional bond or for the substitution of one surety for another, and, of course, after the contractor had given bond in pursuance of law and had entered into a contract with the state of Ohio in virtue of said bond, he, the contractor, could not be compelled to give any further or additional bond. This was specifically held by my predecessor, Hon. Edward C. Turner in opinion No. 1834, Opinions of the Attorney-General for 1916, Vol. II, page 1346. But the question still remains as to whether the state highway commissioner would be justified in law in receiving another bond providing the contractor himself would be willing to sign a bond with a surety other than the one with whom he signed in the matter of the original bond.

As stated above, there is no authority in law for the state highway commissioner accepting a different bond from that which was given in the beginning of the proceedings to improve the highway. Further, under the law I do not believe that he would be warranted or justified in doing so. It must be remembered that the bond is given not entirely for the uses and purposes of the state of Ohio, but for the benefit of the county and the township or townships interested in the matter of the improvement, as well as the property owners who are assessed for a part of the cost and expense of the improvement. Further, the bond which is given by the contractor inures to the benefit of all material men who furnish material for the improvement for which the bond is given, as well as to all laborers who perform labor thereon.

Under the Cass highway law this provision was found in section 1208 G. C., which provided that the bond should be conditioned "that the contractor will indemnify the state, county or township against any damages that may result by reason of the negligence of the contractor in making said improvement." This section further provided that such bond shall also be conditioned for the payment of all material and labor furnished for or used in the construction of the road for which the contract is made.

The provisions of this section are carried into the White-Mulcahy law in a special act, which is found in 107 O. L., page 642. Section 1 of this act provides that the usual bond as provided for in statute shall be given, "with an additional obligation for the payment by the contractor, and by all subcontractors, for all labor performed or materials furnished in the construction, erection, alteration or repair of such building, works or improvements."

From these provisions it must be considered that the labor performed upon a road improvement and the material furnished for the road improvement is performed and furnished with a view to the bond as it existed at the time that the labor is performed and the material is furnished. In law, at least, it can be assumed that the man performing labor and those furnishing material for road improvements take into consideration the fact that such and such a person or company is surety on the bond

and that said person or company is satisfactory to said persons. Hence, in law it occurs to me that the state highway commissioner has no authority, after a contract for a road improvement has once been entered into to substitute a new bond for that which was given in the beginning, or, in other words, in substituting one surety for another.

Further, I am of the opinion that to do so would be against sound public policy. If this principle were followed it might lead to the substitution of a surety which is not financially responsible for one which is financially responsible, and this even though the state highway commissioner should exercise the greatest care and caution in making the change.

Hence, answering your question specifically, it is my opinion that it is against the law and against sound public policy for the state highway commissioner to accept a bond in lieu of the one which was given as a basis upon which the contract would be entered into.

Of course, this opinion has nothing whatever to do with the acceptance of an additional bond, but simply has to do with the proposition of substituting one bond for another.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

963.

COURTS OF DOMESTIC RELATIONS—ACT CREATING SAME IN HAMILTON, MAHONING AND SUMMIT COUNTIES—DOES NOT CREATE NEW COURTS—ORDERS OF SAID COURTS NOT INVALID UNDER DECISION IN CASE OF STATE EX REL. D'ALTON V. RITCHIE ET AL.

The different acts of the legislature providing courts of domestic relations in Hamilton, Mahoning and Summit counties do not create new courts in those counties, but provide for the assignment of certain classes of cases to a certain judge of the court of common pleas.

The orders of these courts in reference to the matters of which jurisdiction is given them are not rendered invalid by the decision of the court in the Lucas county case, D'Alton v. The Judges.

COLUMBUS, OHIO, January 23, 1918.

HON. JAMES M. COX, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—On December 24th you forwarded to this department for consideration a communication from a member of the bar of Hamilton county in reference to the effect of the late decision of the supreme court in reference to Lucas county court of domestic relations. The letter to you is as follows:

> "The decision of the supreme court upholding the Lucas county court of domestic relations act has a distressing feature. Section 5 of the syllabus found in the Cincinnati court index of December 17, 1917, declares section 3 of the act is in part unconstitutional insofar as the act purports to confer jurisdiction upon the court to the exclusion of the jurisdiction conferred upon the common pleas court by the general laws of this state.
>
> In other words the Hamilton county act providing for a court of domestic relations as a part of the common pleas is unconstitutional insofar as it

confers exclusive juvenile jurisdiction on the court of common pleas of Hamilton county, whereas in other counties it is in the common pleas, probate, insolvency, and superior courts.

The act also ousts the common pleas judges who are not of the division of domestic relations. In other words the court of common pleas of Hamilton county has different jurisdiction than that of the common pleas of other counties. The court also is not another court like the Lucas county court and may on this ground be subject to attack.

I have the following suggestions to make:

Let the legislature be called into special session and let a constitutional amendment be proposed to the electors in August providing that the legislature may create courts of domestic relations or division of domestic relations, court of common pleas, giving them exclusive jurisdiction over all cases relating to domestic relations. Let the amendment contain a curative clause validating all courts of domestic relations or divisions of domestic relations, courts of common pleas. Action must not be delayed as social reform will suffer greatly. I suggest that Attorney-General McGhee be consulted."

Your correspondent has arrived at the conclusion upon reading the syllabus of the case of State ex rel. D'Alton v. Ritchie et al., decided December 11, 1917, which causes apprehensions on his part that disappear upon a thorough investigation of the law.

By this decision the supreme court has not rendered any judicial act invalid that was done in any of the courts of domestic relations. The decision is that the statute is unconstitutional only in so far as it makes this jurisdiction exclusive. The legislature has complete power to create the new court and to confer upon it the jurisdiction it did give it, and the statute is only invalid to the extent that it makes the jurisdiction exclusive, so that this court having concurrently with other courts the jurisdiction to render the different judgments they have rendered those are perfectly valid, as of course their similar judgments will continue to be in the future so that the only difficulty left in the situation is one arising from the fact that two different courts will have jurisdiction of the same matter. This, however, is not at all unusual and ordinarily gives the suitor an option as to which court he will submit himself to.

The Lucas county statute is different from the others in that it is the first which sought to make a distinct and separate court of domestic relations. In Hamilton, Mahoning and Summit counties the statute only provided for a division of the labor among the different judges of the court of common pleas providing that certain classes of cases should go to the common pleas judge who is selected to serve in the division of domestic relations of that court.

The provision as to Hamilton county is found in section 1639 General Code, which section first provides that the court of common pleas, probate, insolvency, and superior courts, shall concurrently have jurisdiction as juvenile courts, which shall be exercised by their designating one of their number as a juvenile judge. It contains the following exception:

"The foregoing provisions shall not apply to Hamilton county, in which county the powers and jurisdiction conferred in this chapter shall be exercised by the court of common pleas, and in 1914 and every sixth year thereafter, one of the common pleas judges to be elected at said times shall be elected as a judge of the court of common pleas, division of domestic relation. To him shall be assigned all juvenile court work arising under this chapter, and all divorce and alimony cases, and whenever said judge of the court

of common pleas, division of domestic relations, shall be sick, absent or unable to perform his duties, the presiding judge of the common pleas court shall assign another common pleas judge to perform his duties during his illness, absence or indisposition."

All that is done by the act is to call this one judge by a different name, or rather as an addition to his title, and then provides by statute for the assignment of these duties to him instead of having the judges make the assignment as in other cases, so that instead of the Hamilton county case being more dangerous or more liable to be declared unconstitutional than the Lucas county case, it is exactly the other way. In all three of these counties, Hamilton, Lucas and Summit, the draftsman of the act was apparently afraid of the exact question made in the Lucas county case and had the act so drawn as effectually to safeguard it from any such dangerous consequence. That is, the Hamilton county act was drawn first and the other two have followed it as a model, or almost verbatim.

The Mahoning county statute differs in this respect in that it contains the following paragraph:

"To such judge shall be assigned all juvenile court work arising under title 4, chapter 8, of the General Code, and all divorce and alimony cases, and cases involving the care and custody of children in said county."

This might be thought to contain the same vice as the Lucas county statute. The difference, however, is this: in the Lucas county case they made a new court, one that had no former existence and was successor of no other court and sought to give it exclusive jurisdiction in the cases mentioned, while in the Mahoning county case the provision is that all divorce cases, etc., shall be assigned to this judge. Even if that statute were unconstitutional in that respect it would work no harm, but as above stated would simply give the judge concurrent jurisdiction with other common pleas judges.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

964.

ROADS AND HIGHWAYS—CHIEF HIGHWAY ENGINEER, AT COMPLETION OF IMPROVEMENT, CERTIFIES TOTAL COST AND EXPENSE THEREOF TO PARTIES INTERESTED—AMOUNT SO CERTIFIED IS USED AS A BASIS FOR APPORTIONING COST—*THIS OPINION BASED UPON CASS HIGHWAY LAW.*

1. *Under chapter 8 of the Cass highway law, the chief highway engineer, at the completion of an improvement, certifies the total cost and expense thereof to the parties interested. Then the township trustees proceed to assess against the abutting property owners the proportion of the same to be borne by them, giving due notice thereof as provided by section* 1214 *G. C., and first adding to the said proportion of the cost and expense the proportion of the interest on bonds issued, if any, to be borne by the abutting property owners.*

2. *The amount certified by the chief highway engineer and used as a basis in arriving at the amount to be paid by the state, county, township or townships and abutting property owners, is not the estimated cost of the improvement, nor the contract price of the same, but the actual cost and expense thereof, which must ultimately be paid by the parties interested.*

3. *The above conclusions of law are based upon the Cass highway act, and not upon the White Mulcahy act which has been the law since June* 28, 1917.

COLUMBUS, OHIO, January 23, 1918.

HON. HENRY W. CHERRINGTON, *Prosecuting Attorney, Gallipolis, Ohio.*

DEAR SIR:—I have your communication of December 8, 1917, which reads as follows:

> "In July, 1916, the state highway commissioner let a contract for the construction of section E of inter-county highway 399 of this county. The work was done in co-operation with the county commissioners of Gallia county, Ohio, and was not completed until May, 1917. In July, 1916, the state highway commissioner also let a contract for the construction of section D of inter-county highway No. 405 in this county. The work was done in co-operation with the county commissioners and was not completed until October, 1917. In October or November, 1917, the contractor was compelled to give up the contract for the construction of section D and the work was completed by the state highway commissioner at a cost of several thousand dollars more than the contract price.
>
> Ten per cent. of the cost of these sections of inter-county highway is to be assessed against the abutting property owners. I am somewhat doubtful as to the necessary steps required to be taken to make this assessment. The question has also arisen as to whether or not the assessment should be based upon the contract price, or upon the actual amount expended by the county and state in the construction of these roads.
>
> Please advise me what is necessary to be done in respect to levying and collecting these assessments under the statement of facts herewith submitted."

Your inquiry naturally divides itself into two different parts:

(1) The nature of the necessary steps which are required to be taken in making assessments against abutting property owners in the improvement of highways.

(2) As to what shall be made the basis for said assessment, the contract price or the real cost and expense of the improvement.

Inasmuch as you apparently have in mind contracts which were entered into prior to June 28, 1917, I will quote the statutes, relative to your inquiries, as they existed at that time. However, the principles of law applying to your questions vary to some extent under the new law.

The first step in the apportionment of the part of the cost and expense of an improvement which the abutting property owners are to bear is found in section 1211 G. C., which read as follows:

> "Section 1211. Upon completion of the improvement, the chief highway engineer shall immediately ascertain the cost and expense thereof, and apportion the same to the state, county, township or townships and abutting property. He shall certify the total cost and expense of the improvement, and his apportionment thereof to the county commissioners, and the trustees of the township or townships interested therein."

It will be readily seen that under this section the making of assessments is first up to the chief highway engineer, who, after the improvement is fully completed, apportions the total cost and expense to the state, county, township or townships and abutting property.

After it is known what the total amount to be assessed against the property owners is, it will then be necessary for the authorities to turn to section 1214 G. C. for further steps in the assessment made against each individul property owner. This section read in part as follows:

> "Section 1214. * * * The township trustees shall apportion the amount to be paid by the owners of the abutting property according to the benefits accruing to the owners of the land so located. At least ten days' notice of the time and place of making such apportionment shall be given to the persons affected thereby, and an opportunity given them to be heard. The township trustees shall cause a notice to be served upon abutting property owners, stating the time and place for hearing on the apportionment and the amount to be paid by each abutting property owner. In case any of the abutting property owners are non-residents, such notice shall be given by one publication in some newspaper of general circulation in the county. If the improvement lies in two or more townships, the amount to be paid by each shall be apportioned according to the number of lineal feet of the improvement lying in each township.
>
> The trustees shall determine the number of installments in which such assessments shall be paid, not exceeding ten semi-annual payments.
>
> When bonds are issued in anticipation of taxes and assessments the interest thereon shall be treated as a part of the cost and expense of the improvement and apportioned among the county, the township or townships, and the specially benefited property in the proportions to which they severally contribute to the payment of the total cost and expense thereof not paid by the state under the provisions of this or any other section."

Under this section the second step is up to the township trustees, namely, they apportion the total amount of money, which is to be paid by the property owners, among the different property owners whose property abuts upon the improvement, assessing, however, against no property owner an amount greater than that which would be equal to thirty-three per cent. of the value of his property for the purposes of taxation.

The third step is that the township trustees must fix a day upon which the abutting property owners may be heard in reference to the assessments made against them, and at least ten days' notice of the time and place of such hearing must be given the abutting property owners, under said section 1214.

After hearing the complaints, if any, of the abutting property owners, relative to the assessments, the township trustees will finally adopt the assessment as it was made by them in the first instance or as it may be modified by them in view of the hearing had.

The next step is provided for in section 1216 G. C., by virtue of which the township trustees shall certify the assessments so made or adopted by them to the county auditor, who shall place them upon the tax duplicate and collect them in the same manner as other taxes are collected.

It will also be noted that the township trustees shall fix the number of installments in which such assessments shall be paid. It must further be kept in mind that when bonds are issued in anticipation of the taxes and assessments, then interest must be computed on the bonds and the proper proportion of the interest be assessed against the abutting property owners; that is, it must be added to the part of the total cost and expense of the improvement which is to be borne by the property owners. In fixing the amount of interest to be added, it must be remembered that the state itself bears no part of the interest on the bonds, and that the county, town-

ship or townships and abutting property owners have all the interest to pay, which must be divided among them in the same proportion as is the total cost and expense of the improvement.

Under said section 1216 it seems to be up to the township trustees to make the assessment against the abutting property owners, whether they or the county commissioners have made application for state aid. I might suggest that section 1214 G. C. in the White-Mulcahy law (107 O. L. 129) is clearer and more specific relative to this matter of making assessments against abutting property owners, but, as I understand you, the above will answer same.

We come now to the question of what is the basis for this apportionment, whether it is the estimated cost and expense, the contract price or the actual cost and expense of the improvement. While this is not so readily answered, I am of the opinion that our statutes are sufficiently clear on this point to enable us to arrive at a fairly reliable opinion in reference to same.

We will again turn to section 1211 G. C., above quoted. It provides that upon the completion of the improvement the chief highway engineer shall immediately ascertain the *cost and expense thereof* and shall certify the *total cost and expense* of the improvement and his apportionment thereof to the county commissioners and the trustees of the township or townships interested therein. There is nothing in this section about the estimated cost or the contract price, but the language used is "the cost and expense thereof" and "the total cost and expense of the improvement."

Sections 1213 and 1214 G. C. make provision as to the proportion of the cost and expense which is to be borne by the state, county, township and abutting property owners.

Section 1213 read in part as follows:

> "Whenever there are one or more improvements to be made in a county, and the *cost and expense thereof* does not exceed twice the amount apportioned by the state to a county, then the state shall pay fifty per cent. *of such cost and expense.* * * *."

Section 1214 G. C. provided in part as follows:

> "Except as otherwise provided in this chapter (G. C. sections 1178 to 1231-3), the county shall pay twenty-five per cent. of all cost and expense of the improvement. Fifteen per cent. of the cost and expense of such improvement, except the cost and expenses of bridges and culverts, shall be apportioned to the township or townships in which such road is located. Ten per cent. of the cost and expense of improvement, excepting therefrom the cost and expense of bridges and culverts shall be a charge upon the property abutting on the improvement, provided the total amount assessed against any owner of abutting property shall not exceed thirty-three per cent. of the valuation of such abutting property for the purposes of taxation. * * *."

It will be seen that under this section the county shall pay twenty-five per cent, the township or townships fifteen per cent., and the abutting property owners ten per cent. of "*All cost and expense of the improvement,*" and not of the estimated cost or contract price of the same.

We find language to the same effect in section 1212 G. C. which provided the manner in which the state, the county, township and abutting property owners are to pay their respective proportions of the cost and expense. Said section read in part as follows:

> "Section 1212. The state's proportion of *the cost and expense* of the con-

struction, improvement, maintenance or repair of a highway under the provisions of this chapter, shall be paid by the treasurer of state upon the warrant of the auditor of state. * * *."

This same language is used through the section and is to the effect that it is the actual cost and expense of the improvement which is considered.

From all the above it is my opinion that the proportion of the cost and expense to be paid by the state, county, township or townships and abutting property owners, is to be based upon the actual cost and expense and not upon the estimated cost, nor upon the contract price. This seems to have been the idea of the legislature in requiring the chief highway engineer, under section 1211 G. C., to apportion the total cost and expense at the conclusion of the improvement.

If the contract price were to be used as a basis, there would be no necessity of putting this matter off until the improvement is fully completed. Of course it is well known that the estimated cost and expense made by the legislature is used merely as a basis upon which the contract may be let for the improvement. The contract price may be less than the estimated cost and expense.

To be sure, under section 1207 G. C. the contract price can not be more than the estimated cost and expense, for this section provides:

"Section 1207. No contract for any improvement shall be awarded for a greater sum than the estimated cost thereof. * * *."

From this it might be argued that the contract price would represent the actual cost and expense, but this is not true.

Section 1209 G. C. provided that the state highway commissioner may declare the contract forfeited and complete the same under force account or by contract, or in any manner that he may deem for the best interests of the public.

Under these conditions the total cost and expense of the improvement may be more than the contract price. To be sure, if the contractor or his bondsmen are financially responsible, they are compelled to pay the additional cost and expense, but if they are not responsible, this additional cost and expense will have to be borne by the parties interested in the improvement.

Further, section 1210 G. C. provided for extras in an improvement resulting from unforeseen contingencies and not included in the original contract. If there are extras required, the cost of the same becomes a part of the total cost and expense of the improvement and hence makes it greater than that which is provided for in the original contract.

Hence it is my opinion that when the chief highway engineer under section 1211 G. C. certifies the total cost and expense of the improvement to the county commissioners, he will not use the contract price as the basis of his certification, but he will use the total cost and expense which must ultimately be borne by the parties interested, viz., the state, county, townships and the abutting property owners.

In connection with this matter I desire to call attention to section 1218 G. C., which provided:

"* * * No contract shall be let by the state highway commissioner in a case where the county commissioners or township trustees are to contribute a part of the cost of said improvement, unless the county commissioners of the county in which the improvement is located shall have made a written agreement *to assume in the first instance tha part of the cost and expense of said improvement over and above the amount to be paid by the state.* * * *"

The agreement mentioned in the above quoted provision is usually termed the final resolution of the county commissioners or township trustees, in which they agree to assume a certain part of the cost and expense of the improvement. From the language used in this section it might be argued that the amount specified in the final resolution to be assumed by the state is a fixed and determinate amount and that the county commissioners, township trustees and abutting property owners would be compelled to pay everything above that amount, irrespective of what the actual cost and expense might be, for it must be remembered that this agreement upon the part of the county commissioners or township trustees is based not upon the actual cost nor upon the contract price, but merely upon the estimated cost and expense of the improvement. However, I do not think such a construction as that above suggested should be placed upon this language, for when we turn to sections 1213 and 1214, supra, we find that the state bears a certain proportion of the cost "and expense of the improvement," as does the county, the townships and the abutting property owners

Hence from all the above it is my opinion that the amount of money certified by the chief highway engineer is not the contract price, but the actual cost and expense of the improvement, which must ultimately be borne by the parties interested, whether the amount so certified be more or less than the contract price.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

965.

DISAPPROVAL—BOND ISSUE OF HANCOCK COUNTY—ROADS AND HIGHWAYS—NOTICE.

1. *The publication provided for in section* 6912 *G. C.* (107 *O. L.* 97) *must be made by the county commissioners, even though they are constructing a highway located entirely within the limits of a municipality.*

2. *The publication provided for in section* 6950 *G. C.* (107 *O. L.* 107) *migh' be sufficient notice to any persons having claims for compensation or damages, but said publication does not provide for notice to the public in general.*

COLUMBUS, OHIO, January 23, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of Hancock county, Ohio, in the sum of $19,500.00, for the purpose of paying the cost and expense of improving Lima avenue as a part of the Dixie highway improvement in the city of Findlay, Ohio.

The improvement for which the said bonds were issued by the county commissioners of Hancock county lies entirely within the limits of the city of Findlay, but it is an improvement over which the county commissioners have assumed jurisdiction under and by virtue of the provisions of sections 6949 to 6952 inc. G. C. (107 O. L. 107).

The sections of the General Code covering road improvements over which the county commissioners assume jurisdiction are 6906 to 6948-1 inc. (107 O. L. 95), and it is my opinion that even though the proposed improvement is one which goes into or is within or passes through a municipality, yet the county commissioners must

follow the same steps as they would follow if the improvement lies entirely without the limits of a municipality, and that sections 6949 to 6952 inc. are merely additional steps which must be taken by the council of a municipality and the county commissioners, when the improvement passes into, within or through a municipality.

In an opinion rendered by me to Hon. J. H. Musser, prosecuting attorney, on December 7, 1917, I laid down the following proposition:

> "Sections 6949 to 6953 inclusive, form a part of the generel scheme of road building by county commissioners and apply particularly to those proceedings connected with the improvement of roads lying within a municipality, running into the same or passing through it.
>
> However, it must be borne in mind that sections 6906 et seq. apply just as well to mprovements lying within a municipality, performed under sections 6949 to 6953 inclusive, in so far as the powers and duties of the county commissioners are concerned."

In this opinion I held that sections 6906 et seq. G. C. apply as well to improvements lying within a municipality as they do to those lying outside the limits of a municipality, in so far as the powers and duties of the county commissioners are concerned, and I believe that said proposition is correct.

With these general observations in mind, I desire to call attention to two matters connected with the transcript having to do with the issuing of said bonds. The transcript shows that there was no publication had by the county commissioners as is provided for in section 6912. Without quoting from this section, will state that it provides for a publication which serves the purpose of giving notice to two different groups of persons:

(1) A notice to those persons who may claim compensation for lands and property taken or damages sustained on account thereof; and

(2) A notice to the public in general to give them an opportunity to offer objections to said improvement.

The first notice is to a limited group of persons only, while the second is to the taxpayers of the county at large; that is, to the public in general, which would include the taxpayers of the city of Findlay as well as those residing outside said municipality.

It is true that section 6950 G. C. (107 O. L. 107) provides that "all compensation and damages on account of said improvement shall be paid by the municipality." This section further provides that notice shall be published by the council of the municipality that consent has been given by it for the construction of a highway into, within or through the municipality by the county commissioners, and the notice must fix a time within which claims for compensation and damages on account of the proposed improvement shall be filed with the council. If the council is under obligation to give notice to those having claims for compensation or damages, and if the municipality is to pay all claims for compensation and damages to property owners, then of course in the case under consideration the first object to be accomplished by the notice set out in section 6912 G. C. would not be necessary in the present case

But how about the second object, viz., a notice to the public in general to give them an opportunity to offer objections to said improvement? Section 6950 G. C. makes no provision for this, but merely for a notice to those who may claim compensation or damages on account of the construction of said improvement.

Hence it is my opinion that the publication provided for in section 6912 G. C. must be made by the county commissioners, at least in so far as notice to the public is concerned, and that this is one of the jurisdictional steps to be taken by the county commissioners, without which they have no authority to proceed with the further

steps, one of which is the issuing of bonds to take care of the share of the cost and expense of the improvement to be borne by the county.

I will direct your attention to another provision which leads one to the same conclusion above suggested. Section 6950 G. C. states:

> "* * * the county commissioners, after the approval by them of the surveys, plans, profiles, cross-sections, estimates and specifications for said improvement, shall cause a copy of the surveys and profiles to be filed with the council of the municipality. * * *."

We will note at what time and under what conditions the county commissioners approve the surveys, etc.

Section 6917 G. C. (107 O. L. 98) provides as follows:

> "If, after hearing and determining all claims, for compensation and damages on account of land or property taken for said improvement, or after the determination of such claims in the probate court on appeal, said board of commissioners is still satisfied that the public convenience and welfare require that such improvement be made, and that the cost and expense thereof will not be excessive in view of the public utility thereof, said commissioners shall order by resolution that they proceed with such improvement, and shall adopt the surveys, plans, profiles, cross-sections, estimates and specifications therefor, as reported by the surveyor, or with such modifications thereof as the commissioners and surveyor may agree upon."

That is, after the county commissioners have heard from all the parties interested, if they arrive at the conclusion "that the cost and expense thereof will not be excessive in view of the public utility thereof," then said commissioners shall adopt the surveys, etc.

Hence the publication provided for in section 6912 G. C. must be made before the county commissioners can adopt the surveys, etc., and they must adopt the surveys, etc., before they submit the same to the council of the municipality. Therefore the publication provided for in said section 6912 is made a vital part of the proceeding for an improvement, even though that improvement lies within the corporate limits of a municipality.

My attention has been called, by the prosecuting attorney of Hancock county, to opinion No. 241, rendered by me to the bureau of inspection and supervision of public offices on May 4, 1917, in which I set out certain steps to be taken in those cases in which the county commissioners construct a road improvement through or within a municipality. However, it must be remembered that in that case the city solicitor was making inquiry as to how the city should proceed, and the only thing I had in mind was to give those steps which were required to be taken by the municipality itself, and those necessary to be taken by the county commissioners which fit into the proceedings which had to be taken by the municipality, such as giving the consent of the municipality and submitting the plans, specifications and estimates to the municipality for its approval. In that opinion I did not have in mind the steps necessary to be taken by the county commissioners, unless they fit into or were connected with the proceedings necessary to be taken by the municipality.

In passing I will make a suggestion relative to the manner in which the consent is given by the municipality.

Section 6949 G. C. provides:

> " * such consent shall be evidenced by the *proper legislation* of the council of said municipality *entered upon its records*, * * *."

The transcript is silent as to the manner in which the consent of the city of Findlay was given In view of the provisions of said section 6949, this matter should receive careful consideration.

In view of all the above, it is my opinion that you should not purchase said bonds, and that they are not a legal and binding obligation against the county of Hancock.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

966.

APPROVAL—BOND ISSUE—CANTON CITY SCHOOL DISTRICT.

COLUMBUS, OHIO, January 25, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

RE: Bonds of Canton city school district, in the sum of $191,000.00, for the purpose of completing certain school building in said school district and constructing new school buildings therein.

I have carefully examined the transcript of the proceedings of the board of education of Canton city school district relating to the above bond issue and find that only one question of any consequence is presented on consideration of the same. This question arises on consideration of the following provision in the resolution of the board of education providing for the issue of said bonds:

> "That bonds of the said school district be issued in the sum of $191,000.00 for the purpose of completing the construction of the front section and right wing of the new high school building, the Clarendon avenue school building, the J. J. Burns school building, the Daniel Worley school building, and to construct a new school building in the southwestern part of the city. Provided, however, that should there remain in the fund any sum after the completion and construction of said buildings, such remainder may be used for the completion of other buildings in this school district."

It will be noted that the purpose of the proposed bond issue for the most part is to provide for the completion of school buildings in said school district which have been partially constructed. On further information furnished at my request I am advised that the high school building and two of the other school buildings mentioned in the resolution have been constructed to their present condition from the proceeds of bonds issued by the board of education of said school district on a vote of the electors under the provisions of sections 7625 et seq. of the General Code. Inasmuch as the above bond issue is one without a vote of the electors under section 7629 General Code, the question suggested by this fact is whether or not after the board of education of a school district issues bonds under the provisions of section 7625 et seq. of the General Code for the purpose of constructing a school building or buildings in an amount estimated by the board to be sufficient to completely construct said buildings, the board of education is authorized to issue additional bonds under section 7629 to complete such buildings in the event that it turns out that the proceeds of the bonds issued under section 7625 et seq. are not sufficient for the purpose of constructing said building to completion.

This question has been answered squarely in the negative by my predecessors, Hon. T. S. Hogan and Hon. E. C. Turner. Before discussing or otherwise further noting the opinions of Mr. Hogan and Mr. Turner on this question I desire to note briefly the statutory provisions involved in the consideration of the question presented.

Section 7629 General Code authorizes the board of education of a school district to issue bonds of the school district without a vote of the electors for the purpose of obtaining or improving school property in anticipation of income from taxes, for such purposes, levied or to be levied from time to time as occasion requires. Under this section, however, the board of education may not in any one fiscal year issue bonds in an amount greater than would equal the aggregate of a tax at the rate of two mills on the tax duplicate valuation of the school district for the year next preceding.

Section 7625 General Code and sections immediately following authorize the board of education of a school district on a vote of the electors thereof to issue bonds "to purchase a site or sites to erect a schoolhouse or houses, to complete a partially built schoolhouse, to enlarge, repair or furnish a schoolhouse, or to purchase real estate for playground for children, or to do any or all of such things," in such amount as is estimated by the board of education to be necessary to accomplish the particular purpose or purposes of the bond issue. Under this section, however, before the board of education can submit to the electors the proposition of a bond issue in any amount for the purpose or purposes named therein the board must find and determine that the funds at its disposal or that can be raised under the provisions of section 7629 are not sufficient to accomplish the purpose.

Mr. Turner in his opinion, which is found in Vol. I of the Opinions of the Attorney-General for the year 1915, at page 536, held that where a board of education of a school district submits the question of a bond issue to a vote of the electors of the district under authority of and in compliance with the requirements of sections 7625 et seq. of the General Code for any of the purposes mentioned therein, said board by submitting said bond issue for an amount of money which said board estimates will be sufficient for the purpose exhausts its authority for this particular purpose when the issue is approved by the electors and the bonds are issued and sold, and that said board of education can not thereafter provide an additional sum of money for the same purpose by an issue of bonds under the authority of section 7629 General Code. Mr. Turner's opinion was addressed to the same question here presented, to-wit, that of the power and authority of a board of education to issue bonds without a vote of the electors under section 7629 General Code for the purpose of obtaining sufficient money to complete a school building, for the construction of which bonds had previously been issued by the board of education on a vote of the electors under section 7625 General Code and in an amount then estimated by the board to be sufficient to construct such school building.

Carrying the reason advanced by Mr. Turner for his conclusion on the question there, as here, presented to its logical end the same would deny to a board of education the authority to issue bonds on a vote of the electors of the school district for the purpose of obtaining money to complete a school building constructed to its present condition out of the proceeds of a previous issue of bonds by the board of education on a vote of the electors of the school district. I do not find myself able to subscribe to this conclusion in view of the fact that "to complete a partially built schoolhouse" is one of the specific purposes for which bonds may be issued on a vote of the electors under said section 7625.

Mr. Hogan, addressing himself to this question in an opinion found in the Annual Report of the Attorney-General for the year 1912, volume II, page 1200, says:

"Although the question is not free from doubt I am of the opinion that

after action has once been taken under section 7625 action under section 7629 cannot thereafter be taken for the same purpose. Putting it in another way, when a board of education has sought and received the approval of the electors upon an issue of bonds for the purpose of improving or constructing school property it cannot thereafter issue other bonds without the approval of the electors for the same purpose."

In the particular case under consideration by Mr. Hogan it appeared that bonds had been issued and sold by the board of education of the school district on the approval of the electors and the amount thus realized having been found to be insufficient for the purpose, the question of an additional issue for this purpose was twice submitted to the electors and defeated. Thereupon the question was presented to the Attorney-General whether or not additional bonds could be issued by the board of education without a vote of the electors under section 7629 General Code, and the answer of Mr. Hogan, as above noted, was in the negative.

It will be noted that Mr. Hogan does not take the position that a board of education may not on a vote of the electors issue bonds for the purpose of obtaining money necessary to complete an improvement after a previous issue of bonds by the board of education on a vote of the electors in an amount estimated by the board to be sufficient to accomplish the purpose. Though not so stated in Mr. Hogan's opinion, the reason suggested on a consideration of said opinion in the light of the facts there under consideration seems to be that when the proposition of a bond issue is submitted to the electors of a school district under section 7625 General Code for any of the purposes therein mentioned the electors in voting on said proposition vote not only on the proposition whether such improvement should be made, but also upon the question of the amount of money that should be expended for the inprovement, and that when the electors vote in favor of such proposition and the amount submitted by the board of education to the electors as sufficient for the purpose to be accomplished the board of education is thereafter without authority to issue additional bonds for the same purpose without the approval of the electors of the school district.

From the standpoint of the taxpayers of the school district this reasoning suggested by the opinion of Mr. Hogan appears strongly to the mind of any person making an honest effort to get to the bottom of the question. However, on a consideration of the statutory provisions applicable to this question I am unable, notwithstanding the forceful reasoning suggested by Mr. Hogan's opinion, to arrive at the conclusion reached by him and Mr. Turner on the question here presented. On a consideration of the provisions of section 7629 and 7625 General Code it is apparent that the purposes for which bonds may be issued under section 7629 are stated in far more general terms than are the purposes for which bonds may be issued under section 7625 General Code. Inasmuch, however, as it appears that before the board of education of a school district can submit the question of a bond issue for any of the specific purposes mentioned in section 7625 to the electors of the school district such board of education must find that the funds at its disposal or that can be raised under section 7629 are insufficient for the purpose, this to my mind is direct legislative recognition of the fact that the purposes for which bonds may be issued under section 7629 are at least as broad and inclusive as those stated in section 7625, and that within the limitations of section 7629 bonds may be issued under said section for any of the purposes for which bonds may be issued under section 7625. This legislative recognition is the more significant on the point when we consider that both section 7629 and section 7625 were enacted in their present form by the same act of the legislature (97 O. L. 357, 358). Indeed, inasmuch as bonds issued under section 7629 General Code for the purposes therein mentioned are issued in anticipation of income from

taxes for such purposes levied or to be levied from time to time, it would appear that bonds might be issued for any purpose for which moneys in the building fund of the school district or the proceeds of tax levies might be used.

Starting with this proposition and the further proposition, of the correctness of which I feel assured, that a board of education may issue bonds under the provisions of section 7625 General Code under a vote of the electors for the purpose of completing a school building constructed to present condition from the proceeds of a prior issue of bonds under said section with a vote of the electors, let us test the conclusion reached by my predecessors, that such subsequent issue for the purpose of completing such building can not be issued under section 7629 General Code without a vote of the electors, by an application of the provisions of said sections of the General Code to a concrete case. We will suppose that a school district has a tax duplicate valuation for the year 1916 of $5,000,000.00; the board of education of such school district in the year 1917 desires to construct a school building, the estimated cost of which is, say $30,000.00; bonds in the estimated amount for this purpose can not be issued under section 7629 for the reason that by the limitations of said section bonds can not be issued for such purpose in any one year in an amount to exceed two mills of the tax duplicate, which in this case would amount to $10,000.00; and said bonds must be issued, if at all, by a vote of the electors of the school district under section 7625 General Code. If after the expenditure of the proceeds of this bond issue in the sum of $30,000.00 the board of education finds that it will still need the sum of $15,000.00 to complete the school building, it is clear that bonds to raise this amount must again be issued by a vote of the electors under section 7625 General Code, for the amount to be raised is in excess of the amount that can be raised by an issue of bonds under section 7629. Suppose, however, that after the expenditure of the proceeds of the first bond issue in the construction of said school building the board finds that it needs only the sum of, say, $5,000.00 to complete said school building: now, assuming that the board of education has not issued any bonds for any purpose under section 7629 during the year, it is obvious that the board of education can not submit to the electors of the school district the proposition of an additional bond issue in the sum of $5,000.00 for the purpose of completing said school building, and this for the reason that under the provisions of section 7625 before the board of education can submit the proposition of a bond issue to the electors it must find that the amount that can be raised by an issue of bonds under section 7629 will not be sufficient for the purpose.

Now in the case above supposed the sum of $5,000.00 needed to complete said school building is below the limitation for which bonds may be issued in the school district under section 7629, and therefore if, as contended by my predecessors, the additional bonds to complete the school building can not be issued under section 7629 the same can not be issued at all, however much the interests of the school district may demand said school building to be completed, and however much the board of education and the electors of said school district may desire this to be done. To my mind the contention of my predecessors, with all respect to them, leads to an absurd conclusion and one which I do not believe the legislature contemplated in the enactment of the statutory provisions here under consideration. The conclusion reached by me necessarily is that bonds may be issued under section 7629 General Code for the purpose of completing the school building constructed to its present condition from the proceeds of bonds issued by the board of education on a vote of the electors in an amount estimated by the board to be sufficient to construct such building to completion, and this conclusion results in an approval of the bonds of Canton city school district on the transcript before me. In reaching this conclusion I am not as free from doubt as I would like to be and usually am in opinions rendered by me with respect to the validity or invalidity of bond issues purchased by you subject to my approval. However, a question of this kind must be decided one way or the other

and my conclusion approving this bond issue with respect to the authority of the board of education of Canton city school district to issue said bonds represents my best judgment in this matter.

I might add that the proceedings relating to this bond issue were conducted by Messrs. Peck, Shafer & Peck, of Cincinnati, Ohio, who are bond attorneys of high standing, but if on a consideration of the whole situation you should think, in view of all that has been said upon the question, that the validity of this bond issue is not as free from all doubt as may be desired with respect to bond issues purchased by you, this department could not, of course, take any exceptions to action upon your part rejecting these bonds.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

967.

TOWNSHIP TRUSTEE—WHEN REQUIRED TO GIVE BOND.

A township trustee is not required to give bond before the first day of January after his election, when his term of office begins, but must give bond before entering upon the discharge of his duties as such township trustee.

COLUMBUS, OHIO, January 28, 1918.

HON. DAVID A. WEBSTER, *Prosecuting Attorney, Bryan, Ohio.*

DEAR SIR:—Under recent date you ask my opinion upon the following state of facts regarding certain township trustees in your county:

> "The trustees that were elected in November last, two of them never filed their bond with the clerk, or took their oath of office until the 7th day of this month. One of the trustees was a candidate at the election and did not file his expense account as provided by statute."

You desire to know whether vacancies exist in these two offices of township trustee, by reason of the fact that they did not take their oath of office or file their bonds until after the date of the beginning of their term.

Section 3268 G. C. provides:

> "Three trustees shall be elected, biennially, in each township, who shall hold their office for a term of two years, commencing on the first day of January next after their election."

Section 3269 G. C. provides:

> "Before entering upon the discharge of his duty, each township trustee shall give bond to the state for the use of the township, with at least two sureties, who shall be residents of the same township with the trustee, in the sum of five hundred dollars, conditioned for the faithful performance of his duty as trustee. Such bond shall be approved by a justice of the peace of the township in which the bond is given."

Section 3263 G. C. provides that after the election of township officers, the township clerk shall make a list of all the officers, stating the offices, and add thereto:

> "* * * a requisition that they severally appear before him, or some other officer authorized to administer oaths, and take the oath of office, and give bond as provided by law. * * *."

Section 3265 G. C. provides:

> "If after receiving notice of his election or appointment, a person elected or appointed to a township office fails to take the oath of office and give bond within the time required by law, he shall be deemed to have declined to accept, and the vacancy shall be filled as in other cases."

Section 7 G. C. provides:

> "A person elected or appointed to an office who is required by law to give a bond or security previous to the performance of the duties imposed on him by his office, who refuses or neglects to give such bond or furnish such security, within the time and in the manner prescribed by law, and in all respects to qualify himself for the performance of such duties, shall be deemed to ha e refused to accept the office to which he was elected or appointed, and such office shall be considered vacant, and be filled as provided by law."

I have been unable to find any provision of law fixing the time for giving the bond, except that in section 3269 G. C., which is that it must be done "before entering upon the discharge of his duty."

While it is true that section 3268 G. C. provides that the term of the township trustees commences on the first day of January, there is no provision, as there is in the sheriff statute, that the official bond shall be given prior to a day fixed. It was by reason of the express provision of law that required the sheriff to give a bond "within ten days after receiving his commission and before the first Monday of January," that the supreme court in State ex rel. Poorman v. Commissioners, 61 O. S. 506, held that a vacancy was occasioned.

I think your situation is governed by the decision of the court in State ex rel. v. Nash, 65 O. S. 549. In this case mandamus was sought on the theory that a vacancy had arisen in the office of infirmary director because a bond had not been given prior to the first day of January, when the term of the infirmary director commenecd. The court at p. 553 says:

> "An infirmary director must give bond 'before entering on the discharge of his duties' * * *. The term of office of an infirmary director begins on the first Monday of January; but the actual discharge of the duties of such office does not necessarily begin with his term. The petition does not show that Hill performed any official duty prior to the giving of the bond on January 7, 1902, which was the day after the first Monday in January * * *."

The syllabus of this case reads:

> "An infirmary director is not required to give bond before the first day of January, when his term of office begins, but must give bond before entering on the discharge of his duties as such infirmary director."

The facts in your communication do not show that the township trustees in question attempted to discharge any of the duties of their office prior to the date on which they filed their bond and took their oath of office. Under the authority of the case of State ex rel. v. Nash, supra, it is my opinion that the fact that they had not filed their bond would not create a vacancy, since they had not entered upon the discharge of their duties. As I understand your communication, this was the question submitted.

You further state that one of the trustees did not file his expense account as provided by the corrupt practices statute. While that might be a cause for removal, although I am inclined to believe that the statute is directory and that he could still file such expense account, it would not occasion a vacancy in the office.

Trusting this fully answers your inquiry, I am,

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

968.

APPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN FRANKLIN AND JEFFERSON COUNTIES.

COLUMBUS, OHIO, January 28, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your communication of January 24, 1918, in which you enclose, for my approval, final resolutions on the following improvements:

Franklin county—Section F, Columbus-Lancaster road, I. C. H. No. 49.

Jefferson county—Section A, Skelly-Empire road, I. C. H. No. 378.

I have carefully examined said final resolutions, find same correct in form and legal and am therefore returning the same to you with my approval endorsed thereon, in accordance with the provisions of section 1218 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

969.

COUNTY SURVEYOR—MAY PERFORM NO OTHER WORK EXCEPT OFFICIAL DUTIES—FEES—DEPUTY SURVEYOR—MAY PERFORM WORK FOR PRIVATE PARTIES OUTSIDE OF WORKING HOURS—FEES—COMPENSATION—EXPENSES.

1. *The county surveyor must devote all his time to the performance of the duties of his office and therfore can not under any circumstances perform work for private parties, unless this work is made by statute a part of his official duties, in which event the fees collected therefor must be turned into the county treasury.*

2. *The deputy or assistant of the county surveyor can not perform any work for private parties during office hours, unless said work has been made by statute a part of the official duties of the county surveyor, in which event the fees received for said work must be turned into the county treasury.*

3. *The deputy or assistant of the county surveyor outside of office hours may perform work for private individuals which is not a part of the official duties of the county surveyor, and may receive pay for the same; but this work must be done so as not to interfere in any way with the performance of public duties, and in such a manner as not to impair in any measure the efficiency of the deputy or assistant.*

4. *In the performance of work for private parties by a deputy or assistant of the county surveyor, which work by statute has been made a part of the official duties of the county surveyor, the deputy or assistant is entitled to the expenses therein incurred, but in doing the work for private parties which is not a part of the official duties of the surveyor, said deputy or assistant is entitled to no money from the public for expenses incurred therein. The matter of such expense is between the deputy or assistant and party for whom the work is done.*

COLUMBUS, OHIO, January 28, 1918.

HON. MILTON HAINES, *Prosecuting Attorney, Marysville, Ohio.*

DEAR SIR:—I have your communication of January 4, 1918, in which you request my opinion on the following state of facts:

> "I am in receipt of a copy of a notice directed to the county surveyor by the county auditor by order of the county commissioners, that he, Chas. E. Blain, county surveyor, report the amount of money collected for making surveys, etc., for private parties, or labor other than official county work from the 29th day of June, 1917, to date, and from now on a monthly report of same as directed by section 7181 (107 O. L. 110).
>
> Mr. Blain replies that he understands that he can not make surveys, etc., for private parties without paying in the amounts to the county treasury monthly, but that he turns this part of the work over to his deputy, Mr. W. P. Beightler, who is a regularly appointed deputy, drawing a set amount from the county treasury, and that he is entitled to the amounts collected as well as livery to and from said private surveys, etc., giving as his reason that the above named section or any other sections of Ohio laws do not specify that a deputy surveyor shall not be permitted to do private surveying and collect the money therefrom for his own use, and that section 7181 (105-6 O. L. 612) allows for livery, meals, etc."

While your question has particular reference to deputies and assistants of the county surveyor, it will assist us to briefly consider the provisions of law relating to the county surveyor himself.

The following provision is found in section 7181 G. C. (107 O. L. 110):

> "The county surveyor shall give his entire time and attention to the duties of his office and shall receive an annual salary to be computed as follows: * * *."

So it is seen that the county surveyor has no authority to do private work unless said work is made a part of the duties of his office.

A further examination of section 7181, supra, will disclose that there is certain work of a private nature which is made a part of the duties connected with the office of county surveyor, the section providing:

> "* * * When the county surveyor performs service in connection

with ditches or drainage works under the provisions of sections 6442 to 6822 inclusive of the General Code of Ohio, he shall charge and collect the per diem allowances or other fees therein provided for, and shall pay all such allowances and fees monthly into the county treasury to the credit of the general county fund. * * *."

The duties of the county surveyor, however, as set forth in said sections 6442 to 6822 inclusive, are in the main, if not entirely, public in nature; that is, they are duties which the county surveyor performs in the main for the county commissioners.

Said section 7181 further provides:

"* * * The county surveyor shall do likewise when he performs services under the provisions of sections 2807 to 2814 inclusive of the General Code of Ohio."

The duties prescribed in these sections are purely personal or private, being performed for private individuals, and the services performed for private individuals become a part of the duties of the office of county surveyor, and therefore said surveyor is authorized to devote a part of his time and attention to the performance of these duties, although the fees he receives therefor must be turned into the county treasury.

It must be distinctly understood, however, that outside of the provisions set out in said section 7181, relative to work for private individuals, the county surveyor has no authority to do work for private individuals, even though he should turn the fees received therefor into the county treasury. His *entire time* must be given *to the duties of his office.* Therefore, unless the statutes make work for private parties a part of the duties connected with the office of county surveyor, said surveyor is not under any circumstances authorized to do said work.

We will turn now to deputies and assistants to the county surveyor. If the duties of the office are such that the county surveyor can not perform them alone, he is entitled to deputies and assistants.

Section 2787 G. C. (107 O. L. 70) provides:

"* * * the county surveyor shall file with the commissioners of such county a statement of the number of *all necessary* assistants, deputies, draughtsmen, inspectors, clerks or employes in his office for the year beginning on the first Monday of September next succeeding and their aggregate compensation. * * *."

Section 2788 G. C. (107 O. L. 70) provides:

"The county surveyor shall appoint such assistants, deputies, draughtsmen, inspectors, clerks or employes *as he deems necessary* for the proper performance of the duties of his office, * * *."

It is evident from the above quoted sections that the surveyor has authority to employ only such deputies and assistants as may be necessary to enable him to perform the duties of his office. He has no authority, neither is he warranted in law, to employ deputies and assistants, whose services are paid for by the county, to engage in private employment. If he has more deputies and assistants than he needs for the proper performance of the duties of his office, he should discharge some of them. If he has no greater number employed than will enable him to perform well the duties of the office, then their time should not be given to work entirely outside the duties of the office, which would be at the expense of the public. The public pays for their time and is entitled to it.

With this in mind, what rule should apply when the duties set forth in section 7181, supra, are performed by a deputy or assistant, for private parties? Exactly the same rule as applies to the surveyor. In fact it is the surveyor that performs the duties, through a deputy or assistant, and the fees collected for the performance of such work must be turned into the county treasury, whether the work is done by the county surveyor personally or through his deputies and assistants. The expenses of the deputies or assistants, incurred in the performance of the duties set out in said section 7181, would be taken care of in the same manner as are other expenses of the county surveyor or his deputies or assistants in the performance of other duties connected with the office of said surveyor.

But what about the deputy or assistant performing work for private parties which is not under the law made a part of the duties of the county surveyor? What rule should apply here? Exactly the same rule as applies to the county surveyor. The deputies or assistants have no authority to perform work for private parties unless said work is made by law a part of the duties of the office of county surveyor, even though the fee should be turned over to the county treasury. The county surveyor is elected and the deputies and assistants are appointed to perform the official duties of the office. For this they are paid. To this they must give their time and attention.

We come now to the consideration of another matter, viz., the work which deputies and assistants to the county surveyor might perform for private parties outside of office hours. We are all well aware that there are certain hours in every office known as office hours, and that ordinarily the officers elected, together with their deputies or assistants, are free at the close of said hours.

In so far as the surveyor is concerned, the law is clear to the effect that he must devote *all his time* to the performance of the duties of his office. Under this provision he can not under any circumstance, as said before, perform work for private parties unless by said statute said work is made a part of his official duties. But there is no such a provision as this relative to deputies and assistants of the county surveyor.

I desire to call attention to an opinion rendered by my predecessor, Hon. Edward C. Turner, on May 4, 1916, and found in Vol. I, Opinions of the Attorney-General or 1916, p. 769. The second paragraph of the syllabus of said opinion reads as follows:

> "A deputy county surveyor or an employe in the county surveyor's office may lawfully perform services for a municipality or for a private individual and be compensated therefor, provided all the work for such municipality or private individual is performed outside of business hours, and with the further qualification that the amount of time devoted to such outside work must not be so large as to interfere in any way with the performance of public duties or impair in any measure the efficiency of the deputy or employe."

I concur with this opinion of my predecessor, but do not believe it should be extended in the least beyond the principle therein set forth, namely, that the deputy or assistant of a county surveyor should not under any circumstances perform work for private parties during office hours, unless said work is a part of the official duties of the county surveyor, in which event the fees received by the deputy or assistant would be turned over to the county treasury, under section 7181 G. C. It is my view that if the work performed for private individuals is not a part of the official duties of the county surveyor, the deputy or assistant of the county surveyor cannot under any circumstances perform the same during office hours, but may perform them under the conditions set forth by my predecessor, and receive pay therefor.

Mr. Turner in his above mentioned opinion states at p. 771:

> "I am fully aware that a situation under which the deputies and assistants may accept private employment, is subject to grave abuse, and would prefer to reach the conclusion that outside employment may not be accepted under any circumstances, if I were able so to do."

I might say that I am of the opinion the legislature had in mind this grave abuse and therefore greatly limited the right of the surveyor and his deputies and assistants to accept private employment. I further desire to say that in the event the deputies and assistants of the county surveyor do perform work for private parties outside of office hours, they are not entitled to any expense whatever incurred in the performance of said duties. This is purely a private matter between the deputy or assistant and the one for whom the work is done, and the public is not held responsible for the expenses so incurred.

Hence answering your question specifically, I desire to lay down the following propositions:

1. The county surveyor must devote all his time to the performance of the duties of his office and therefore can not under any circumstances perform work for private parties, unless this work is made by statute a part of his official duties, in which event the fees collected therefor must be turned into the county treasury.

2. The deputy or assistant of the county surveyor can not perform any work for private parties during office hours, unless said work has been made by statute a part of the official duties of the county surveyor, in which event the fees received for said work must be turned into the county treasury.

3. The deputy or assistant of the county surveyor outside of office hours may perform work for private individuals which is not a part of the official duties of the county surveyor, and may receive pay for the same; but this work must be done so as not to interfere in any way with the performance of public duties, and in such a manner as not to impair in any measure the efficiency of the deputy or assistant.

4. In the performance of work for private parties by a deputy or assistant of the county surveyor, which work by statute has been made a part of the official duties of the county surveyor, the deputy or assistant is entitled to the expenses therein incurred; but in doing work for private parties which is not a part of the official duties of the surveyor, said deputy or assistant is entitled to no money from the public for expenses incurred therein. The matter of such expense is between the deputy or assistant and the party for whom the work is done.

The above opinion is rendered and conclusions drawn on the theory that the deputy to whom you refer is a regularly employed deputy and not one who works simply a part of the time. To be sure, the deputy, if employed for part time only by the county surveyor, would be entitled to accept private employment under the conditions set out in the opinion during the time he is not employed by the surveyor.

In other words, the deputy would be entitled to accept private employment outside of business hours.

Further, inasmuch as the county surveyor is compelled to devote all his time and attention to the duties of his office, it would not be lawful for him to turn over to his deputy strictly private work, on the theory that the fees received for the same would be divided between the deputy and the surveyor.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

970.

BOARD OF EDUCATION—ELECTION—TERM—STATUTES—WHEN CONTEXT SHOWS WRONG WORD USED PROPER ONE WILL BE DEEMED TO BE SUBSTITUTED.

Where one word has been wrongly used for another and the context affords the means of construction, the proper word will be deemed substituted or supplied.

In section 4726 G. C., where provision is made that three members of a board of education shall be elected for THREE years, an error is apparent and the phrase therein should read "shall elect two members of the board of education for two years and three members to serve for FOUR years, and at the proper elections thereafter their successors shall be elected for four years."

COLUMBUS, OHIO, January 28, 1918.

HON. CLARE CALDWELL, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR:—In your letter of January 8, 1918, you request my opinion as follows:

> "In Bristol township, this county, the schools were centralized under section 4726-1, General Code, and in accordance therweith the probate judge appointed a school board of five members, and the first township election thereafter was held on November 6, 1917.
>
> Said section 4726-1 provides that the electors of such township shall elect two members of the board for two years and three members to serve for *three years, and at the proper elections thereafter, their successors shall be elected for four years.* The election for township officers in Ohio is to be held in the odd numbered years. That being true, how will it be possible to elect three members at the expiration of their terms of three years, as provided in said section 4726-1? If the election for three members be held at the expiration of the three year term, the election would be held in November of 1920 and every four years thereafter, which would not be the years for the election of township officers.
>
> Kindly advise if you think that this section is proper or whether a mistake has been made in the drafting thereof."

Section 4726-1 G. C. provides:

> "In townships in which there are one or more school districts, the qualified electors of such school district may vote on the question of centralizing the schools of said township districts, or of special school districts therein, without interfering with the existing school district organization until the result of the election shall have been determined. If at such election in any township a majority of all the votes cast shall be in favor of centralizing the schools in said township, the probate judge of the county shall create a new board of education for the said township, without delay, by selecting from the several boards of education thus consolidated five suitable persons, giving each former district its fair representation in such selection, which such five persons so selected shall constitute the board of education for said township until the first township election thereafter; *at such first township election thereafter the electors of such township shall elect two members of the board of education for two years, and three members to serve for three years, and at the proper elections thereafter their successors shall be elected for four years.* If a

majority of the electors in such township vote against said centralization at the time above designated, then the several school districts in said township shall proceed as though no election had been held."

The object of the above legislation is to provide centralization for the schools of a township in which townships there are two or more school districts, and it is provided that the qualified electors of such township may vote on the question of the centralization of the schools of the districts within such township. If, however, such centralization election carries, then it is provided that the probate judge of the county shall create a school board for the entire township centralized district, by selecting from the several boards of education five suitable persons and that the successors of said five persons shall be elected at the first township election after they have been so selected by such probate judge, two for the term of two years and "three members to serve for *three* years," and that at the proper elections thereafter three successors shall be elected for four years. Members of boards of education are elected on the first Tuesday after the first Monday in November in odd numbered years (section 4828). So that the proper elections after said first election would be the elections which were held in odd numbered years. It is provided in various sections of the General Code that the first election for members of a board of education in a district may be for what is commonly called a short or long term, that is, for two or four years. To illustrate, section 4736-1 provides that the successors of the members of a board of education of a new district which is appointed by the board of county commissioners shall be elected at the first election for members of a board of education held in such district after they have been so appointed by the board of county commissioners, "two members to serve for two years and three members for *four* years"; and again, in section 4709, it is provided that in a village district "at the first election in such district a board of education shall be elected, two members to serve for two years and three members to serve for *four* years." It is also provided in section 4745 G. C. that the terms of office of members of each board of education shall be for four years. So that, the entire scheme of school legislation, as far as the election of members of boards of education are concerned, is that when the terms are so arranged that all members do not finish their term at once but there is a continuity of service, then the term of any and all members of boards of education shall be four years and that the members of such board shall be elected on the first Tuesday after the first Monday in November in odd numbered years. It seems to me that it is clearly apparent that an error was made when said section 4736-1 was enacted and that what the legislature intended to do was not to provide that three members should be elected for three years, but that three members should be elected for four years. It would be an error which the scrivener or printer could easily make, having used the word "three" before "members," to also use the word "three" before "years" in the same sentence and in such close proximity, but when it is considered that the term "proper election" is used immediately thereafter in the same sentence and for the term of four years, it is impossible to reconcile the same other than to conclude that the use of the word "three" preceding "years" is clearly a mistake.

Mistakes will not be permitted to defeat the object of legislation, and Lewis, in his edition of Sutherland on Statutory Construction, section 410, says:

> "Legislative enactments are not any more than any other writings to be defeated on account of mistakes * * * provided the intention of the legislature can be collected from the whole statute. * * * Where one word has been erroneously used for another * * * and the context affords the means of construction, the proper word will be deemed substituted or supplied."

In this instance the intention of the legislature is gathered from the act itself, that is, that a school board for a new district is being provided for and after making provision that the members should be appointed by the probate judge, then provision is made how the election of their successors shall be had; so that the terms of all the members will not terminate at the same time, and the fact, as noted by the author, supra, that the word "three" was used erroneously instead of the word "four" will not be permitted to defeat the clear intention of the legislature, but the word "four" will be substituted for the word "three" in said section. To the same effect is found the language in 36 Cyc., page 1126, where the following language is used:

> "Mere verbal inaccuracies or clerical errors in statutes in the use of words * * * will be corrected by the court whenever necessary to carry out the intention of the legislature as gathered from the entire act."

A few of the many cases in which a similar holding has been made should be briefly noted:

In Haney v. State, 34 Ark., 263, the second branch of the syllabus reads:

> "Where it is obvious that the legislature did not intend to use a particular word written in a statute, and it is further apparent what word they did intend, *the courts will correct the mistake by substituting the word intended for the one used.*"

In that case a statute had been amended and the word "fifth" had been used as designating the Monday in January and July when court should open in a particular county. Eakin, J., on page 269, says:

> "The mistake is obvious on the face of the act. It is very true, as a general rule of construction, that where the language of an act is plain and unambiguous, the courts must give it effect, as it stands, or declare the law unconstitutional. But this rule is subject to much qualification and does not apply to cases of *plain clerical errors*, where it is obvious that the legislature *did not intend to use the word as written*, and it is further apparent what word they did intend. A mistake of this nature may be corrected by the courts, upon as sound principle as a mistake in a deed. It is not judicial legislation nor judicial interference with the legislative will. It is in support of the legislative will, and wholly distinct from the reprehensible practice of warping legislation, to suit the views of the courts as to correct policy. The only conditions to be observed in the exercise of this power of literal correction are, that the courts should be thoroughly and honestly satisfied of the legislative intent, irrespective of the policy of the act.
>
> It would be frightful if, in a case like the present, the business of all the courts of a circuit should be delayed by such a mistake, and the rights of litigants thrown into confusion until the next session of the legislature, for the want of this wholesome power, which is constantly applied to the contracts of individuals. Such is not the meaning nor spirit of our constitutional provision that the different departments should be independent of each other. They should respect the constitutional will and intention of each other, and that being clearly ascertained, should act in consonance therewith."

In Palms, et al. v. Shawano County, et al., 61 Wisc. 211, the court had under consideration a statute which contained a description of certain lands. On page 215, Taylor, J., says

"We think it is clearly apparent that the word 'south' was a mere clerical error and was intended to be 'north.' The word 'south' destroys all sense in the description; the word 'north' makes it sensible and makes the boundary complete. With the word 'north' inserted the line would read—the township line between townships 30 and 31, and the last course would read the place of beginning and make the boundary complete. * * * The court will inspect the whole act, and, if the true intention of the legislature can be reached, *the false description will be rejected as surplusage, or words substituted, in the place of those wrongfully used, which will give effect to the law.*"

In the case of Loper v. State, 82 Minn. 71, a criminal statute was being considered. Lovely, J., says, at page 73:

"In copying section 7869 there was an evident oversight in leaving out the words 'that steals a horse or horses from any person' so that, standing alone, it seemingly provides for a bounty for the conviction of any or every crime of which any person may be convicted. It is easy to see how this mistake might have occurred. In the haste of copying from section 7869, where the word 'person' is repeated, the eye of the engrossing clerk evidently passed too rapidly over the omitted words to this word (person) where it next occurred, and thus omitted the words intended to be retained. * * * *Legislative enactments are not to be defeated on account of mistakes, errors or omissions provided the intentions of the legislature can be collected from the whole statute and the title and its history may be referred to for that purpose.*"

In The People ex rel. v. Hoffman, 97 Ill. 234, it was held in the second branch of the syllabus:

"The words *capias ad satisfaciendum*, in section 5 of the chapter relating to judgments, decrees and executions, which provides that no execution shall issue against the body except in certain cases, or unless the defendant shall have been held to bail upon a writ of *capias ad satisfaciendum*, as provided by law, etc., are construed to mean *capias ad respondendum*, that being the evident intention of the legislature."

And on page 236, Mr. Justice Craig, during the opinion of the court, said:

"A *capias ad satisfaciendum* is defined to be a judicial writ of execution, which issues on the record of a judgment, and by the writ the sheriff is commanded to take the body of the defendant in execution, and him safely to keep, so that he have his body in court at the return of the writ to satisfy the plaintiff his debt and damages. * * * There is no such thing known to the law as a defendant being held to bail under a capias of this character; but, on the other hand, it may be regarded as the final process, which imprisons until the judgment is discharged. When the legislature, therefore, said that no execution shall issue against the body of the defendant * * * unless the defendant shall have been held to bail upon a writ of *capias ad satisfaciendum*, that body did not mean what it said, nor did it intend to say what it did. But the legislature evidently intended to say, unless the defendant shall have been held to bail upon a writ of *capias ad respondendum*. A capias of this character is a writ commanding the sheriff to take the body of the defendant, if he may be found in his bailiwick or county, and him safely keep, so that he may have him in court on the day of the return to answer to the plaintiff of a plea of debt, trespass, etc., as the case

may be. * * * This construction of the statute renders it consistent, harmonious and intelligent, but should it be construed literally as it reads, then no intelligent meaning can be gathered from it * * * Statutes must be interpreted according to the intent and meaning, and not always according to the letter. A thing within the intention is within the statute, though not within the letter; and a thing within the letter is not within the statute unless within the intention. * * * *We are of the opinion that in the construction of the section of the statute, supra, the words ad satisfaciendum should be rejected, and the words ad respondendum should be inserted in their stead.*"

In the case of Ex parte Hedley, 31 Calif. 108, the last branch of the syllabus reads:

"Where there is an evident mistake in the use of a word in a section of a statute, and it is apparent what was the word intended, it will be read as though the intended word was inserted."

The court on page 114 says:

"The word 'without' occurs twice in this provision, but it is apparent that in the instance in which it is used last, the word 'within' was the word really intended. The provision must therefore be so read."

A number of decisions in our own state also follows the above view. In Sawyer v. State ex rel., etc., 45 O. S. 343, the act of the legislature created a new judicial circuit district and provided for three additional circuit judges, one for the new eighth and two for the old sixth circuit, and contained a provision that such additional judges should be elected "on the first Tuesday of November next," but there was no machinery for holding such election nor was there any adequate machinery to be found in any of the general provisions of the statutes in relation thereto. It was held that the clause fixing the time for the election of the new judges was surplusage, should be disregarded and the general provisions of the statutes for the election of circuit judges on the first Tuesday after the first Monday in November applied to such new judeships.

Owen, C. J., in delivering the opinion, quoted from Moore v. Given, 39 O. S. 663, as follows:

"That the law does not require vain, absurd or impossible things of men is one of its favorite maxims; and it is the plain duty of the courts, in the interpretation of a statute, unless restrained by the rigid and inflexible letter of it, to lean most strongly to that view which will avoid absurd consequences, injustice and even great inconvenience; for none of these can be presumed to have been within the legislative intent."

In the case of Tracy v. Card. 2 O. S. 431, Thurman, J., delivering the opinion of the court, said:

"While, on the one hand, the judiciary should be careful not to make its office of expounding statutes a cloak for the exercise of legislative power, on the other hand, it is equally bound not to stick in the mere letter of a law, but rather to seek for its reason and spirit, in the mischief that required a remedy and the general scope of the legislation designed to effect it."

In the last above mentioned case the word "administrator" was by construction

incorporated into an act and inserted after the word "executor," as this seemed to the court to be within the clear legislative intent.

In State ex rel. v. Atchibald, Sheriff, 52 O. S., page 1, the act of the legislature provided that a successor "shall be elected on the first Tuesday after the second Monbay in November," but the court held that there was a mistake and that the statute meant that the election should be held on the first Tuesday after the first Monday in November, as is provided by law. On page 9 the court uses the following language:

> "If there is such error or mistake, and the intention of the legislature can be ascertained, the error or mistake should be corrected by the court."

An almost endless line of authorities is cited along the above line by text writers and in the digests, but the above is sufficient, we think, for this opinion.

Following the principles above set forth as to the construction of said section 4726-1, I advise you that the word "three" which precedes "years" in the phrase "three members to serve for three years," shall be read "four" so that the whole phrase in relation thereto will read "shall elect two members of the board of education for two years and three members to serve for *four* years, and at the proper elections thereafter their successors shall be elected for four years."

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

971.

STATE HIGHWAY DEPARTMENT—MAY NOT FURNISH ASSISTANCE TO COUNTY SURVEYORS TO PREPARE MAPS—HOW COUNTY SURVEYOR MAY OBTAIN ASSISTANCE TO PERFORM SAID WORK—ENGINEER FROM STATE HIGHWAY DEPARTMENT MAY BE HIRED BY COUNTY SURVEYOR.

1. *The state highway department has no authority to furnish assistance to the county surveyors in the preparation of the maps provided for under section* 1187 *G. C. and pay for such assistance out of the funds appropriated for the expenses of the state highway department.*

2. *Under sections* 2787 *and* 2788 *G. C.* (107 *O. L.* 70), *the county surveyor is authorized to employ the necessary assistants and draughtsmen to enable him to prepare said maps, with the condition that the total amount expended by him for all office help does not exceed the amount allowed by the county commissioners of his county or the common pleas court thereof.*

3. *A county surveyor can employ an engineer connected with the state highway department, to assist him, and pay him for said services, provided the work done by said engineer is performed outside of business hours and at such times as in no way to interfere with the duties which he owes the state.*

COLUMBUS, OHIO, January 28, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of January 8, 1918, which reads as follows:

> "I desire to have your opinion as to whether or not this department can legally expend money for the hire of extra help for making, or for correcting,

county highway maps which are required to be made, or corrected, by the county surveyor under the provisions of section 1187 G. C., but which the surveyor is unable to furnish to the satisfaction of this department, (1) from funds which are appropriated by the legislature for the maintenance of the state highway department, and (2) from funds which are allowed by the emergency board for mapping work in connection with the preparation of maps under the provisions of sections 2284-1 and 2284-2.

In case this department is unable to secure timely, or reliable, or satisfactory mapping work under the provisions of section 1187 G. C., what legal recourse would you suggest in order to prevent busy, or delinquent, or incompetent county surveyors from holding up the publication of such maps as is contemplated under the provisions of sections 2284-1 and 2284-2?

Also I desire your opinion on the following point: Would it be legal and proper for a county surveyor to temporarily hire and pay an engineer who is regularly employed in the state highway department, for the purpose of having him make a county highway map, which said surveyor is required to make under the provisions of section 1187 G. C., with the understanding that the time put in by such engineer would be extra time outside of the required eight hours per day service rendered to this department?"

Briefly stated, your question is as to whether the state highway department would be permitted to furnish assistance to the county surveyors in connection with their duties as set out in section 1187 G. C., and pay those who render assistance out of funds appropriated either by the legislature for the maintenance of the state highway department, or by the emergency board for the making of maps; and if the state department can not do this, whether a county surveyor would be permitted to employ an engineer in the state highway department, and pay him for his services, provided said services were renderd outside of business hours.

Section 1187 G. C. reads as follows:

"The state highway commissioner or chief highway engineer, may call upon the county highway superintendent, at any time, to furnish a map or maps of of the county showing distinctly the location of any rivers, railroads, streams, township lines, cities, villages, public highways and deposits of road material, together with any other information that may be required by said commissioner or engineer. Such information shall be furnished in such form as the state highway commissioner may require. A copy of such maps, plats or other information shall be kept on file in the office of the county highway superintendent."

This section provides that the maps must be furnished by the county surveyor, complete; that is, the maps must contain the information in such form as the state highway commissioner may require. This makes it obligatory upon the county surveyor to furnish the state highway commissioner with maps of the kind and character suggested by said commissioner. This work becomes a part of the duties of the office of the county surveyor, just the same as any other duties which the surveyor is required by law to perform. The maps so furnished should conform to the regulations of the highway commissioner.

Hence, inasmuch as these are duties which rest with the county surveyors, the state highway commissioner is not required to furnish or assist in furnishing said maps. Such is not a part of the duties of said commissioner. Therefore he would not be authorized to assist in doing said work. If he is not authorized to assist in doing the work, he could not pay for the assistance rendered, out of moneys appro-

priated for the maintenance of his department, or from any funds provided for him by the emergency board to enable him to perform the duties devolving upon him under sections 2284-1 and 2284-2 G. C.

The next question to be considered is whether the county surveyor could employ assistants to assist in the preparation of said maps. Sections 2787 and 2788 G. C. (107 O. L. 70) control the matter of assistants to the county surveyor.

Said section 2787 provides that the county surveyor shall file with the county commissioners of each county a statement of the number of all necessary assistants, deputies, draughtsmen, inspectors, clerks or employes in his office for the year beginning on the first Monday of September next succeeding his report and their aggregate compensation.

Section 2788 provides that:

> "The county surveyor shall appoint such assistants, deputies, draughtsmen, inspectors, clerks or employes as he deems necessary for the proper performance of the duties of his office, and fix their compensation * * *."

There is but one condition attached to the right of the county surveyor to appoint the necessary assistants, deputies, etc., viz., that the total compensation paid by him for office help must not exceed in the aggregate the amount fixed therefor by the county commissioners or allowed by a judge of the court of common pleas of the county.

From the provisions of these two sections, it is my opinion that a county surveyor could employ assistants or draughtsmen to help him in the preparation of maps specified in section 1187 G. C., and pay for the services so rendered, under the condition that the total amount paid for all office help shall not exceed the amount allowed by the county commissioners or the common pleas court of the county.

If this be true, we can pass to the next question which naturally arises, as to whether a county surveyor can under the law employ an engineer who is regularly in the employment of the state highway commissioner, to assist him in the making of said maps, provided the work is done by the engineer outside of business hours; or possibly the question had better be stated in this form: Whether such an engineer would be authorized to accept such employment, if performed under the above mentioned conditions.

There is no statutory provision to the effect that the engineers in the employment of the state highway department shall devote their entire time to the duties of their office, and there is no provision of law which forbids said engineers from accepting the employment outside of business hours or outside of the time which they owe the state under the rules and regulations of the state highway department.

Under practically similar provisions of law I held in opinion No. 969 that a deputy county surveyor could, outside of business hours, accept employment from municipalities or private individuals, provided it be done under such circumstances and conditions as not to interfere with the performance of his duties in the surveyor's department. In rendering this opinion I concurred in an opinion rendered by my predecessor, Hon. Edward C. Turner on May 4, 1916, to Hon. T. B. Jarvis, Prosecuting attorney, Mansfield, Ohio, and found in Vol. I, Opinions of the Attorney-General for 1916, p. 769. The last branch of the syllabus of said opinion reads as follows:

> "A deputy county surveyor or an employe in the county surveyor's office may lawfully perform services for a municipality or for a private individual and be compensated therefor, provided all the work for such municipality or private individual is performed outside of business hours, and with the further qualification that the amount of time devoted to such outside work

must not be so large as to interfere in any way with the performance of public duties or impair in any measure the efficiency of the deputy or employe."

On page 771 Mr. Turner used the following language:

"It should also be observed that it is within the power of the county surveyor to prevent abuses along this line, and it is the duty of that official to see that his deputies and assistants do not perform work for third persons during business hours or devote to such work an amount of time such as to interfere with the performance of public duties or impair the efficiency of the service due the county."

While I concurred in this opinion of Mr. Turner, yet I held that the limitations and restrictions therein set out by him should be strictly followed by the county surveyors and their deputies, when the deputies accept private employment or employment with municipalities.

I am of the opinion that the principle of law relating to county surveyors and their deputies would apply to the matter about which you inquire, and that an engineer of your department might be employed by a county surveyor to assist him in making such maps as might be required by your department, and that he can be paid by the county surveyor for the services so rendered, under the limitations above set out. But I believe that the services rendered should be kept strictly within the conditions and under the terms set out in the above quoted opinion of my predecessor, and that you, as the head of the state highway department, should exercise such care that the duties which the engineers owe the state will not be impaired to any extent because of the assistance they render the county surveyors in the preparation of said maps.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

972.

APPROVAL—CONTRACT BETWEEN BOARD OF TRUSTEES OF KENT STATE NORMAL COLLEGE AND HERWIG & GRAU.

COLUMBUS, OHIO, January 28, 1918.

HON. JOHN E. MCGILVREY, *President, Kent State Normal College, Kent, Ohio.*

DEAR SIR:—I have carefully examined the contract entered into between the board of trustees of the Kent state normal college and Kerwig & Grau, of Kent, Ohio, for the installing of heating plant equipment in Merrill hall, said contract having been entered into on the 15th day of January, 1918, and calling for the sum of $11,164.00. I have also examined the bond securing said contract.

Finding the contract and bond to be in compliance with law and having received the certificate of the auditor of state that there are funds sufficient for the payment of the same, I have this day approved the contract and filed the same, together with the bond, in the office of the auditor of state.

I am herewith returning you the other bids which were submitted to me.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

973.

LAW RELATING TO DOG TAX DOES NOT CREATE ANY NEW OR DIFFERENT KIND OF A DEPUTY SHERIFF—COMMISSIONERS REQUIRED TO TAKE ADDITIONAL SERVICE INTO ACCOUNT WHEN FIXING DEPUTY HIRE.

The act of the legislature in reference to the dog tax and requiring the county commissioners to provide for the employment of deputy sheriffs necessary to enforce the provisions thereof, does not create any new deputy or different kind of deputy from those already existing. The sheriff is required to perform the services necessary to enforce the act and this he does by himself or through regular deputies.

The provisions require the county commissioners to take the additional services into account when fixing the amount of deputy hire allowed the sheriff in the regular manner.

COLUMBUS, OHIO, January 29, 1918.

HON. JOHN V. CAMPBELL, *Prosecuting Attorney, Cincinnati, Ohio.*

DEAR SIR:—On December 22, 1917, you addressed the following request to this office for an opinion:

> "Will you kindly advise me what is meant by that provision of section 5652-8 General Code relating to the registration of dogs as amended in 107 O. L. at page 536, which reads as follows:
>
> 'The county commissioners shall provide for the employment of deputy sheriffs necessary to enforce the provisions of this act.'
>
> I am in doubt, first, as to whether these deputies are to be appointed by the sheriff as those provided under section 2830 or appointed in a different manner and when appointed are they special deputies for a particular purpose who can not be used interchangeably with the deputies regularly appointed under section 2830 for general purposes in the sheriff's office.
>
> *Second.* Are the deputies provided for in this act to be paid in the same manner as the deputies regularly appointed under section 2830—out of the sheriff's fee fund—or in some other manner and out of some other fund?
>
> *Third.* Does the language 'shall provide for the employment of deputy sheriffs' mean that the county commissioners shall make an allowance for the compensation of these extra or additional deputies made necessary by the additional burden cast upon the sheriff by reason of this law pertaining to dogs, when they fix the aggregate sum to be expended for deputies, etc., for the year commencing January 1st and thereafter under section 2980 of the General Code?"

On December 15, 1917, I addressed an opinion to Hon. Perry Smith, prosecuting attorney of Muskingum county, in which a greater part of what you ask is answered, and a copy of that opinion is herewith enclosed to you.

You ask three questions. The first relates to the manner of appointing the deputies to the sheriff to carry out the provisions of this act and is fully answered in the opinion referred to.

A discussion of your second question taken in connection with the same opinion will render any discussion unnecessary as to your third. Let us therefore address the discussion to your second question—whether the deputies are to be paid in the manner already provided for the pay of deputy sheriffs out of the sheriff's fee fund or in some other manner.

These deputies are not different from other deputies. To state it more correctly, there is no deputy provided by law specially to perform the duties required by this statute. Those duties are to be performed by the sheriff. Section 7 of the act (section 5652-7 G. C.) states:

"County *sheriffs* shall seize and impound all dogs * * *."

The same section contains the following:

"Upon affidavit made before a justice of the peace, that a dog more than three months of age and not kept constantly confined in a registered dog kennel is not wearing a valid registration tag and is at large, or is kept harboured in his township, such justice of the peace shall forthwith order the *sheriff* of the county to seize and impound such animal. Thereupon such *sheriff* shall immediately seize and impound such dog so complained of. Such *sheriff* shall forthwith give notice to the owner of such dog, if such owner be known to the sheriff, that such dog has been impounded, and that the same will be sold or destroyed if not redeemed within four days. If the owner of such dog be not known to the *sheriff*, he shall post a notice in the county court house," etc.

All of the duties as to seizing dogs and disposing of them are contained in this section, and no mention is made of anybody but the sheriff, who is directly referred to five times. Immediately following this is section 8 (section 5652-8 G. C.) making provision for the employment of deputy sheriffs necessary to enforce the provisions of the act.

Now it is perfectly plain that the sheriff would not in all counties do this dog catching, etc., himself, but would do it by deputy, so that taking the two sections together, and the whole act for that matter, it is plain that there are to be no special deputies for this particular duty. If the sheriff gets another deputy on the strength of this law he would be simply a deputy like any other deputy. If the sheriff sees fit to assign this branch of work to one particular deputy no objection is apparent, but that would in no manner change the legal status of a sheriff or any of his deputies. These deputies, if they be appointed, being the same as other ordinary deputies it remains to determine whether the provisions requiring the commissioners to provide for their employment means that it is to be provided for in any other manner or at any other time than with reference to other deputies. The statute itself is silent as to any such difference. The whole act simply provides additional duties for the sheriff not theretofore done which might require additional deputy hire. These duties are to be performed by the sheriff and by ordinary deputies. No express statement is contained in the law that the provision for deputies is to be in any other manner than that already specifically provided.

Therefore, on the plain rules of interpretation the case is presented of the application of a law already in force to new cases provided by a new law but coming within the general terms of the old, and the statute would be construed to mean that the commissioners in making the annual provision for deputies of the sheriff would take this work into account. This might be thought to leave the present season unprovided for and the provision might be construed as meaning that special provision was to be made this year to carry the law into effect, and that this particular provision would have no permanent effect inasmuch as in the nature of the case it is necessary for the commissioners to consider all of the duties of the sheriff when annually making provision for deputies. However, an examination shows that there is nothing in the nature of this particular case requiring this unusual interpretation. Although this act became a law and went into force ninety days after the thirty-first of March, by

its terms nothing is to be done under it until this January. The first registration is to occur on the first of January after the passage of the act, which is New Years, 1918. The last of July was the last opportunity to submit the act to a referendum, and in fact it is well known to every one that there can not be a referendum unless measures toward that end are taken some weeks in advance of the going into effect of the law.

The provision of section 2980 General Code is:

> "On the twentieth of each November such officer shall prepare and file with the county commissioners a detailed statement of the probable amount necessary to be expended for deputies * * * of their respective offices, showing in detail the requirements of their offices for the year beginning January 1st next thereafter with the sworn statement of the amount expended by them for such assistants for the preceding year. Not later than five days after the filing of such statement, the county commissioners shall fix an aggregate sum to be expended for such period for the compensation of such deputies. * * *."

So that the commissioners must take this duty into account in fixing the amount for the sheriff's deputy hire. A difficulty may be presented by section 2980-1 General Code, which begins as follows:

> "The aggregate sum so fixed by the county commissioners to be expended in any year for the compensation of such deputies * * * shall not exceed for any * * * sheriff's office * * * an aggregate amount to be ascertained by computing thirty per cent. on the first two thousand dollars * * *" (and a sliding scale for higher amounts).

If this language were effective it might in some instances leave an insufficient amount if the maximum was fixed by law without regard to these new duties. However, if the amount turns out insufficient the statute proceeds:

> "said officer shall make application to a judge of the court of common pleas of the county wherein such officer was elected; and thereupon such judge shall hear said application and * * * he may allow such a sum of money as he deems necessary to pay the salary of such deputy, deputies, * * * and thereupon the board of county commissioners shall transfer from the general county fund, to such officers' fee fund, such sum of money as may be necessary to pay said salary or salaries."

Here is the regular place in the provisions already made for the board of county commissioners to do the thing required in the new act, viz., provide for the employment of deputy sheriffs necessary to enforce the provisions of this act. The fact that the maximum which the commissioners may allow is not based upon any of the fees for duties under the new act would be a sufficient reason for the judge allowing an additional amount if such maximum amount was insufficient.

It might be further observed that the new statute as to the money collected thereunder does not place it in the fee fund. Section 13 of the act (section 5652-13 G. C.) provides that the registration fees shall constitute a special fund known as the dog and kennel fund which shall be disposed of by defraying the cost of registration and by the payment of animal claims. Section 12 (section 5652-12 G. C.) provides:

> "All costs collected under the provisions of sections 5652-10 and 5652-11

shall be deposited in the county treasury and placed to the credit of the county general fund."

So that none of these funds go into the fee fund. This, however, will not affect the maximum which the commissioners may allow for deputy hire, as under section 2980-1 G. C. the percentage is calculated on the "fees, costs, percentages, penalties, allowances and other perquisites collected for the use of the county in any such office for official services during the year ending September thirtieth next preceding the time of fixing such aggregate sum;" so that next year there will have been nine months of all such fees to be taken into computation. This may require additional calculation and bookkeeping, as the fee fund proper will not show the amount upon which the maximum is to be computed. This is, however, relieved by the provisions of section 2982 G. C., which provides:

> "Each of such officers shall keep full and regular accounts of all official fees, costs, percentages, penalties, allowances or other perquisites charged or collected by him, and such accounts shall be records of the offices, shall belong to the county, and shall be transmitted by such officer to his successor in office. * * *"

It is further provided that such accounts shall be subject to scrutiny by the commissioners and by the judges of the court of common pleas or any person appointed for that purpose by the judges, etc.; so that in each instance there is a public record convenient for fixing the amount.

I have called attention to all these various intricate provisions not because they have such necessary influence upon the construction of the statute or the determination of the question involved, but because they show that every detail will work out satisfactorily with no change in the existing method of selecting and paying deputies.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

974.

APPROVAL—BOND ISSUE OF THE BOARD OF EDUCATION OF BIRMINGHAM RURAL SCHOOL DISTRICT, ERIE COUNTY.

COLUMBUS, OHIO, January 29, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

RE: Bonds of Birmingham rural school district, Erie county, Ohio, in the sum of $5,000.00, on a vote of the electors, for the purpose of completing and equipping school building in said school district.

I have carefully examined the corrected transcript of the proceedings of the board of education and other officers of Birmingham rural school district relating to the above bond issue, and find said proceedings to be in accordance with the provisions of the General Code of Ohio relative to bond issues of this kind.

I am therefore of the opinion that properly prepared bonds covering this issue will, when signed by the proper officers and delivered, constitute valid and binding obligations of said school district.

The bond form submitted as a part of the transcript is not entirely satisfactory to this department and I am therefore holding the transcript until a satisfactory bond form is submitted and approved.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

975.

"FOR THE YEAR 1911"—FOUND IN SECTION 3001 MEANS OFFICIAL YEAR OF COUNTY COMMISSIONERS.

The phrase "for the year 1911" as found in section 3001 G. C. means official year of county commissioners beginning third Monday of September, 1910, following State v. Lewis, 15 O. N. P., n. s., 582.

COLUMBUS, OHIO, January 29, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I have your letter of December 11th, in which you request my opinion as follows:

> "We wish to call your attention to what we believe to be a legislative blunder in the language of the first part of section 3001, G. C., as amended 102 O. L., 514. Prior to the amendment of this section there was no ambiguity as to how the salary of a county commissioner should be based. This section as amended seems to fix a minimum of $900.00, and seems to direct the compensation to be paid upon the value of the duplicate as it was on December 20, 1911, but if you will read further down you will find a proviso that says that the compensation shall not be greater than 115 per cent. of the salary paid for the year 1911. Does this latter expression refer to the calendar year of 1911, or does it refer to the official year ending on the third Monday of September, 1911? The bureau's attitude has been that the minimum of of $900.00, as provided in the amendment of the section, is inoperative because of the proviso just spoken of, presuming, of course, that the year 1911 means the official year ending on the third Monday of September, 1911.
>
> In order to understand our attitude we must go back to the enactment of May, 1904, when the county commissioners were placed upon a salary instead of a per diem. The law provided that the salary should be based upon the value of the duplicate as it was on the 20th day of December of the next preceding year. It was held that the law fixing the salary of the commissioners became immediately operative; hence, in order to base the salary it was necessary to use the value of the duplicate as it was on December 20th, 1903, which fixed the salary from May, 1904, until the third Monday of September, 1905. The value of the duplicate as it was on December 20, 1904, therefore, fixed the salary from the third Monday of September, 1905, to the third Monday of September, 1906. The duplicate for December 20, 1905, fixed the salary from the third Monday of September, 1906, to the third Monday of September, 1907. The duplicate for December 20, 1906, fixed

the salary from the third Monday of September, 1907, to the third Monday of September, 1908. The duplicate for December 20, 1907, fixed the salary fro'the third Monday of September, 1908, to the third Monday of September, 1909. The duplicate for December 20, 1908, fixed the salary from the third Monday of September, 1909, to the third Monday of September, 1910. The duplicate for December 20, 1909, fixed the salary from the third Monday of September, 1910, to the third Monday of September, 1911.

The Smith one per cent. law resulted in the increase of the duplicate for the tax year 1911, but it was not intended by the legislature that the commissioners should have largely increased salaries by reason of the largely increased value of the duplicate. Therefore, under the law the duplicate for the 20th of December, 1909, was the basis for all future time, unless the legislature changed the method of payment, plus 15 per cent. Or in other words, the salary for the official year ending the third Monday of September, 1912, and for all future years, should not be more than 115 per cent. of the salary paid for the official year ending the third Monday of September, 1911 (at least that is our interpretation), which, as you will see, it was necessary to base upon the value of the duplicate as it was December 20, 1909.

In support of this view we call your attention to the case of State v. Lewis, 15 O. N. P. (N. S.) 582, and we would like your written opinion upon this matter in order that this department may formulate a definite ruling to be observed in all the counties of the state in making a proper basis for the salary of county commissioners, at least in such counties where this matter has been misunderstood, for all future time, or until there is other legislation upon this subject."

Of course the decision to which you refer me is squarely in point. The head note of the case is as follows:

"1. The phrase 'for the year 1911' in section 3001 General Code, as amended May 31, 1911 (volume 102, O. L. 514), means the official year of the county commissioners beginning on the third Monday of September, 1910, and ending on the third Monday of September, 1911; and the phrase 'for the year 1912' means the succeeding official year for said officers, or the first year of the term of those commissioners elected in 1910.

2. The clause 'that the compensation of each county commissioner for the year 1912, and each year thereafter, shall not in the aggregate exceed 115 per cent. of the compensation paid to each county commissioner for the year 1911' is a proviso, and controls and overrides the purview or general provisions of the act fixing the minimum compensation at nine hundred dollars, with an additional compensation of three dollars on each full one hundred thousand dollars of the tax duplicate above five million dollars on December 20, 1911.

3. The compensation paid each county commissioner of Adams county, Ohio, for the year 1911 being seven hundred and fifty dollars, it follows that the compensation of each county commissioner beginning the term on the third Monday of September, 1911, and thereafter is but eight hundred and sixty-two dollars and fifty cents, and any amount drawn from the county treasury above that sum must be refunded."

The opinion of Corn, J., is well reasoned and is adequately epitomized in the head note which has been quoted. To follow this decision is to decide your question. I would not feel justified in rejecting it as a conclusive determination of the question except upon rather clear and convincing grounds. The learned judge had

the benefit of the arguments of counsel, which have been denied me. The question itself, to be sure, is not free from doubt and I am not satisfied as a matter of first impression that the decision is correct. Nevertheless it is the decision of the common pleas court, and I am disposed to follow it; the very doubtful nature of the question is one of the reasons which impels me to do so. Another is the fact that the question was decided in one of the counties where the situation was most acute. If it has not been followed in that county the failure to follow it is, in my judgment, morally reprehensible. After its rendition, county commissioners who accepted office therein must have known of it, and the county auditors must, likewise, have been cognizant of what took place. To go on receiving and paying their salaries at the rate which had been condemned by the common pleas court does not appeal to me as proper official conduct.

Of course the question is not *res judicata*, even in the county where the case was heard; neither does the rule of *stare decisis* have application, so a court, for example, would necessarily be bound by such a decision. But something like the rule of *stare decisis* ought, in my judgment, to govern the conduct of executive officers under such circumstances. In that class of officers I find myself.

Therefore, without greater consideration upon the merits of the question than enough to satisfy me that plausible ground existed for reaching the conclusion arrived at by Judge Corn, and supported argumentatively by the bureau, I advise that in your supervision of the accounts of the county officers of the state you should follow that rule.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

976.

APPROVAL—CONTRACT BETWEEN BOARD OF TRUSTEES OF OHIO STATE UNIVERSITY AND THE GRAVES & MARSHALL COMPANY.

COLUMBUS, OHIO, January 30, 1918.

HON. CARL E. STEEB, *Secretary, Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—I have examined the contract submitted by you, which contract was entered into on the 20th day of December, 1917, between the board of trustees of Ohio State Uuniversity and The Graves & Marshall Company, of Dayton, Ohio, for the construction and completion of breeching for boilers in the new power house on the Ohio State University campus, for the sum of $3,389.00, together with the bond securing the same, and finding the same to be in compliance with law, have this day approved the same, and having received from the auditor of state a certificate that there is money available for the purpose, have this day filed the said contract and bond with the auditor of state.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

977.

APPROVAL—BOND ISSUE OF COUNTY COMMISSIONERS OF LICKING COUNTY.

COLUMBUS, OHIO, January 30, 1918.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

RE: Bonds of Licking county, Ohio, in the sum of $75,000.00, for the purpose of funding certain indebtedness, bonded and otherwise, of said county which the said county is unable to pay by reason of its limits of taxation.

have carefully examined the corrected transcript of the proceedings of the board of county commissioners of Licking county, Ohio, relating to the above bond issue and find the same to be in accord with the provisions of the General Code of Ohio relative to bond issues of this kind.

I am therefore of the opinion that properly prepared bonds will, when the same are properly signed and delivered, constitute valid and binding obligations of said county.

No bond form covering said issue was submitted with the transcript, and I am therefore retaining said transcript until said bond form is submitted and approved by this department.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

978.

DISAPPROVAL—BOND ISSUE OF THE COMMISSIONERS OF LICKING COUNTY.

COLUMBUS, OHIO, January 30, 1918.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

RE: Bonds of Licking county, Ohio, in the sum of $4,000.00, for the purpose of paying part of the cost and expense of improving county road No. 25-26 from county road No. 92 to No. 159 in Lima and Jersey townships, said county.

I am herewith returning, without approval, transcript of the proceedings of the board of county commissioners of Licking county, Ohio, relating to the above bond issue.

The county commissioners have provided for the issue of these bonds for the purpose of paying a part of the cost and expense of the improvement of a road petitioned for January 10, 1917, under the assumed authority of the Braun road law, so-called (sections 6956-1 to 6956-15 G. C.). The statutory provisions under the authority of which this road improvement was initiated were repealed by the legis-

lature in the enactment of the Cass road law, which went into effect September 6, 1915, and inasmuch as the petition for this improvement and the proceedings of the board of county commissioners thereunder do not conform to any statutory provisions now authorizing a board of county commissioners to improve roads upon petition, no alternative is presented in the consideration of this transcript other than to disapprove the bonds and to advise you not to purchase the same.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

979.

STATE BOARD OF AGRICULTURE—MAY MAKE RULES FOR THE GOVERNMENT OF COUNTY AGRICULTURAL SOCIETIES NOT IN CONFLICT WITH STATUTORY PROVISIONS—INDEPENDENT AGRICULTURAL SOCIETIES DEFINED—PUBLIC AID.

Under the provisions of section 1092 *General Code, authorizing the state board of agriculture to make rules for the government of county agricultural societies it is not competent to adopt such rules in any manner in conflict with any statutory provision.*

It is not competent to pass a rule to have universal application that such county society may not receive a larger sum from the county treasurer than the amount paid out by such society in premiums.

The independent agricultural society provided for in sect on 9880-1 *General Code is not different from the regular county or district agricultural society, but draws its public aid upon a different basis.*

COLUMBUS, OHIO, January 30, 1918.

HON. N. E. SHAW, *Secretary of Agriculture, Columbus, Ohio.*

DEAR SIR:—On January 7, 1918, you sent the following request for an opinion to this d partm nt:

> "A number of independent agricultural societies organized under section 9880-1 have sent in their annual financial reports and others are making inquiry relative to action necessary to receive state aid under above section.
>
> Some of these organizations hold their fairs on the streets as agricultural street fairs, others as pumpkin shows and others hold mid-winter shows.
>
> The total expenditures of some of these societies are less than the state aid that they will receive if same be granted.
>
> Since the amount to be received by the various agricultural societies is fixed by law, would the following rule, if adopted, by the state board of agriculture be operative or legal?
>
> 'No certificate shall be issued to any agricultural society for a greater amount than the total amount paid in premiums by any such society.'
>
> Are all such societies, when regularly organized, eligible to the per capita tax, without regard to amount of premiums offered and paid?
>
> What constitutes an independent agricultural society in compliance with section 9880-1? "

Your proposed rule must be submitted to the test of the requirements of section 9880-1 which is as follows:

> "When thirty or more persons, residents of a county, or of a district embracing one or more counties, organize themselves into an agricultural

society, which adopts a constitution and by-laws, selects the usual and proper officers and otherwise conducts its affairs in conformity to law, and the rules of the state board of agriculture, and when such county or district has held an annual exhibition in accordance with the three following sections, and made proper report to the state board, then, upon the presentation to the county auditor, of a certificate from the president of the state board attested by the secretary thereof, that the laws of the state and the rules of the board have been complied with, the county auditor of each county wherein such agricultural societies are organized, annually shall draw an order on the treasurer of the county in favor of the president of the county or district agricultural society for a sum equal to two cents to each inhabitant thereof, on the basis of the last previous national census. The total amount of such order shall not in any county exceed eight hundred dollars, and the treasurer of the county shall pay it."

This section, by its express terms, gives the right to the required number of persons to organize themselves into an agricultural society, and by proceeding in accordance with its terms, and holding a fair in accordance with the next *two* succeeding sections, to receive the contribution set out in the statute.

I say "two succeeding sections" although the statute says "three," but section 9883 of the General Code is a mere obsolete remnant that is in the chapter only because it is not dropped out.

Section 9880 General Code is to be read in connection with section 1092, the latter section being found in the chapter on the board of agriculture, and providing the authority for the board to make rules governing agricultural societies. The section reads as follows:

"On the first Tuesday after the second Monday of January of each year, there shall be a meeting in Columbus of the board of agriculture of Ohio, together with the presidents or other authorized delegates of agricultural societies organized under the laws of the state and conducted under the rules of the board of agriculture and holding fairs as provided by law, for the purpose of deliberation and consultation as to wants, prospects and conditions of agriculture throughout the state. The board of agriculture shall provide a uniform method for the election of the directors and officers of all agricultural societies receiving any support whatsoever out of the state or county treasuries and provide general rules and regulations under which such agricultural societies shall be conducted. At such meeting the reports from such agricultural societies shall be delivered to the board of agriculture."

General authority is given the board here to provide general rules and regulations under which such county agricultural societies shall be conducted. These rules may supplement and piece out the statutory provisions, but never set them aside. The rule of the board of agriculture that is contradictory to the statute is, of course, invalid. The statute in this case says that upon the performance of certain conditions they may receive funds. The conditions substantially are that the societies must comply with the law and with your rules. Now you purport by one of those rules to say that they shall not have the fund upon their compliance with the terms of the statute and the other rules but this one, and that they shall not receive the contribution unless they pay out an equal or greater amount in premiums. It is submitted that the statute itself provides the conditions upon which they shall receive the amount, and that this rule not being a rule "under which such county agricultural society shall be conducted" but instead, a rule that unless it secures certain financial results it shall not receive the fund, would be invalid.

It would seem to be traveling around in a circle to say that they should have the money upon compliance with your rules, but that one of those rules is that they cannot have the money.

This brings us to a further consideration of what are the essential requirements to enable them to receive it. The first and principal one is that they must

"organize themselves into an agricultural society."

This matter is now in litigation in a proceeding in the supreme court in which this department is defending your department from a claim that you should award the fund in a particular case and is soon to be argued.

Our claim is that these persons must organize themselves into a real agricultural society,—not to go through the requirements of the statutes as a matter of form for the purpose of receiving the fund,—in short that the fund is given to aid the agricultural society instead of agricultural societies being formally organized to get the fund.

If we are right in this contention a question of fact arises in each case calling for your determination. The rule you propose, although it could not be enforced in all cases as such, is undoubtedly a good declaration of policy and seems to be as liberal a test as anyone ought to expect or ask. Of course in rare instances untoward circumstances might make a fair an entire failure and in such cases persons honestly conducting such fair ought not to be penalized for misfortune, but in ordinary cases it would seem like nothing less than brazen effrontery to come up and ask the state to pay all the premiums they promised to give at a fair and give them a bonus beside. The policy of this law is to give state aid to such fairs to encourage the local societies to put their own shoulders to the wheel and make every effort for success, and not simply to give out a gratuity in each instance without regard to what is done locally.

As to these street fairs and pumpkin shows you mention it is doubtful whether they are within the spirit and intent of the act. You will probably have no difficulty in dealing with them, however, as it will be almost impossible for these organizations to comply with the provisions of these statutes, or if they succeed in that it could be rendered absolutely impossible for them to comply with the proper rules your board might make.

A categorical answer to your question, however, as to your proposed rule would have to be in the negative, but it is trusted that the above considerations should be of some assistance to you in giving it a practical enforcement.

You ask another question:

> "What constitutes an independent agricultural society in compliance with section 9880-1?"

The word "independent" as used in this section seems to have no special signification or if any the wrong one for the object of the statute is to get some financial aid for the fair on which it may depend. The substantive part of this act is mostly a repetition of section 9880; the difference comes in in the amount of the bonus and this seems to have been the object of enacting the new section. It is here seen that the section recognizes the existence of a second fair in a county or of another fair in a district composed of counties each of which already has a fair and the word "independent" seems to have been used to express this idea. This is indicated in the provision that where the fund is to be distributed by different counties it "shall be equal to an average amount paid to several county fair boards"—that is to say, that the amount received by these fairs is to be ascertained by adding together the amount paid to other fairs in the district and dividing that sum by the number of fairs and this

amount being ascertained it is then to be divided among the different counties in proportion to their populations, so that your question, "what constitutes such independent society" is answered by stating how they arrive at the amount that they are to receive. The independent society is constituted, so to speak, just like the other societies already receiving the subsidy before this enactment.

There seems to have been a notion in the legislative mind that but one society in a county could receive this aid, and if that notion were correct this authorizes a second or possibly an indefinite number to receive the contribution.

There is one other important feature of this section. It only takes in societies that have existed prior to 1915. The section begins:

> "9880 1. When thirty or more persons, residents of a county, or of contiguous counties not to exceed three are organized into an independent agricultural society that has held annual fairs for agricultural advancement previous to January first, 1915, and when such independent society has held an annual exhibition," etc. (returning to the language of theprincipal section).

The sub-section was passed May 5, 1915, and it will be observed not only made no provision for the future organization of such fairs, but if any had been formed in the preceding four months and four days, discriminated against them and left them out. These, then, whose existence began since that date, can receive no financial aid from the county. They are of the same family as the others, but they cannot have the same portion as their elder sisters, or a like dowry, but must live up to their name and be independent. Your department has no concern with them in respect to public aid, for they are dependent on the county or the public for nothing.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

980.

CORPORATIONS—MUTUAL CORPORATIONS NOT STRICTLY FOR BENEVOLENT OF CHARITABLE PURPOSES AND HAVING NO CAPITAL STOCK MAY ACQUIRE AUTHORITY TO HAVE CAPITAL STOCK BY AMENDMENT—FILING FEE—FEE FOR FILING ARTICLES OF INCORPORATION OF COMPANIES ORGANIZED NOT FOR PROFIT.

A corporation organized as a "mutual corporation not strictly for benevolent or charitable purposes and having no capital stock" may lawfully acquire authority to have a capital stock by amendment to its articles of incorporation under section 8719. *The fee for filing the certificate of such amendment is the same as that for filing other certificates of amendment and is not based upon the amount of the capital stock thus acquired, being governed by paragraph* 9 *of section* 176 *G. C. The procedure for making such amendment is the same as that in other cases.*

The fee for filing articles of incorporation of companies organized not for profit but having a capital stock is governed by paragraph 1 *of section* 176 *and is the same as that exacted of corporations for profit.*

COLUMBUS, OHIO, January 30, 1918.

HON. W. D. FULTON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of January 15, 1918, requesting my opinion upon the following questions:

"The Akron I. O. O. F. Company was incorporated October 13, 1917, as a corporation not for profit, and paid a fee of $25.00 for filing its articles, which evidently was charged by virtue of paragraph 4 of section 176 G. C.

At the time of the incorporation, it was the intention of the incorporators to have a provision in their articles for $100,000 capital stock, but through oversight it was left out. It is the desire of the company now to make provision for $100,000 capital stock.

If this is done by virtue of section 8719 of the General Code, amending the articles, what fee should be charged and what course of procedure should be followed?

Kindly advise us in regard to the question, in view of the following provisions of section 176 of the General Code: Paragraph 1, paragraph 5 so far as it relates to 'corporations not organized for profit and not mutual in character,' and paragraph 9.

In giving your opinion, also advise us what is the proper fee to be charged for a corporation organized not for profit and not mutual in character, having a capital stock. Is the fee for filing articles of such a corporation to be governed by paragraph 1 or paragraph 5 of section 176 G. C.? "

You do not appear to raise any question as to the legality of inserting in the articles of incorporation the provision for a capital stock by amendment thereof. However, I may say that in my judgment this may lawfully be done. Though section 8719 has been recently amended in 107 O. L. 414, nothing in said amendment affects the questions thus raised as the new matter inserted in the section thereby does not touch the question. However, the section now provides and always has provided that there may be added to the articles of incorporation by amendment "anything omitted from, or which lawfully may have been provided for originally" with the qualification, however, that "the authorized capital stock of a corporation shall not be increased or diminished by such amendment."

It is clear, of course, that a corporation may be organized not for profit without a capital stock and that such a corporation may have a capital stock. Snyder, et al v. Chamber of Commerce, 53 O. S. 1. Therefore, it would seem to be perfectly lawful for a corporation not for profit, originally organized without a capital stock, to add to its articles of incorporation a provision for a capital stock, unless such an addition would amount to an increase of the authorized capital stock of the corporation within the meaning of the limiting clause in section 8719. The form which your questions take suggests the only reason which occurs to me for giving an affirmative answer to this question. It may be that one of the purposes of the legislature in thus limiting the functions of an amendment to the articles of incorporation was to make sure that the procedure of amendment might not be used to avoid the payment of fees which would accrue to the state if other procedure available for an increase of capital stock might be taken.

When reference is had to the provisions relating to the increase of capital stock, section 8698 G. C., it appears that this procedure is available only to corporations already having a capital stock.

Section 176 of the General Code hereinafter to be referred to, in referring to the fee for filing a certificate of increase of capital stock, must be taken, I think, to refer to such certificates as are authorized by section 8698.

From these considerations it follows, I think that the acquisition of a capital stock by a corporation not theretofore having any capital stock, through the medium of amendment to its articles of incorporation, could not be regarded as an increase of its authorized capital stock.

I therefore conclude that you are right in assuming that it is lawful to accomplish the purposes suggested in your letter by amendment to the articles of incorporation.

Your first question then is as to the fee that should be charged and the course of procedure that should be followed.

I take it that there is no serious question as to the course of procedure that should be followed, that being outlined in detail by the provisions of sections 8720 to 8723 inclusive of the General Code and being the same in short as would be followed in the case of any amendment to the articles of incorporation of a company not for profit. I am advised, however, by letter received from Messrs. Stuart & Stuart, attorneys at law of Akron, that under a misconception stock has already been issued by the company in question. This would raise the question as to whether or not the meeting at which the amendment to the articles is to be adopted should be a stockholders' meeting or a members' meeting. In my opinion the meeting should be a meeting of members and the membership should be determined in the same manner as the membership of similar corporations not having capital stock would be determined. The holders of the prematurely issued stock as such should be ignored in the procedure.

Coming now to the question respecting the fee I quote the following provisions of section 176 of the General Code:

> "The secretary of state shall charge and collect the following fees for official services:
>
> 1. For filing articles of incorporation whose capital stock is ten thousand dollars or under ten dollars; of a corporation whose capital stock is over ten thousand dollars one-tenth of one per cent. upon the authorized capital stock of such corporation.
>
> * * * * * * * * * *
>
> 4. For filing articles of incorporation of a mutual life insurance corporation having no capital stock; or of other mutual corporations not organized strictly for benevolent or charitable purposes and having no capital stock twenty-five dollars except as hereinafter provided.
>
> 5. For filing articles of incorporation formed for religious, benevolent or literary purposes; or of corporations not organized for profit and not mutual in their character or of religious or secret societies; or societies or associations composed exclusively of any class of mechanics, express, telegraph, railroad or other employes and formed exclusively for the mutual protection and relief of members thereof and their families two dollars.
>
> * * * * * * * * * *
>
> 9. For filing an amendment to articles of incorporation twenty cents for each hundred words, but in no case less than five dollars.
>
> * * * * * * * * * *"

In my opinion neither paragraphs 1, 4 nor 5 as above quoted are applicable to the case at hand. Having decided that the proper procedure is a certificate of amendment it is plain that the official action required of the secretary of state could in no wise be regarded as the filing of articles of incorporation. Inasmuch as each of the first three paragraphs above mentioned prescribes a fee for filing articles of incorporation it is manifest that none of these can apply to the case. It follows necessarily that paragraph 9 states the fee which is to be charged.

Of course this holding makes it possible for a corporation not for profit but intending to have a large capital stock to evade the payment of fees which it might otherwise be obliged to pay (assuming a given answer to the second question which you ask) by incorporating without a capital stock and then amending its articles so as to acquire a capital stock. If this were true, however, it would constitute no ob-

jection to the result at which I have arrived in the legal sense. It would simply be a possibility which the general assembly in providing for the schedule of fees chargeable by the secretary of state had overlooked.

Your second question was considered by my predecessor Hon. Edward C. Turner in an opinion to the secretary of state under date of May 12, 1915, Opinions of the Attorney-General for that year at page 719, in which he came to the conclusion that paragraph 1 of section 176 governs the filing fee of corporations having a capital stock which if they had no capital stock would come under paragraph 5 of the section. Of course there is no question as to paragraph 4 thereof as the phrase "having no capital stock" occurs therein. The effect of its omission from the second clause of paragraph 5 was considered by Mr. Turner and accounted for upon grounds with which I agree.

Very truly yours,
JOSEPH McGHEE
Attorney-General.

981.

HOW WORN OUT AND BROKEN TOOLS BELONGING TO STATE HIGHWAY DEPARTMENT MAY BE DISPOSED OF.

The disposl of worn out and broken tools belonging to the state highway department is had under section 1231 *G. C. and not under section* 196-12 *G. C.,* 107 *O. L.* 425.

COLUMBUS, OHIO, January 31, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of January 18th, 1918, in which you ask my opinion upon the following:

> "Under the provisions contained in section 1231 G. C. this department has prepared blanks and formulated a plan for the disposal of worn out and broken tools.
>
> We are somewhat uncertain, however, as to our authority to proceed under the above section because of a possible conflict with the authority now vested in the state purchasing department, particularly under section 196-12 G. C., 107 O. L., page 425.
>
> I therefore respectfully request an opinion from you as to the authority of this department with reference to the sale or exchange of machinery, tools or equipment which through wear have become unfit for use."

The question which bothers you arises from the fact that the legislature has established a state purchasing department giving it certain power and authority to purchase necessary supplies and equipment for the different officers and departments of the state and at the same time enacted a provision giving to the state highway commissioner authority to purchase and sell or exchange certain supplies and equipment used in his particular department. Your difficulty arises particularly with reference to section 196-12 G. C. (107 O. L. 425) which reads as follows:

> "The state purchasing agent shall establish a state exchange department. Whenever any supplies or equipment in any department of the state are not required for use in such department or whenever any property of the state is to be abandoned or whenever any department of the state is abolished or discontinued the officer in charge of such department or property shall notify

> the state purchasing agent thereof. The state purchasing agent shall take possession of such supplies or equipment not required for use or property to be abandoned and all supplies, equipment, records books and papers of such abolished or discontinued department. He shall inventory and appraise such property, supplies and equipment and turn over to the auditor of state such records, papers and books and a copy of such inventory and appraisement. The state purchasing agent shall give the officer, board or commission from whom he receives any supplies or equipment not required for use in a department, credit upon his account for such appraised value. The state purchasing agent may have such supplies or equipment as may come into his hands repaired and placed in as good condition as good management would justify."

Section 196-7 G. C. of this same act gives the state purchasing department the authority to purchase all supplies and equipment for the officers and different departments of the state. There are, however, certain departments and officers specifically excepted from the provisions of this act. At the same time that the legislature has made the provisions as set out above in reference to the powers and duties of the state purchasing agent, it has provided in section 1231 G. C. that:

> "The state highway commissioner is hereby authorized to sell either at private sale, or at public sale, after such notice as he may deem proper, any machinery, tools or equipment that through wear have become unfit for use."

This section also gives him the power to exchange any machinery, tools or equipment for new equipment. Also under the provisions of section 1221 G. C. he is given authority to

> "purchase or lease such oilers, trucks, machinery, tools, material and other equipment and supplies as may be necessary"

for the repair and maintenance of inter-county highways and main market roads; and section 1231 G. C., from which a quotation was made above, also provides that the state highway commissioner

> "shall have power to purchase such equipment and material and employ such labor as may be deemed necessary to execute any work upon said main market roads."

The question now is as to whether the general provisions found in the act creating the state purchasing department will control in reference to the state highway department or whether the special provisions giving the state highway commissioner the power to purchase supplies and equipment and to sell or exchange the same will control as to said department.

In the outset it must be remembered that the act creating the state purchasing department is general, applying to all the officers and departments of the state with the exceptions therein noted, and of course would include, under ordinary circumstances, the state highway department; while the provisions of sections 1221 and 1231 G. C., above quoted, are specific, referring to one department of the state alone.

The proposition is well established and is universally held by the courts that the provisions of a special act will control in reference to a certain matter rather than the provisions of a general act which might include the same matter for which provision is made in the special act.

There is one thing connected with the two acts which we have under consider-

ation which ought to be particularly noted, and that is that the White-Mulcahy law of which sections 1221 and 1231 G. C. are a part, and found in 107 O. L. 69, was passed on March 20, 1917, and was filed with the secretary of state on March 29, 1917; while the act creating the state purchasing department, found in 107 O. L. 422, was passed on March 21, 1917, and filed with the secretary of state on March 31, 1917. Thus it will be seen that the act creating the state purchasing department was passed, filed and became a law subsequent to the time the White-Mulcahy act was passed, filed and became a law. This being the case, the question might arise as to whether the provisions of the state purchasing act in reference to the purchase, sale and exchange of supplies and equipment, would not repeal by implication the provisions of the White-Mulcahy law, granting power to the state highway commissioner to purchase and sell or exchange supplies and equipment used in the state highway department.

This question will be easily answered, however, if we remember the proposition as set out above that the act creating the state purchasing department is a general act governing all the departments and officers of the state, while the part of the White-Mulcahy act which has to do with the powers of the state highway department in reference to the matters under consideration is special in its nature, referring to one department only.

With this in mind let us note the law that should prevail.

Black, in his work on "Statutory Construction," page 116, lays down this proposition:

> "As a corollary from the doctrine that implied repeals are not favored, it has come to be an established rule in the construction of statutes that a subsequent act, treating a subject in general terms, and not expressly contradicting the provisions of a prior special statute, is not to be considered as intended to affect the more particular and specific provisions of the earlier act, unless it is absolutely necessary so to construe it in order to give its words any meaning at all."

In Crane v. Reeder, 22 Mich. 322, the following proposition is set forth:

> "Where there are two acts or provisions, one of which is special and particular, and certainly includes the matter in question, and the other general, which, if standing alone, would include the same matter and thus conflict with the special act or provision, the special act must be taken as intended to constitute an exception to the general—especially when such conflicting provisions are contemporaneous in their passage."

The latter part of the above quoted matter is especially applicable to the matter in hand, for the two acts under consideration were passed almost contemporaneously, only a day or two intervening between the passage of the acts and the filing of the same with the secretary of state.

In State ex rel. v. Bishop, treasurer, 41 Mo. 16, the court say:

> "When the mind of the legislature has been turned to the details of a subject and it has acted upon it, a subsequent statute in general terms, or touching the subject in a general manner, and not expressly contradicting the original act, will not be construed as intended to affect the more particular or positive previous provisions unless it be absolutely necessary so to do in order to give any meaning to the words of the later statute. The law does not favor a repeal of statutes by implication."

Our own supreme court in State ex rel. v. The Mayor, et al., 14 O. S. 472, lays down this proposition in the fifth branch of the syllabus:

> "It is an established rule in the construction of statutes that a subsequent statute, treating a subject in general terms, and not expressly contradicting the provisions of a prior act, shall not be construed as intended to affect more particular and positive provisions of the prior act, unless it be absolutely necessary to do so in order to give its words any meaning."

From all the above it is quite evident what answer should be given to the question propounded by you. The provisions of the White-Mulcahy act giving your department the power and authority to purchase supplies and equipment and to sell or exchange the same, should be given force and effect, notwithstanding the provisions of the act creating the state purchasing department having to do with the same matter, viz.: purchasing, selling and exchanging supplies and equipment for the different officers and departments of the state.

Hence, you will govern your acts in reference to the above matters by the provisions of the sections of the General Code which apply directly to your department, and not by the provisions of the act creating the state purchasing department.

To be sure the principle herein enunciated applies only to such supplies and such equipment in reference to which you are given the specific power and authority to purchase, sell or exchange. In other respects your department would be controlled by the state purchasing act just the same as are all other departments of the state.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

982.

ROADS—PETITION FOR SAME FILED WITH COUNTY COMMISSIONERS.

The provisions of sections 6887 *to* 6889 *inc.. G. C.* (107 *O. L.* 73) *to a certain extent take the place of the provisions of section* 6958 *G. C. as it stood before the enactment of the Cass highway act. Said three sections provide for the filing of a petition with the board of county commissioners, while section* 6958 *G. C., prior to this enactment provided for filing a petition with the board of township trustees.*

COLUMBUS, OHIO, January 31, 1918.

HON. ROY R. CARPENTER, *Prosecuting Attorney, Steubenville, Ohio.*

DEAR SIR:—I have your letter of January 19, 1918, which reads as follows:

> "Under section 6950 (6958) G. C., before the enactment of the Cass road law, there was a specific provision whereby a person desiring to have a township road laid out from his plantation, dwelling house, mill, quarry, mine, etc., could petition the township trustees. This statute was repealed by the Cass road law.
>
> What is there, if anything, in the present road law that gives an individual a right in corresponding cases to petition the township trustees? Concretely the question that has arisen is this:
>
> A:, who owns a farm, has opened a mine over the hill far distant from his outlet to the county road, and in a place where it is practically impossible

for him to build a road up the hill and across his farm to the present outlet. Where the mine is located it is a short distance across a field to another public road. In the present law I am unable to find any provision that warrants the trustees to entertain a petition from said A."

In your communication you refer to section 6950 G. C. as it stood prior to the enactment of the Cass road law. You undoubtedly had in mind section 6958 G. C., which related to the matter you have in mind.

We will consider what has been the general scheme and plan of the legislature, in reference to altering, laying out, changing and vacating roads, prior to and since the enactment of the Cass highway law. Prior to said enactment the general scheme seemed to have been that the county commissioners should have jurisdiction over altering, laying out, changing and vacating county roads, as provided in section 6860 et seq. G. C., and especially in section 6861, which prior to the enactment read as follows:

"Section 6861. Applicants for laying out, altering changing the width of, or vacating *a county road* shall be by petition to the county commissioners, * * ";

while section 6860 provided:

"Section 6860. *County roads* hereafter laid out and established shall not be less than thirty nor more than sixty feet wide. * * *."

The above quotations apply to county roads only, but when we come to section 6957 et seq. G. C., as they stood prior to the enactment of the Cass law, we find that the township trustees were given jurisdiction in altering, laying out, changing and vacating township roads. Section 6957 provided:

"Section 6957. Township roads hereinafter laid out and established shall not be less than sixteen nor more than sixty feet wide * * *."

The sections following provided the manner in which township roads might be altered, changed or laid out. For instance, section 6973 G. C. provided that:

"The trustees of a township, upon petition for that purpose, may alter or change the direction of a township road * * *."

The provision to which you refer formed a part of this general scheme, in which the township trustees were given jurisdiction over establishing, etc., township roads, and was found in section 6958 G. C. and read as follows:

"Section 6958. A person, desiring to have a township road laid out from a plantation, dwelling place, mill or house of public worship, or to the cemetery, burial-ground or public road, or from one public road to intersect another, or from a tract of wild land or timber land, stone quarry, coal mine or mineral land, other than petroleum or natural gas land, to a railroad or railroad station, or from a railroad station to a township, county or state road, or saw-mill, shall petition the trustees of the proper township, after giving thirty days' previous notice thereof, by advertisement posted up in three public places within the township, setting forth therein the time when the petition is to be presented, the place of beginning of such road, the intermediate points, if any, and the place of termination thereof."

As hereinbefore stated, this general plan and scheme was radically changed when the Cass law was enacted. The power and jurisdiction of the township trustees in altering, vacating, establishing and laying out roads seem to have been entirely taken away from them and is now in the county commissioners as to all roads excepting inter-county highway and main market roads.

Section 6860 of the Cass law now reads:

> "The county commissioners shall have power to locate, establish, alter, widen, straighten, vacate or change the direction *of roads* as hereinafter provided. This power extends to *all roads within the county*, except the inter-county and main market roads."

From the fact that the legislature has repealed all those sections which gave jurisdiction to the township trustees in locating, establishing, altering, vacating or changing the direction of township roads, and has enacted nothing to take the place of the sections so repealed, and from the further fact that the county commissioners are given jurisdiction over locating, etc., all roads within the county, except inter-county and main market roads, it is clear that the intent of the legislature was that the township trustees have no jurisdiction in the matter set out in section 6860. Said section was not modified by the White-Mulcahy act which is now the law of the state.

In making the above general observations, I am not unmindful of the provisions of section 3298-1 G. C. (107 O. L. 73), wherein provision is made as follows:

> "* * * The township trustees shall have power to widen, straighten or change the direction of any part of a road in connection with the proceedings for its improment."

But it is evident that this power does not extend further than simply to a change that may be necessary, due to a road improvement under said section and those following.

We come now directly to the question which you submit, as to whether there is any provision of the Cass highway act or of the White-Mulcahy law, which takes the place of the provisions set out in section 6958 G. C. prior to the Cass law.

After a careful study of these two acts, I feel safe in making the statement that there is no such provision as that found in section 6958 as it stood prior to the enactment of the Cass law, which covers the filing of a petition with the township trustees, in which the request is made that a township road be established.

However, there are provisions very similar to those found in section 6958 as it formerly read, which are contained in the chapter of which section 6860 G. C. is now a part. Those provisions are found in sections 6887 to 6889 inclusive, G. C. These sections were first enacted as a part of the Cass act, and in accordance with the general scheme of things provide for the petition's being filed with the county commissioners, rather than with the township trustees. The provisions in these three sections are the only ones with which I am familiar, that in any way take the place of those formerly found in section 6958 G. C.

I entered into a full discussion of these three sections in opinion No. 535, rendered by me to Hon. G. O. McGonagle on August 15, 1917, and I am enclosing copy of said opinion. I stated in said opinion that it is doubtful whether these sections could be held constitutional, for the reasons therein set out.

Since rendering said opinion to Mr. McGonagle, I have been informed that a certain common pleas court in the state—I think of Licking county—has held these sections to be unconstitutional.

Therefore, answering your question specifically, it is my view that there are no sections of the General Code, other than sections 6887 to 6889 inclusive, which take

the place of section 6958 as it originally stood, and, as said before, under these sections the petition must be filed with the board of county commissioners, instead of with the board of township trustees. I might suggest that section 6889 G. C. was amended in the White-Mulcahy law, as found in 107 O. L. 73.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

983.

APPROVAL—BOND ISSUE OF THE BOARD OF EDUCATION OF KENMORE VILLAGE SCHOOL DISTICT, SUMMIT COUNTY.

COLUMBUS, OHIO, January 31, 1918.

Industrial Commission of Ohio, Columbus, Ohio
GENTLEMEN:—

IN RE: Bonds of Kenmore village school district, in the sum of $140,000.00, for the purpose of constructing and equipping school building in said school district.

I have carefully examined the transcript of the proceedings of the board of education and other officers of Kenmore village school district, Summit county, Ohio, relating to the above bond issue, and find said proceedings to be in conformity with the provisions of the General Code of Ohio relative to bond issues of this kind.

I am therefore of the opinion that bonds properly prepared according to the bond form submitted will, when signed by the proper officers and delivered, constitute valid and binding obligations of said school district.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

984.

BOND ISSUE—BY BOARD OF EDUCATION OF CITY SCHOOL DISTRICT —HOW CANVASS OF RETURNS OF VOTE ON SAID PROPOSITION MADE—DISAPPROVAL—BOND ISSUE OF SPRINGFIELD CITY SCHOOL DISTRICT.

The canvass of the returns of the vote at an election in a registration city on the proposition of a bond issue submitted by the board of education of the city school district is governed by the provisions of section 5120 General Code, and the canvass of the returns of the vote at such election should be made by the board of education in the manner therein provided and the result entered on the records of such board. The provisions of section 5115 General Code do not apply to the canvass of the returns of the vote at such election.

COLUMBUS, OHIO, February 1, 1918.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

IN RE: Bonds of Springfield city school district in the sum of $160,000.00, for the purpose of purchasing site for and erecting school houses therein and to enlarge, repair and furnish school houses in said district.

I am returning to you, without my approval, transcript of the proceedings of the board of education and other officers of Springfield city school district relating to the above bond issue.

The issue of bonds in question is provided for by a resolution duly adopted by the board of education of said school district pursuant to an affirmative vote of more than a majority of the electors of said school district, at an election on the proposition of said bond issue held under the authority of section 7625 General Code on the sixth day of November, 1917, due notice of said election having been given in accordance with the provisions of section 4839 General Code, which provides that the clerk of each board of education shall publish a notice of all school elections in the manner therein provided. The only material question arising on the consideration of the transcript relating to this bond issue is one with respect to the manner in which the returns of the vote cast at said election was canvassed. The transcript shows that such returns were canvassed by a board of canvassers consisting of the board of deputy state supervisors of elections of Clark county and the city auditor of the city of Springfield. It is manifest that this canvass was made in accordance with the provisions of section 5115 General Code, and assuming that Springfield is a registration city within the meaning of said section a question still remains whether the canvass of said election is governed by the provisions of said section or by the provisions of section 5120 General Code. These sections of the General Code read as follows:

> "Section 5115. In registration cities the returns of the election of municipal officers, members of boards of education or justice of the peace shall be made to the board of deputy state supervisors of the county in which such city is located, and canvassed by a board of canvassers, consisting of such board of deputy state supervisors and the city auditor."
>
> "Section 5120. In school elections, the returns shall be made by the judges and clerks of each precinct to the clerk of the board of education of the district not less than five days after the election. Such board shall canvass such returns at a meeting to be held on the second Monday after the election, and the result thereof shall be entered upon the records of the board."

Section 5115 General Code was enacted as a part of an act entitled "An act to revise the laws of Ohio relating to the conduct of elections," passed April 23, 1904, and approved by the governor on said date. The provisions of section 5115 General Code were enacted as a part of section 2966-8 Revised Statutes as the same was amended by said act. Said section of the Revised Statutes as amended in so far as applicable to a consideration of the question at hand read as follows: (97 O. L. 224.)

> "In November elections for township or municipal officers, or boards of education, or the election of a justice of the peace, the judges and clerks of election in each precinct shall make and certify the returns to the clerk of the township or the clerk or auditor of the municipality in or for which the election is held, or the clerk of the board of education of the school district, instead of to the deputy state supervisors, and the said township clerk, or the clerk or auditor of the municipality, or clerk of the board of education, shall canvass the vote and declare the result in the manner, and as provided in sections 1453, 1729 and 3910 of the Revised Statutes, and in case of an election of a justice of the peace, shall certify the result to the board of deputy state supervisors; but in municipalities where the voters are registered the returns of the election of municipal officers or boards of education or justices of the peace shall be made to the board of deputy state supervisors, and canvassed by a board of canvassers, consisting of the board of deputy state supervisors and the city auditor."

The provisions of section 5120 General Code were enacted by the general assembly in an act entitled "An act to provide for the organization of the common schools of the state of Ohio", passed April 25, 1904, and approved by the governor the same day. The provisions of section 5120 General Code were enacted as a part of section 3970-10 Revised Statutes as amended in said act. Said section 3970-10 Revised Statutes as thus enacted read as follows: (97 O. L. 354.)

> "The election of members of boards of education shall be governed and controlled by the general election laws of the state. There shall be separate poll books and tally sheets used for all elections for school purposes, and the ballots of the electors at said elections shall be deposited in a separate ballot box. In city school districts the ballots for each subdistrict shall contain the names of the candida es for member of the board of education from such subdistrict and also the names of the candidates to be elected at large. Returns of all school elections shall be made to the clerk of the board of education not less than five days after the election, and it shall be the duty of the board of education to canvass said returns at a meeting to be held on the second Monday after the election, and the result thereof shall be entered upon the records of the board; in case of a tie vote, the same shall be decided by said board of education, by lot."

In so far as there may be any conflict in the provisions of these enactments with respect to the question here made it is clear, I think, that effect must be given to the provisions of the act in which the present provisions of section 5120 General Code were enacted, as the later act. Both of these acts took effect on approval of the governor and so far as any conflict in their respective provisions is concerned the act last approved by the governor is the effective law.

State ex rel. v. Halliday, 63 O. S. 165;
Drum v. Cleveland, 13 N. P., n. s., 281, 290;
Lukens v. Nye, 156 Cal., 498;
Stuart v. Chapman, 104 Me., 17.

However, I am unable to see any necessary conflict in the provisions of sections 5115 and 5120 General Code with respect to this question, and, consistent with established rules of statutory construction, I am convinced that proper effect may be given to both sections.

It is a well recognized principle of statutory construction that if there are two statutory provisions, whether enacted as a part of the same or different acts, one of which is special in its application and clearly includes a particular matter, while the other is general in its application and would, if standing alone, include the particular matter also, and if reading the general provision side by side with the special provision the inclusion of the particular matter in the former would produce a conflict between it and the special provision it must be taken that the latter was designed as an exception to the general provision.

Doll v. Barr, 58 O. S. 113, 120;
Gas Co. v. Tiffin, 59 O. S. 420, 441.

Applying this principle of construction to a consideration of the application of sections 5115 and 5120 General Code, the latter appears as a general provision which if standing alone would govern the matter of canvassing the returns in all school elections in all school districts in the state and in the election of members of the board of

education, as well as all special questions or propositions submitted. On the other hand, the provisions of section 5115 General Code are special, applying only in registration cities and in the election of the particular officers therein named.

Consistent with the rule of construction before noted, the provisions of section 511 General Code govern in the matter of the canvass of the returns in the particular elections therein provided for, notwithstanding such matter might otherwise be within the provisions of section 5120 General Code, but inasmuch as the special provisions of section 5115 General Code do not reach the matter here under consideration, to wit, the manner of canvassing the returns of the votes cast on the proposition of a bond issue submitted by the board of education of the school district, the only conclusion consistent with the application of the established rule of statutory construction above noted is that said matter is governed by the provisions of section 5120 General Code, which, as will be noted, requires the canvass in such case to be made by the board of education and the result thereof entered upon the records of said board.

Having reached this conclusion with respect to the application of section 5120 General Code to the matter at hand, I may observe that although I am of the opinion that the provisions of this section, in so far as they prescribe the time within which the board of education shall make a canvass of the returns in school elections, are directory rather than mandatory, I am equally convinced that a mandatory duty rests upon the board of education to make such canvass and enter the result thereof on the records of the board before it is authorized to take any further steps carrying into effect the authority granted to it by the vote of the electors of the school district.

I am of the opinion therefore that by reason of the failure of the board of education of Springfield city school district to canvass the returns of the vote on this bond issue election, the board had no lawful authority to adopt the resolution providing for the issue of said bonds and that for this reason said bond issue is invalid and should not be purchased by you.

The conclusion reached by me that the provisions of section 5120 General Code rather than those of section 5115 General Code apply to the canvass here in question accords with that reached by my predecessor, Hon. Edward C. Turner, in an opinion addressed to the secretary of state under date of February 1, 1915 (Opinions of Attorney-General, 1915, volume I, page 72).

For the reasons above stated, my opinion to you is that the above issue of bonds should not be purchased on the present legislation of the board of education of said school district.

Since writing the above, I am advised that the board of education of Springfield city school district has corrected its procedure with respect to the matter of the canvass of the vote of the election at which the bond issue was authorized, and has adopted a new resolution providing for the issue of said bonds and has made a new offer of same to you.

Under the circumstances, the proper procedure will be for you to adopt proper resolutions, rescinding your purchase on the first offer, and, if you so desire, adopt a resolution providing for the purchase of the bonds on the new offer made to you.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

985.

CEMETERIES—MONEY RECEIVED BY CITY FOR CEMETERY PURPOSES—MONEY DERIVED FROM SELLING LOTS IN CEMETERY—SURPLUS FUNDS RECEIVED BY CITY FOR PURPOSE OF KEEPING IN ORDER AND EMBELLISHING CEMETERY—HOW THESE FUNDS HELD AND DISPOSED OF.

Money received by a city for purpose of a cemetery, under the provisions of sections 4160 et seq. General Code, shall be held as a separate and distinct fund.

The part of the selling price of lots in a city cemetery which is received for the purpose of reimbursing the city for the purchase price of the land used in said cemetery may be transferred to the trustees of the sinking fund for the purpose of providing for the payment of bonds issued to make such purchase.

Where surplus funds are received by a city for the purpose of keeping in order and embellishing a city cemetery, and for the purpose of caring for lots in said cemetery, the earnings upon the investment of such funds cannot be transferred to the trustees of the sinking fund for the purpose of paying bonds issued to pay the purchase price of the land used in said cemetery.

COLUMBUS, OHIO, February 2, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Your inquiry of January 10, 1918, is received, in which you submit for my opinion the following questions:

> "We respectfully request your written opinion upon the following matters:
>
> We are enclosing you herewith a communication received today from the city solicitor of Lorain, Ohio.
>
> It has been the opinion of this bureau that owing to the laws governing cemeteries that it is much better to have the cemetery fund as a separate and distinct fund and not as a part of the public service fund.
>
> '1. It is legal, is it not, for a city to hold the accounting of the cemetery fund as a separate and distinct fund under the guidance of council, for which council can appropriate the same as for any other municipal fund?
>
> The city of Lorain owns a cemetery which is no longer available and has puchased new cemetery grounds from the proceeds of a bond issue of $20,000.00. We would call your attention to section 3704 G. C., relative to transfer to the sinking fund of moneys received through the sale of properties acquired by bond issue. Also to section 3804 G. C., relative to transfer to sinking fund of any unexpended balance in bond issue funds. We also call your attention to cemetery laws as set forth in sections 4160 et seq. G. C., together with the opinion of Attorney-General Hogan under date of May 27, 1912, recorded in the Annual Reports of 1912, page 1747, and would state that upon opening the sale of lots in the new cemetery, the city of Lorain will receive probably a great deal more money than will be necessary in the near future or at any time for cemetery requirements.
>
> 2. Can the city legally transfer a portion of such receipts to the sinking fund trustees to apply upon the bonds? You will bear in mind, of course, that the sale of cemetery lots is not an actual sale of property but is a sale of the rights of usage of such property.
>
> 3. Can the city, in case such surplus funds are invested, as governed by law, turn a portion of such earnings on investments over to the sinking fund trustees to apply upon the bonds?' "

You call attention to the opinion of Hon. Timothy S. Hogan, Attorney-General, under date of May 27, 1912, as shown at page 1747 of the Annual Report of the Attorney-General for 1912. The syllabus of this opinion is as follows:

> "Under sections 4167, 4168 and 4169 General Code, the director of public service is authorized to sell cemetery lots and to receive donations for cemetery purposes. All money so received must be turned over to the clerk of council and by him given into the custody of the city treasurer subject to the control and power of the investment of the same by the council.
>
> The income of such money shall be paid to the director of public service to be by him devoted to cemetery purposes.
>
> A record of all expenditures, receipts and accounts of these moneys shall be kept by a clerk of the cemetery appointed under section 4170 General Code, by the director."

In another opinion by Mr. Hogan, under date of July 18, 1912, and reported at page 328 of the Annual Report of the Attorney-General for 1912, he holds:

> "In accordance with section 3795 of the General Code all moneys donated for cemetery purposes must be deposited in the municipal treasury to the credit of this specific fund and can only be paid out upon the warrant of the auditor upon the direction of the director of public service."

It is clear from the above holdings that the funds for cemetery purposes should be kept and accounted for as a separate and distinct fund.

Section 3795 General Code, reads as follows:

> "The taxes of the corporation shall be collected by the county treasurer and paid into the treasury of the corporation in the same manner and under the same laws, rules and regulations as are prescribed for the collection and paying over of state and county taxes. The corporation treasurer shall keep a separate account with each fund for which taxes are assessed, which account shall be at all times open to public inspection. Unless expressly otherwise provided by law, all money collected or received on behalf of the corporation shall be promptly deposited in the corporation treasury in the appropriate fund, and the treasurer shall thereupon give notice of such deposit to the auditor or clerk. Unless otherwise provided by law, no money shall be drawn from the treasury except upon the warrant of the auditor or clerk pursuant to the appropriation by council."

This is a general statute covering all moneys received or collected by a municipal corporation and such moneys are to be deposited in the appropriate fund.

Cemeteries under control of a city are governed by the provisions of sections 4160 et seq. of the General Code.

Section 4167 General Code reads as follows:

> "The director of public service shall have entire charge and control of receipts from the sale of lots, and of the laying off and embellishing the grounds. He may receive donations by bequest, devise, or deed of gift, or otherwise, or money, or other property, the principal or interest of which is to be used for the enlargement, improvement, embellishment, or care of the cemetery grounds, generally, or for any particular part or parts, lot or lots therein, as the donor directs, or as the director may from time to time determine if no direction is given. He shall sell lots, receive payment therefor,

direct the improvements, and make the expenditures, under such rules and orders as he prescribes, and invest, manage, and control property received by donations and surplus funds in his hands from any source whatever."

Section 4169 General Code reads:

"The director shall turn over to the council property on hand or held by him as a permanent fund, for such purposes under his control, or such money as may thereafter come to him for such purpose, rendering a full statement thereof, by whom, when, and for what purpose paid. The council shall acknowledge receipt thereof in writing to the director signed by its clerk. By resolution duly passed and entered on the minutes of its proceedings, the council shall pledge the faith and credit of the corporation to forever hold such money as a permanent fund, and pay in semi-annual payments, to the director as interest on the funds, sufficient to provide perpetual care of the lot and lots as agreed by the director. The council and its successors shall invest and keep invested such funds in interest bearing debts of the city, if any, and if no such debts are owing by the city, in safe interest bearing bonds, or stocks for the benefit of such cemetery funds, that will bear as great an income as possible, and all such money and the income thereof shall be exempt from taxation, the same as other cemetery property."

This section clearly shows that funds raised for cemetery purposes are to be kept as a separate and distinct fund. This answers your first inquiry.

Your second question is as to the right of the city to set apart a part of the funds received from the sale of lots in a city cemetery for the purpose of providing a sinking fund to pay for bonds issued for the purpose of purchasing the land used for cemetery purposes.

Section 4165 General Code reads as follows:

"The director shall determine the size and price of lots, the terms of payment therefor, and shall give to each purchaser a receipt, showing the amount paid and a pertinent description of the lot or lots sold. Upon producing such receipt to the proper officer, the purchaser shall be entitled to a deed for the lot or lots described therein."

Section 4166 General Code reads as follows:

"No more shall be charged for lots than is necessary to reimburse the corporation for the expense of lands purchased or appropriated for cemetery purposes, and to keep in order and embellish the grounds, and provision shall be made for the interment in such cemetery of persons buried at the expense of the corporation."

In section 4166 supra it is provided that the charge for lots may include an amount necessary to reimburse the corporation for the purchase price of the cemetery lands. Where bonds are issued to make such purchase, the amount so received under section 4166 supra, to reimburse the corporation for the purchase price could not be used for such purpose unless the funds so received were paid into the sinking fund.

Section 4517 General Code reads as follows:

"The trustees of the sinking fund shall have charge of and provide for the payment of all bonds issued by the corporation, the interest maturing thereon and the payment of all judgments final against the corporation, except in con-

demnation of property cases. They shall receive from the auditor of the city or clerk of the village all taxes, assessments and moneys collected for such purposes and invest and disburse them in the manner provided by law. For the satisfaction of any obligation under their supervision, the trustees of the sinking fund may sell or use any of the securities or money in their possession."

By virtue of this section the trustees of the sinking fund are required to provide for the payment of all bonds issued by the corporation. It would therefore be the duty of the trustees of the sinking fund to provide for the payment of bonds issued for the purchase of land to be used as a cemetery.

Section 4166 General Code determines the manner in which funds may be raised to meet the payment of such bonds. It is apparent therefore that the part of the selling price of a lot in a cemetery which is to reimburse the corporation for the purchase price of the land may be transferred to the trustees of the sinking fund for the purpose of meeting the bonds when they shall become due.

Your third question is as to the right to transfer the income of surplus funds to the sinking fund, to be applied upon bonds issued to purchase the land used for the cemetery.

Under section 4166 General Code two things are to be taken into consideration by the director of public service when he fixes the selling price of lots in the cemetery. He may include, first, a sum sufficient to reimburse the corporation for the purchase price of the land, and second, he may include a sum sufficient to keep the grounds in order and to embellish the same.

In answer to your second question it is seen that the part received to reimburse the city for the purchase price of the land should be paid to the trustees of the sinking fund. The part received to keep the cemetery in order is in the nature of a perpetual fund to be used for the specific purpose for which such fund is provided.

There is provision in section 4169 General Code for the investment of moneys received for the purpose of maintaining the cemetery and the income of such investment is to be paid to the director of public service for that purpose.

Section 4168 General Code provides:

"In the by-laws and regulations, the director shall declare the amount of money he will accept by agreement, gift, devise, bequest or otherwise and hold as a permanent fund of the cemetery. He shall pledge the faith and credit of the city for the perpetual care of the lot or lots designated, using only the interest or income of the money. On receipt of the sum of money they designate, the director shall issue therefor a written receipt and acknowledgment thereof, signed by him, and bind the faith and credit of the corporation to forever hold such money as a permanent fund, and to provide perpetual care of the lot or lots therein named, for the use, income or interest of such money. He shall enter on the minutes of his proceedings full detail of the obligation, and shall enter the receipt and incomes of the money and the expenditures thereof in detail on his books of accounts ,keeping each case separately."

It appears from this section that the funds received are for the purpose of providing for the perpetual care of the lot or lots for which such funds are received.

You call my attention to the provisions of section 3804 General Code. This section reads as follows:

"When any unexpended balance remaining in a fund created by an issue of bonds, the whole or part of which bonds are still outstanding, unpaid

and unprovided for, is no longer needed for the purpose for which such fund was created, it shall be transferred to the trustees of the sinking fund to be applied in the payment of the bonds."

This section does not cover the funds received for lots in a cemetery, as such funds are specifically provided for in sections 4160 et seq. General Code. It would apply, however, to any part of the bond issue which was not used in the purchase of the land.

You also call attention to the provisions of section 3704 General Code. This section reads as follows:

"Money arising from the sale or lease of real estate, or a public building or from the sale of personal property, belonging to the corporation, shall be deposited in the treasury in the particular fund by which such property was acquired, or is maintained, and if there be no such fund it shall be deposited in the general fund. If the property was acquired by an issue of bonds the whole or a part of which issue is still outstanding, unpaid and unprovided for, such money, after deducting therefrom the cost of maintenance and administration of the property, shall on warrant of the city auditor be transferred to the trustees of the sinking fund to be applied in the payment of the principal of the bond issue."

This is a general section covering money received from the sale of property by a municipal corporation, but it does not control the money received in the sale of lots in a cemetery for the reason that such money is specifically provided for in the sections above cited.

The funds received by the director of public service for the purpose of keeping in order and maintaining a cemetery and for the purpose of taking care of lots in a cemetery are received for a specific purpose. No part of these funds nor any part of the income received from the investment of such funds should be transferred to the sinking fund for the purpose of paying bonds issued for the purchase price of the lands.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

986.

OFFICES INCOMPATIBLE—TEACHER EMPLOYED BY A BOARD OF EDUCATION AND CLERK OF SAME BOARD.

A teacher may not, while employed by the board of education of a school district, as a teacher in the schools of said district, be elected to the position of clerk of said board.

COLUMBUS, OHIO, February 4, 1918.

HON. FRANK B. PEARSON, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—I am in receipt of an inquiry asking my opinion upon a matter which appears to be of such general interest to your department that I am directing my answer to you, and shall send the inquirer a copy. The question is:

"Can a teacher be clerk of the board of education of the school district in which he is employed as such teacher?"

Section 4747 of the General Code provides that the board of education of each city, village and rural school district shall organize on the first Monday of January after the election of members of such board; one member shall be elected president, one member vice-president *and a person who may or may not be a member of the board shall be elected clerk.*

The duties of the clerk of a board of education are largely ministerial, but under the provisions of section 7786 G. C. he is made the custodian or person with whom is deposited certain reports and also the certificate, or a copy thereof, of each teacher employed by the board. Said section reads in part as follows:

> "No clerk of a board shall draw an order on the treasurer for the payment of a teacher for services until the teacher files with him such reports as are required by the superintendent *of public instruction and the board of education*, a legal certificate of qualification, or a true *copy thereof, covering the entire time of the service, and a statement of the branches taught.*"

That is, under the provisions of the above part quoted section the clerk of the board of education is made the custodian or person with whom is filed such reports as the superintendent of public instruction or the board of education requires.

In a recent communication received at this office it is maintained that:

> "The provisions of section 7786 of the General Code have been superseded by certain provisions of the new school code which require all teachers to make monthly reports to the county and district superintendents, even the annual reports—not a single report is made by the teacher to the clerks of the respective boards."

While it may be true that in the particular school district in question no report are made by the teachers to the clerk of the board, nevertheless the provisions of section 7786 require that the clerk of the board draw no order on the treasurer for the payment of the teacher's salary until the teacher files with him "such reports as are required by the superintendent of public instruction and the board of education." It would appear, therefore, that the provisions of section 7786 G. C., in this respect have not been superseded. Be that as it may, the clerk of the board is also compelled to keep as one of the files in his office a legal certificate of qualification, or a true copy thereof, covering the entire time of the service of the teacher, and a statement of the branches taught by such teacher. This provision of said section is one which makes the two positions incompatible. If the teacher were clerk, then such teacher would file with himself his certificate, or a copy thereof, and he would have custody of those things which the law requires to be filed with a representative of the board prior to the time the clerk draws an order on the treasurer for any money in favor of the person so depositing same. He would be the sole judge of the performance of these duties and if it were within his power to draw an order for the payment of his own salary, he would pass upon his own reports in relation thereto.

I do not believe that this was within the contemplation of the legislature when said section was enacted, neither did my predecessors when matters similar to the above were under consideration.

It is held in opinion No. 68, Annual Report of the Attorney-General for 1913, Vol. II, page 1097, that:

> "Inasmuch as by the provisions of section 7786, a clerk of a township board of education is obliged to pass on reports of teachers before an order may be drawn by said clerk for the payment of their salaries, the office of

said clerk constitutes a check upon the position of teacher, and, therefore, both positions may not be held at the same time by the same individual."

Again, in opinion No. 1025, Annual Report of the Attorney-General, 1915, Vol. III, page 2229, it was held:

"A teacher may not, while employed by the board of education of a school district, as a teacher in the schools of said district, be elected to the position of clerk of said board."

I concur in the conclusions reached in both of said opinions, both for the reasons that the reports which are required to be filed by teachers with the clerk are such as the legislature contemplated should be filed by one person with another, and also because of the language of section 7786, which requires that the certificate of the teacher must be filed with the clerk before an order is drawn on the treasurer to pay such teacher for services rendered as such.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

987.

FINES—SECRETARY OF AGRICULTURE AND CHIEF WARDEN OF FISH AND GAME DEPARTMENT HAVE NO AUTHORITY TO REMIT.

Neither the secretary of agriculture nor the head of the fish and game department has any authority to refund fines assessed and paid into the state treasury.

COLUMBUS, OHIO, February 4, 1918.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your communication of January 25, 1917, wherein you ask for my opinion as follows:

"I desire to call your attention to the enclosed vouchers which were presented to me by Examiner Brennan, who doubts their legality. This is the first time that this matter has been officially called to my attention, and after Examiner Brennan had taken the matter up with the head of the fish and game division, it was the unanimous opinion of all parties concerned that the matter should be submitted to you in order that you may render an opinion as to whether or not the division of fish and game can refund from the public treasury fines assessed and paid into the state treasury without a specific appropriation made by law. Mr. Baxter will be glad to furnish you any information in connection with these refunds."

You also sunmit four vouchers drawn by the board of agriculture, division of fish and game, in favor of various persons, in different amounts, for fines remitted in whole or part, which fines I presume were assessed in cases brought by the fish and game division of the board of agriculture, for violations of the law relating to the protection of fish and game.

Section 1390 of the General Code provides:

> "The secretary of agriculture shall have authority and control in all matters pertaining to the protection, preservation and propagation of song and insectivorous birds, game birds, game animals and fish within the state and in and upon the waters thereof. He shall enforce by proper legal action or proceeding the laws of the state for the protection, preservation and propagation of such birds, animals and fish; shall establish fish hatcheries and propagate fish therein or in any other manner for the waters of the state, and, so far as funds are provided therefor, shall adopt and carry into effect such measures as he deems necessary in the performance of his duties."

Section 1391 G. C. provides for the appointment of the chief warden and deputy wardens to carry out the provisions of section 1390, above quoted.

Section 1393 G. C. provides as follows:

> "The chief warden, special wardens and deputy state wardens shall enforce the provisions of this act and the laws relating to the protection, preservation and propagation of birds, fish and game, and shall also enforce the laws against trespassing upon premises, for the purpose of hunting, without the permission of the owner thereof, and shall have authority to make arrests upon view and without the issuance of a warrant therefor. Under the direction of the secretary of agriculture, the chief warden shall visit all parts of the state and direct and assist special wardens and deputy state wardens in the discharge of their duties."

The above sections of the General Code prescribe the powers and duties of the secretary of agriculture and chief warden of the fish and game division. Neither of the above quoted sections authorize the secretary of agriculture or the chief warden to refund fines that have been paid into the state treasury for violations of the law for the protection of fish and game. Although section 1445 authorizes the secretary of agriculture to release from a jail or workhouse a person confined therein for nonpayment of fines assessed for violations of the fish and game law, this section cannot be construed as giving authority to the secretary of agriculture to refund such fines as have been paid into the state treasury. There is no law in this state conferring authority on the secretary of agriculture or the chief warden of the fish and game department to refund fines, or any part thereof, assessed for violations of the fish and game division, nor any specific appropriation for such purpose.

Section 22 of article II of the Ohio constitution provides as follows:

> "No money shall be drawn from the treasury except in pursuance of a specific appropriation, made by law; and no appropriation shall be made for a longer period than two years."

Therefore I advise you that neither the secretary of agriculture nor the head of the fish and game department has any authority to refund fines assessed and paid into the state treasury, and it therefore would not be proper for you to issue the warrants for such vouchers.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

988.

FRANCHISE TAX—WHERE CORPORATION FILES CERTIFICATE OF INCREASE OF CAPITAL STOCK, WITHIN SIX MONTHS PRIOR TO TIME OF FILING ANNUAL REPORT—THE PART OF THE INCREASED STOCK SUBSCRIBED OR ISSUED AND OUTSTANDING IS TO BE TAKEN INTO CONSIDERATION IN COMPUTING THE TAX.

When an existing corporation files a certificate of increase of its capital stock within six months prior to the time for filing an annual report under the franchise tax law, such part of the increased stock so authorized which is subscribed or issued and outstanding at the time the report is filed is to be taken into consideration in computing the franchise tax.

COLUMBUS, OHIO, February 4, 1918.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your letter of January 16th, requesting my opinion upon the following abstract question raised by The Goodyear Tire & Rubber Company, of Akron, Ohio, which has recently filed a certificate of increase of its capital stock.

> When an existing corporation files a certificate of increase of its capital stock within six months prior to the time for filing an annual report under the franchise tax law is any part of the increased stock so authorized which is subscribed or issued and outstanding at the time the report is filed to be taken into consideration in computing the franchise tax of three-twentieths of one per cent?

As you state in your letter, my predecessor, Hon. Edward C. Turner, rendered an opinion upon this question, which is found in the Opinions of the Attorney-General for the year 1916, volume II, page 1606. As you are familiar with that opinion I need not quote any part of it. In that opinion Mr. Turner carefully reviews certain opinions of former attorneys-general and comes to the conclusion that an affirmative answer is to be returned to the question which you state.

Counsel for The Goodyear Tire & Rubber Company submit substantially the same arguments that were considered by Mr. Turner, adding one which, however, is entirely inadmissible. They argue that if Mr. Turner's interpretation is correct then a corporation organized in January or February of a given year and two months later increasing its capital stock would be taxable on the increase, but not on the original capital stock for the first year following the date of its incorporation. This statement is, of course, incorrect. The exemption statute provides that a corporation shall not be required "to file its first annual report * * * until the proper month, hereinbefore provided, for the filing of such report, next following the expiration of six months from the date of its incorporation or admission to do business in this state." If no report is due, of course, no taxes are payable, and the fact that an increase has taken place between the filing of the articles of incorporation and the proper month or the filing of the reports of corporations does not alter the case upon any interpreation of the statute.

In fact section 5519 of the General Code which I have quoted is itself a complete answer to the question as submitted. It goes no further than to provide that a corporation shall not be required to file its *first annual report* under the circumstances therein named. There is no statute which in any way qualifies the obligation to file other annual reports. The law requiring annual reports to be filed specifies what

those reports shall set forth. Section 5497 General Code, as to domestic corporations, and section 5501 General Code, as to foreign corporations, require such reports to show the state of the capital stock of the company on the date as of which they are to be filed. It is true that a very convincing argument can be constructed to the effect that the policy of the state ought to be that which is contended for by The Goodyear Tire & Rubber Company, but the tax in question is the creature of the statute, and I think I must presume that the courts would not assume the power to construct a statutory provision where none had been enacted by the legislature.

Counsel in their letter refer to other opinions of former attorneys-general than the ones considered by Mr. Turner. I have not examined such other opinions There is no question in my mind as to the correctness of Mr. Turner's conclusion. The statute is clear and unambiguous and for this reason, as well as those discussed in Mr. Turner's opinion, I conclude with him that an existing corporation increasing its capital stock within six months prior to the proper month for filing its annual report under the franchise tax law must, if it be a domestic corporation, report and pay franchise taxes upon its entire subscribed or issued and outstanding capital stock, including that authorized by the certificate of increase, at the next succeeding tax period; and if it be a foreign corporation which has filed a certificate of increase of proportion a similar rule must prevail.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

989.

COUNTY COMMISSIONERS—NOT ENTITLED TO EXPENSES INCURRED BY ATTENDING MEETINGS CALLED BY STATE DEPARTMENT UNLESS THERE IS STATUTORY AUTHORITY THEREFOR.

County commissioners are not authorized to have expenses paid by county upon attending meetings by order of state departments, unless there is statutory authority there for.

COLUMBUS, OHIO, February 4, 1918.

HON. CHARLES T. STAHL, *Prosecuting Attorney, Wauseon, Ohio.*

DEAR SIR:—Under recent date you advised us as follows:

> "The commissioners of this county have asked my opinion with regard to their expenses being paid by the county upon being summoned to attend different gatherings or meetings by the order of the different state departments at Columbus.
>
> I am unable to ascertain if they are allowed their necessary expenses at these meetings. I therefore request your opinion as to the same."

Your question is so general that the only answer thereto must of necessity be general.

It has been the holding of the courts of Ohio, as well as of the various attorneys-general of Ohio, that neither compensation or expenses are allowed county officials unless there is provision of statute therefor, and I must therefore advise you that unless the statute authorizes the different state departments to summon county com-

missioners to different gatherings or meetings, and provides for the expenses of said commissioners in so attending said gatherings or meetings, there would be no authority in law for the payment of such expenses by the county.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

990.

ROADS AND HIGHWAYS—MATERIAL MAN COULD NOT UNDER THE CASS LAW PERFECT LIEN AGAINST THE STATE OF OHIO OR ITS AGENT, BY ATTACHING MONEY DUE CONTRACTOR, IN THE HANDS OF HIGHWAY COMMISSIONER.

Under the provisions of law as they existed prior to the taking effect of the White-Mulcahy law, a material man could not enforce a lien against the state of Ohio or its agent, the state highway commissioner, by way of attaching money in the hands of said commissioner, due a contractor for whom material was furnished in the construction of a public highway. This being true, he could not perfect his lien against the state.

COLUMBUS, OHIO, February 4, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of January 15, 1918, in which you set out copy of a letter received by you from Messrs. Hine, Kennedy, Manchester & Conroy, dated January 8, 1918, said parties being the attorneys for The Standard Slag Company. Said letter is quite long and I will simply quote the vital part thereof, which is as follows:

> "Your letter of January 3, to The Standard Slag Company of this city, has been referred by the latter to us for attention.
>
> The Standard Slag Company perfected a lien in the amount of $524.42 against the unpaid balance, payable by the state highway department to Ayers & Kappes for slag furnished to them to be used in the improvement of section 'I' of the national road in Guernsey county. Said lien is perfected under sections 8324-8329 of the General Code of Ohio, said sections having been enacted many years ago and having remained unmodified, and in force at the present time."

In your communication you make the following request:

> "I would be pleased to have your opinion as to whether this department must honor liens presented under the provisions of sections 8324-8329 of the General Code on contracts which were in force prior to June 28, 1917, as well as on contracts in force after that date."

On July 16, 1917, I rendered an opinion (No. 449) to the state highway commissioner, to the effect that the provision contained in section 1208 (107 O. L. 126), relative to mechanics' liens, does not apply to those contracts entered into prior to the taking effect of the White-Mulcahy law on June 28, 1917. The particular part of this section in reference to which said opinion was rendered reads as follows:

> "* * * The provisions of section 8324 of the General Code and the

succeeding sections in favor of sub-contractors, material men, laborers and mechanics shall apply to contracts let under the provisions of the preceding sections as fully and to the same extent as in the case of counties."

The contract under which The Standard Slag Company claims to have perfected a lien was entered into prior to June 28, 1917, and it is still my opinion that the above quoted provisions of section 1208 could not be used as a basis for perfecting a mechanics' lien against the state under said contract, for the reason that it was entered into prior to June 28, 1917. The attorneys for The Standard Slag Company hold that the mechanics' lien law as it stood prior to the enactment of the above quoted provision was broad enough to enable a material man to perfect a lien against the state and enforce the same. This will necessitate our placing a construction upon sections 8324 et seq., relating to mechanics' liens, which I did not do in my former opinion, above referred to. I merely held therein that the above quoted provision of section 1208 would not apply to contracts entered into prior to June 28, 1917.

The very fact that the legislature enacted the provision found in section 1208, supra, should be given some weight. It clearly shows that in so far as legislative interpretation is concerned, the law as it stood prior to the enactment of said provision was not broad enough to enable a material man or laborer to perfect a lien against the state, or an officer or department of the state. The legislature evidently considered it necessary to enact said provision in order to give to the material men and laborers the right to perfect liens against the state. While legislative interpretation is not necessarily conclusive of any matter, yet it is entitled to some weight and respect.

We will consider the sections under which said slag company claims to have perfected a lien.

Section 8324 G. C. provides, in so far as applicable to our case:

"Any sub-contractor, material man, * * * who has * * * furnished material * * * for the construction, improvement or repair of any turnpike, road improvement, sewer, street or other public improvement, or public building provided for in a contract between the owner, or any board, officer or public authority and a principal contractor, * * * may file with the owner, board or officer, or the authorized clerk or agent thereof, a sworn and itemized statement of the amount and value of such labor performed, * * *."

This section is broad enough in its terms to include the state. The language used is "public improvement, or public building" and "any board, officer or public authority."

Along with the right granted in this section we must consider the remedy given to enforce the right.

Section 8331 General Code provides:

"* * * On his failure so to do (payment of the money by the head contractor) within ten days thereafter, the subcontractor or material man, laborer, mechanic or person furnishing material, when due, may recover against the owner, in an action for money had or received the whole or a pro rata amount, as the case may be, of his claim or estimate, * * *."

Of course in the case under consideration the owner would be the state. So the only remedy provided to enforce the lien would be a suit against the state.

I will state two fundamental principles:

(1) The state is sovereign and is never included within the purview of a statute unless it is specifically mentioned in said statute in clear and unmistakable terms.

(2) The state can not be sued. The remedy given to enforce a mechanics' lien is by suit. As there is no provision in the mechanics' lien law for enforcing the lien against the state by suit, no lien against the state can be perfected. As there is no remedy provided, so there is no right afforded.

In support of the first proposition I will note holdings of our courts.

In State ex rel. v. Morrow et al., 10 N. P. (N. S.) 279, the court laid down the following proposition on p. 283:

> "That the words of the statute, 'or other public improvement, or public building' are broad enough to embrace the claim of the relator could not be disputed; but it is contended that the state is not embraced within the general words of the statute and could be held to be within the purview of the same only when so declared expressly, or by necessary implication. The doctrine of the common law as expressed in the maxim, 'The king is not bound by any statute if he be not expressly named to be so bound' is the law of the state of Ohio. The doctrine seems to be that a sovereign state, which can make and unmake laws, in prescribing general laws intends thereby to regulate the conduct of subjects only, and not its own conduct. It is a familiar doctrine that the state is not affected by the statute of limitations, however general its terms may be. Upon the same principle it has been held that the statute providing that 'costs shall follow the event of every action or petition' does not apply to a party prevailing against the state even in a civil case. If in such cases the statute has no binding force upon the state, no good reason could be given as to why any statute of a general nature should apply to the state unless it was expressly provided."

In State v. The Citizens, etc., Co., et al., 15 N. P. (N. S.) 149, the second branch of the syllabus reads as follows:

> "A mechanic's lien filed on property belonging to the state is void, and it follows that a proceeding does not lie to subject funds in the hands of the state to payment of claims for work and material which went into a state building under a contract which was abandoned before completion."

On p. 152 of the opinion the court gives as a reason for said holding:

> "The mechanic's lien sections of General Code, are general laws, and from such laws the state is exempt (56 O. S. 175), and in State ex rel. v. Morrow, 10 N. P. (N. S.), the statutes are quoted and said not to apply to the state."

In Hartman v. Hunter, Treas., 56 O. S. 175, the first branch of the syllabus is as follows:

> "Exemption from the operation of a statute limiting actions and in its terms containing no exception is a privilege of sovereignty, and it can be asserted only by or on behalf of the sovereign."

In the opinion on p. 180 the court say:

> "All attempts to extend the exemption to others than the general and state governments have failed. The terms of the statute except none from its

operation and the exemption is a prerogative. Being a privilege of sovereignty, as in England it is the King's plea, so here it is the plea of the sovereign, to be made by it or in its behalf. This view of the subject does not admit of further question in this state."

From the above holdings of our courts and others which might be quoted, it is clear that the state is not included in the provisions of section 8324 G. C. and that a mechanics' lien therefore could not be perfected against the state.

I will now offer some suggestions relative to the second proposition above set out, viz., that even though the state could be held to be included within the terms of section 8324 G. C., there is no remedy given to enforce the lien against the state. The proposition is well established in our state that the state can not be sued, except to the extent that the legislature may make provision therefor, and there are no provisions in the mechanics' lien law enabling a material man to enforce his lien against the state. Hence if he has no remedy to enforce a lien, he has no right to perfect it.

In State ex rel. v. Morrow, supra, the second and third branches of the syllabus read as follows:

"There are no proceedings in law whereby a mechanic's lien may be enforced against the state of Ohio.

The mechanic lien law, although general in its nature, and the language in the code broad enough to include public improvements of the state, does not apply to any public improvement made by the state And any steps taken pursuant to the mechanic lien act to establish a lien or claim against funds in the hands of the state set apart for any public improvements have no effect in law and afford no ground for action either in law or equity against the state."

This case was affirmed by the circuit court on October 21, 1910, in the following language:

"We think that the judgment of the lower court should be affirmed for the reasons given by Judge Kyle in his opinion."

Inasmuch as the decision of the lower court was affirmed by the circuit court, this decision is entitled to considerable weight.

To the same effect we cite the following cases:

Tice et al. v. Atlantic Const. Co. et al., 65 N. Y. S. 79.
Mason v. Board of Trustees, 50 Misc. Rep. (N. Y.) 40.

The attorneys for The Standard Slag Co. hold that an action in mandamus would lie to compel the state highway commissioner to respect the lien whi h was attempted to be perfected by The Standard Slag Co. The c urt, in the case of State ex rel. v. Morrow, supra, held directly contrary to this idea. The first branch of the syllabus in said case reads as follows:

"A peremptory writ of mandamus will not be allowed directing a public officer to issue his voucher and warrant for the payment of money, unless the relator makes it appear that he has a clear legal right to the fund and that no other person has or can have any claims or interest in and to the same."

In the opinion on p. 282 the court reasoned as follows:

"It is a well settled rule that a peremptory writ of mandamus will not

in any case be granted, unless the right of the relator thereto be clear, and the act, performance of which is desired, be one of absolute obligation on the part of the person or officer sought to be coerced, and before such right will be allowed the relator must show not only a clear legal right to have done the specific act desired, but to have it done by the particular person or officer sought to be coerced; and a plain dereliction of duty must be established against such person or officer before the right will be awarded."

In view of all the above I am of the opinion that The Standard Slag Co. has no lien against the state of Ohio, or its agent, the state highway commissioner, on the funds which it attempted to attach in the hands of the state highway commissioner as being due Ayers & Kappes, under and by virtue of the contract for the improvement of section "I" of the national road in Guernsey county, and that therefore you have no authority to consider said alleged lien in the adjustment of the rights of the parties interested.

One of my predecessors, Hon. Timothy S. Hogan, passed upon this same question and I concur in the opinions so rendered by him, which are found respectively in Vol. I, Annual Report of the Attorney-General for 1912, p. 522, under date of December 4, 1912; and Vol. I, Annual Report of the Attorney-General for 1913, p. 515, under date of August 25, 1913; both opinions being addressed to Hon. Byron L. Bargar, Secretary of Ohio State Armory Board. Very truly yours,

JOSEPH MCGHEE,
Attorney-General.

991.

APPROVAL—CONTRACT BETWEEN BOARD OF TRUSTEES OF THE MIAMI UNIVERSITY AND FRANK L. PACKARD.

COLUMBUS, OHIO, February 5, 1918.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Contract for architectural services between Frank L. Packard and the board of trustees of the Miami university for services on addition to Chemistry building, dated September 20, 1917, has been submitted to this department for approval.

While the contracts are not as full in detail as we would desire, nevertheless, since a uniform state's architect's contract has not yet been fully decided upon, I have endorsed my approval on the contract submitted and herewith hand the same to you. Very truly yours,

JOSEPH MCGHEE,
Attorney-General.

992.

APPROVAL—BOND ISSUE OF POLAND TOWNSHIP RURAL SCHOOL DISTRICT, MAHONING COUNTY.

COLUMBUS, OHIO, February 5, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of Poland township rural school district, Mahoning

county, Ohio, in the sum of $5,800.00, for the purpose of constructing addition to school building.

I have carefully examined corrected transcript of the proceedings of the board of education and other officers of Poland township rural school district, Mahoning county, Ohio, relating to the above bond issue, and find said proceedings to be in conformity with the provisions of the General Code of Ohio relative to bond issues of this kind.

I am therefore of the opinion that bonds properly prepared according to the bond form submitted will, when signed by the proper officers and delivered, constitute valid and binding obligations of said school district.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

993.

APPROVAL—BOND ISSUE OF EAST LIVERPOOL CITY SCHOOL DISTRICT.

COLUMBUS, OHIO, February 5, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of East Liverpool city school district, in the sum of $75,000.00, for the purpose of purchasing sites for and constructing two school buildings in said school district.

I have carefully examined the corrected transcript of the proceedings of the board of education and other officers of East Liverpool city school district, Columbiana county, Ohio, relating to the above bond issue, and find said proceedings to be in conformity with the provisions of the General Code of Ohio relative to bond issues of this kind.

I am therefore of the opinion that bonds properly prepared according to the bond form submitted will, when signed by the proper officers and delivered, constitute valid and binding obligations of said school district.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

994.

WORKMEN'S COMPENSATION LAW—SEC. 1465-82 G. C. APPLIES TO ALL CLAIMS ON ACCOUNT OF DEATHS OCCURRING ON OR AFTER JANUARY 1, 1918.

COLUMBUS, OHIO, February 6, 1918.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—On January 23, 1918, through Mr. Hamm, your director of claims, you make the following request for my opinion:

"On January 1, 1918, the amendment to section 1465-82 of the General Code which fixes the maximum compensation in death claims at $5,000.00

and the minimum at $2,000.00 became effective. Prior to this date, the section provided for maximum compensation in the sum of $3,750.00 and minimum of $1,500.00.

On December 28, 1917, one Grover Cox, an employe of the Robert Grace Contracting Company, Marion, Ohio, received an injury while in the course of his employment. As a result of this injury he died on January 5, 1918.

Your opinion is desired as to whether the dependent wife of such an employe is entitled to compensation in accordance with the amended section 1465-82, effective January 1, 1918, because death occurred after said amendment became effective, or is the amount of compensation to which she is entitled limited to the sum of $3,750.00, as provided by section 1465-82 prior to January 1, 1918. In other words, does the date of injury determine whether the old section or amended section shall apply, or does the date of death?"

The amendment to section 1465-82, to which you refer, is found in 107 O. L page 450, and reads as follows:

"Section 1465-82. In case the injury causes death within the period of two years, the benefits shall be in the amount and to the persons following:

1. If there be no dependents, the disbursements from the state insurance fund shall be limited to the expenses provided for in section forty-two hereof.

2. If there are wholly dependent persons at the time of the death, the payment shall be sixty-six and two-thirds per cent. of the average weekly wages, and to continue for the remainder of the period between the date of the death and eight years after the date of the injury and not to amount to more than a maximum of five thousand dollars nor less than a minimum of two thousand dollars.

3. If there are partly dependent persons at the time of the death, the payment shall be sixty-six and two-thirds per cent. of the average weekly wages, and to continue for all or such portion of the period of eight years after the date of the injury, as the board in each case may determine, and not to amount to more than a maximum of five thousand dollars.

4. The following persons shall be presumed to be wholly dependent for support upon a deceased employe:

(a) A wife upon a husband with whom she lives at the time of his death.

(b) A child or children under the age of sixteen years (or over said age if physically or mentally incapacitated from earning) upon the parent with whom he is living at the time of the death of such parent.

In all other cases, question of dependency, in whole or in part, shall be determined in accordance with the facts in each particular case existing at the time of the injury resulting in the death of such employe, but no person shall be considered as dependent unless a member of the family of the deceased employe, or bears to him the relation of husband, or widow, lineal descendant, ancestor or brother or sister. The word 'child' as used in this act, shall include a posthumous child, and a child legally adopted prior to the injury.

Section 2. That said original section 1465-82 be, and the same is hereby repealed.

Section 3. The provisions of this act shall take effect, and be in full force and effect on and after the first day of January, 1918."

By the express provisions of section 3, above quoted, this act went into full force and effect on the first day of January, 1918, and was the law of this state governing compensation on account of death, when the death of the employe to whom you refer occurred, namely, January 5, 1918.

No claim can be made under section 1465-82, unless an employe has suffered an injury which results in death within the period of two years from the date of the injury and of course, the claim can not be made until the death occurs. The right to claim the award does not come into existence until the date of the death; the only bearing that the date of the injury has upon this right, is that the death must occur within a period of two years from the date of the injury, it being the theory that if death occurs after a longer period, it is attributable to some other cause than the injury. In the case which you present, no right existed to claim an award under section 1465-82, on the date of the injury, namely, December 28th, nor did it exist at any time, until the time the death occurred, namely, January 5, 1918. When the death occurred, then this right immediately came into existence and the statute then in force, governing compensation for claims of this character, would be applicable and that statute was 1465-82, as amended.

In this state statutes do not have a retroactive effect, and repeals and amendments do not, as a general rule, affect existing rights of action.

This has no bearing, however, on your question, for the reason that the right to claim an award from the compensation fund, on account of death, can not arise until the death occurs; and hence must be governed by the law then in force. Therefore, claims for compensation on account of death occurring on and after January 1, 1918, must be governed by section 1465-82, as it now stands.

(See: State ex rel. Carlson v. Dist. Ct. of Hennepin Co., 131 Minn. 96.)

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

995.

GOVERNOR'S DEED—TO CORRECT DEEDS TO SCHOOL LANDS LOCATED IN SECTION 16, AID TOWNSHIP, LAWRENCE COUNTY, OHIO.

COLUMBUS, OHIO, February 6, 1918.

HON. JAMES M. COX, *Governor of Ohio, Columbus, Ohio.*

DEAR SIR:—Under date of January 29th, the auditor of state transmitted to us the enclosed papers and a letter addressed both to you and this department relative to the correction of deeds to school lands located in section 16, Aid township, Lawrence county, Ohio, which letter is to the following effect:

> "We herewith transmit to you the application of certain parties, residents of Aid township, Lawrence county, Ohio, for new deeds correcting description. We are also transmitting to you a letter of the prosecuting attorney of Lawrence county, respecting the matter, divers deeds having relation to the chain of title, and quit claim deed to the state of Ohio. This department discovered the error in cleaning up the titles in that county, and the statements made in the application are true.
>
> Thomas Walton originally purchased lot No. 1, as shown by the original records of this department and completed his payments thereon, but through some error the deed recited lot No. 3. Also, when we were abstracting section 16 we also satisfied ourselves personally, from the records of the county,

that the parties named, towit, Orpha Boggs and Charles Yates, are the present owners of lot No. 1 and that Lydia Bowman and Charles Yates are the present lessees of lot No. 3.

We request that you give us direction to make deeds to Boggs and Yates for that part of lot No. 1 owned by each of them, respectively. We have surveyor's description of the parts of lot No. 1 owned by each, recently made under our direction."

Having satisfied myself that an error has been made, I have prepared the enclosed authority to the auditor of state, have signed the same and present it to you for your signature. If you agree that an error has been committed and should be corrected, kindly sign the authority and transmit it, together with the papers, to the auditor of state.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

996.

CIVIL SERVICE—HOW REMOVAL UNDER SECTION 486-17a G. C. CAN BE MADE—"REASONABLE TIME" DEFINED—REASONS FOR REMOVAL FURNISHED EMPLOYE MUST GIVE NOTICE OF THE CHARGES AGAINST HIM.

What is a "reasonable" time to be afforded to a subordinate removed by an appointing authority in which to make and file an explanation under the civil service law, section 486-17a General Code, depends upon the nature of the reasons given for removal and the probable length of time required in view of the conditions surrounding the particular employment for the subordinate to prepare an explanation which meets the charges.

A removal under said section can be made only by following the procedure therein outlined. Such procedure is not complete until the order of removal with the explanation if any, of the subordinate is filed with the civil service commission. The ten day period within which an appeal to the commission lies begins to run on the date of such filing.

The reasons to be furnished to the employe by the appointing authority as ground for removal, though not required to be as specific and particular as an indictment, must give the employe such notice of the character of the charges against him as to enable him to make his explanation. In case of general charges, such as incompetency, the nature of the incompetency must be set forth. In the case of particular acts, such as immoral conduct, neglect of duty, etc., such acts should be described and identified with sufficient particularity to enable the subordinate to recognize and explain them, if possible.

COLUMBUS, OHIO, February 6, 1918.

The State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—I hasten to answer your letter of January 29th submitting for my opinion the following questions:

"Section 486-17a of the civil service law, relating to removals, reads in part as follows:

'The tenure of every officer, employe or subordinate in the classified service of the state, the counties, cities and city school districts thereof, holding a position under the provisions of this act, shall be during good behavior and efficient service; but any such officer, employe, or subordinate

may be removed for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of the provisions of this act or the rules of the commission, or any other failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office.

In all cases of removal the appointing authority shall furnish such employe or subordinate with a copy of the order of removal and his reasons for the same, and give such officer, employe or subordinate a reasonable time in which to make and file an explanation. Such order with the explanation, if any, of the employe, or subordinate shall be filed with the commission. Any such employe or subordinate so removed may appeal from the decision or order of such appointing authority to the state or municipal commission, as the case may be, within ten days from and after the date of such removal, in which event the commission shall forthwith notify the appointing authority and shall hear, or appoint a trial board to hear, such appeal within thirty days from and after its filing with the commission, and it may affirm, disaffirm or modify the judgment of the appointing authority, and the commission's decision shall be final,' etc.

Several questions as to the proper interpretation of this section have arisen, upon which your opinion and advice is respectfully requested:

1. The commission has frequently been requested for a statement as to what is considered a reasonable time in which to make and file an explanation. In answering this question, the commission has considered, of course, the nature of the reasons given for removal, and the probable length of time required, in view of the conditions surrounding the particular employment, for the employe discharged to prepare a comprehensive explanation.

2. It is not plain from the reading of the statute whether the ten days within which the employe discharged is given the right to file an appeal, begins on the date when he is served with the order of discharge, on the date when discharge becomes effective, or on the date of expiration of the time granted by his appointing officer within which to make and file an explanation.

3. In some few cases with which we are familiar, the courts have held that orders of discharge in which the reasons given for such discharge are couched in the broad wording of the statute setting forth reasons for which removals may be made, as quoted above, are not sufficient. To be more specific, it has been held that an order of removal on the mere ground of incompetency, inefficiency, dishonesty, drunkenness, etc., which does not state in what respects, or in what ways, the employe has been incompetent, inefficient, etc., is not sufficient. This commission has held that orders of discharge should set out one or more of the grounds enumerated in section 17a of the civil service law, such as incompetency, inefficiency, dishonesty, drunkenness, etc., and that in addition as to each, particular acts and circumstances constituting the offense charge should be detailed in such a way as to place the discharged employe properly on his defense. However, we are in doubt as to whether a statement of reasons referring to a class of acts or delinquencies which, if established after a hearing, would be sufficient to support any one of the statutory grounds for removal, is sufficient to satisfy the intent of the law, or whether such statement must set forth specific acts or instances."

In my opinion, the commission's ruling on the first point is correct.

The second question which you submit calls for an interpretation of section 486-17a of the General Code which you have quoted in part. In my opinion, a "removal" is not complete until the order of removal with the explanation, if any, of the employe or subordinate is filed with the commission. To be sure, there are cases in which no notice and no opportunity to file an explanation is required. (Hornberger v. State ex rel, 95 O. S., 148). Still in such case the removal would not be complete until the order were filed with the commission. The second paragraph of section 486-17a states what shall be done "in all cases of removal." The appointing authority is to furnish the employe with a copy of the order of removal and his reasons for same. The employe is to be afforded a reasonable time in which to make and file an explanation, and the order with the explanation is to be filed with the commission. These are the steps to be taken in effecting a removal.

The employer under the statute has a right to expect that the explanation which he makes shall be considered, at least, by the appointing authority, though, of course, the adequacy of the explanation is to be decided in the first instance by the appointing authority and ultimately by the commission. (People ex rel v. Brady, 166 N. Y., 44). It is clear to me, however, that the appointing authority is given a *locas penitentiae* after the explanation of the employe is filed with him. Therefore he has not done his last act in the process of removal until he has taken the next step, which is to file the order with the explanation with the civil service commission.

Accordingly I am of the opinion that the ten days referred to in section486-17 a of the General Code begins on none of the dates referred to by you, but on the date when the order is filed with the commission. (See State ex rel v. Board of Agriculture, 95 O. S., 276).

Your third question is discussed to some extent in State ex rel v. Board of Agriculture, supra. Newman, J., uses the following language at page 284:

> "The law certainly contemplates that the employe is to be advised of the charge against him in terms sufficiently explicit to enable him, if he sees fit, to make and file an explanation. It is further provided that 'Such order with the explanation, if any, of the employe or subordinate, shall be filed with the commission.' This is mandatory upon the appointing authority." (This sentence supports the conclusion which I have just reached respecting your second question.

Your specific question is as to whether a statement of reasons referring to a class of acts of delinquency is sufficient provided the class referred to constitutes one of the statutory grounds of removal, or whether specific acts or instances of delinquency must be assigned among the reasons.

The statement of reasons which the statute requires to be furnished to the employe or subordinate is, as has been pointed out by the supreme court, for the purpose of enabling him to make and file an explanation—is to afford him notice of the charges against him so that he may prepare what amounts to his defense. The general principles determining what constitutes sufficient notice must be applied to the solution of your question. No hard and fast rule can be laid down. The particularity of an indictment is not required, and, on the other hand, you are correct in assuming that it is insufficient merely to use the phraseology of the statute in assigning reasons. Thus a general statement that the employe is incompetent is not sufficient because it does not state the nature of his incompetency. (People ex rel v. Starks, 33 Hun., 384). I do not know that I can be more specific in answering your question than to say that particular delinquencies should be specified in sufficient detail to enable the employe or the subordinate to identify the conduct complained of. Where this requires an enumeration of days and dates such enumeration should be made. Where

the complaint is a general one, such as incompetency, I do not believe that anything more particular is required than a specification as to the respects in which the employe is incompetent to discharge the duties of his position.

In the case of such a charge as dishonesty, however, more particularity would seem to be required. So also with drunkenness, immoral conduct, insubordination, discourtesy, neglect of duty, etc.; in short, any specific acts of misfeasance, malfeasance or nonfeasance in office.

I could more easily answer a specific question of the kind now under consideration than to attempt to lay down general rules. The particularity required in each case is dependent upon the facts of that case. Very truly yours,

JOSEPH MCGHEE,
Attorney-General.

997.

POOR LAWS—BY WHOM ADMINISTERED—IN COUNTIES HAVING NO INFIRMARY—IN CASES IN WHICH THE BOUNDARIES OF A CITY BECOME COTERMINOUS WITH BOUNDARIES OF A TOWNSHIP—IN CASES IN WHICH THE BOUNDARIES OF A VILLAGE BECOME COTERMINOUS WITH THOSE OF THE TOWNSHIP.

1. *In those counties having no county infirmary, the township trustees of the various townships must afford relief to the indigent poor, whether said indigent poor be located outside or within the limits of a municipality in the township.*

2. *In those cases in which the boundaries of a city become coterminous with the boundaries of a township, the district or ward physicians if any have been appointed, and if not, the director of public safety, must afford medical relief to the indigent poor of said city who are sick, and the director of public safety in all cases must afford relief to the indigent poor of said city who are not sick.*

3. *In villages, the boundaries of which are coterminous with the boundaries of a township, the council administers the poor laws, and the marshal and police force might be called to the aid of council in the administration thereof.*

COLUMBUS, OHIO, February 6, 1918.

HON. SAMUEL DOERFLER, *Prosecuting Attorney, Cleveland, Ohio.*

Dear Sir:—I have your communication of January 10, 1918, in which you ask my opinion upon the following questions:

> 1. Can the township trustees administer poor relief in villages in their township in a county in which there is no infirmary?
>
> 2. What rule should be made to apply in those cases in which the boundaries of a city or village become coterminous with the boundaries of a township?

I will limit the answer to your first question to the authority of township trustees to administer poor relief in villages in their township, *in a county in which there is no infirmary.* I do this for the reason that the poor laws relating to counties having no infirmary differ, in reading at least, from those provisions of law applying to counties having county infirmaries.

Sections 3488 and 3489 G. C. particularly pertain to the question under consideration. They read as follows:

> "Section 3488. When the trustees of a township in a county having no

county infirmary, are satisfied that a person in such township ought to have public relief they shall afford such relief at the expense of their township as in their opinion the necessities of the person require. When more than temporary relief is required, they shall post a notice in three public places in the township, specifying a time and place at which they will receive proposals for the maintenance of such person, which notice shall be posted at least seven days before the day therein named for receiving proposals."

"Section 3489. The township trustees may contract with such person as they think suitable to take charge of and maintain such person, which shall be on the most reasonable terms, but not for more than one year at any one time. If the legal settlement of such person is not within this state, or is unknown, they shall keep an accurate account of moneys so expended, and certify it, with the vouchers therefor, to the county commissioners, who shall cause the amounts so paid to be refunded to such township from the county treasury, on the warrant of the county auditor."

From the provisions of section 3488 G. C. it will be seen that these two sections apply to those counties having no county infirmary. Section 3488 begins:

"When the trustees of a township in a county having no county infirmary," etc.

These two sections differ from the other sections of the chapter, in that in practically all of the other sections we find the language, "or the proper officers of each municipal corporation therein." In the two sections above quoted this language is not found.

As a village located in a township is a part of the township, the township trustees under section 3488 G. C. would have the power and duty to take care of the indigent poor, whether they be located outside of a village in the township, or within the limits of the village. That this was the intention of the legislature, is manifested by a study of the history of the act relating to the poor.

In 73 O. L. 233 we find an act entitled: "An act for the relief of the poor, and to repeal certain acts therein named." Section 21 of this act provided for the poor in those counties having no infirmaries, and it is instructive to note that in the whole act as found in 73 O. L. 233 no reference was made to the "proper officers of each municipal corporation therein," but the trustees of the township were given the power and duty to afford relief to the indigent poor in the township.

In 93 O. L. 273 this act was amended and one of the main changes that were made was the insertion in every section which related to the care of the indigent poor of the phrase "the proper officers of each municipal corporation therein," or words to that effect. This insertion was made in every section excepting the one pertaining to those counties having no county infirmaries, which in the original act was section 21. It was not modified in that respect but was still made to read that the trustees of the township in any county having no county infirmary should afford relief to persons in such township, and it now so reads in sections 3488 and 3489 G. C.

From all the above it is clear that the legislative intent was to make a distinction between those counties having county infirmaries and those having none, and it is fairly clear that the legislature at least intended the township trustees of those counties having no county infirmary to afford relief to the indigent poor located not only in the township outside the boundaries of a village in the township, but also to those persons located in the village.

There is another bit of interesting history connected with the legislation pertaining to the indigent poor of those counties having no county infirmary, which throws some light upon the quesion about which you inquire.

Section 5646 G. C. provides for a levy to be made by the trustees of each township, "for township purposes, *including the relief of the poor.*" It seems that the legislature felt that the provision contained in this section was not sufficient to enable the township trustees to take care of the indigent poor of the various townships in counties where there is no county infirmary. This is evident from the fact that section 5647 G. C. was enacted, which reads as follows:

> "In counties where there are no county infirmaries, a township tax in addition to the tax provided in the next preceding section, and not to exceed one mill and five-tenths of a mill on each dollar of the taxable property of the township, may be levied for the relief of the poor, to be applied solely to that purpose."

From these two sections it appears that in those counties where there is no county infirmary, the township trustees are given complete jurisdition over the entire township, including any villages that may be located therein, relative to the indigent poor, and are given power to levy an additional tax to take care of the expenses incident to the care of said poor.

This answers your first question in so far as it applies to those counties in which there is no county infirmary. As stated before, I am not passing on counties which have county infirmaries.

Your second question relates to those municipalities which have become coterminous with the boundaries of a township.

Section 3512 G. C. reads in part:

> "When the corporate limits of a city or village become identical with those of a township, all township officers shall be abolished, and the duties thereof shall thereafter be performed by the corresponding officers of the city or village, * * *."

Of course in such a case there is no longer township trustees to give relief to the indigent poor, and the only question is as to who are the corresponding officers of the city or village. Upon these officers, whoever they are, would devolve the duty of taking care of the indigent poor within such a municipality.

My predecessor, Hon. Timothy S. Hogan, held as follows in an opinion rendered by him on February 27, 1911, to the state board of health, and which is found in Vol. I of the Annual Report of the Attorney-General for 1911-1912, page 854 (syllabus):

> "The board of health is given exclusive jurisdiction to care for sick poor of the municipality, under the statutes, whether said 'sick poor' have infectious or contagious diseases or not."

I concur in said holding of Mr. Hogan.

Section 4408 G. C. reads in part as follows:

> "* * * The board may appoint a clerk, and with the consent of council, as many ward or district physicians, or one ward physician for each ward in the city as it deems necessary."

It was these officials that Mr. Hogan held should take care of the sick poor of a municipality, whether they be sick from infectious or contagious diseases or not. The question of course remains as to what official takes care of the indigent poor who are not sick and what officer would take care of the sick poor of a municipality, provided

no ward or district physician has been appointed by the board of health. Mr. Hogan held in said opinion that in such an event some other "proper authorities" might afford the relief.

It is my opinion, without quoting the sections, that under sections 4368 to 4370, inclusive, G. C., the director of public safety would be the proper official to care for the sick poor in cities in the event there has been no district or ward physician appointed by the board of health, and the indigent poor of the city who are not sick.

Hence, answering your question specifically, in those cases in which the boundaries of a city have become coterminous with the boundaries of a township, the ward or district physicians, if there are any appointed, would afford relief to the sick poor, and if there is no district or ward physician appointed the director of public safety would afford such relief. The director of public safety would in all cases afford relief to the indigent poor of the city who are not sick.

It is possible that you may have in mind a case in which the municipality, the boundaries of which are coterminous with those of a township, is a village. In that case the result would of course be different. The council of a village, unlike that of a city, is not a purely legislative body. It does have the power to levy taxes and appropriate funds, and the general power to contract on behalf of the village. In these respects it "corresponds" to the board of trustees of a township. There is no other municipal agency more closely corresponding to the trustees.

Hence, in my opinion, the council is in the first instance the proper municipal authority to administer general poor relief in a village whose corporate limits are coterminous with those of a township.

A village council has authority, under section 4385 G. C. to confer upon the village marshal and his force "other powers not inconsistent with the nature of their offices" than those directly conferred by law. Without passing upon the question, it might be suggested that the marshal and police force might be thus called to the aid of the council in the practical administration of the poor laws.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

998.

HUMANE SOCIETY ORGANIZED UNDER SECTION 10062 ET SEQ.—AGREEMENT BY SAID SOCIETY TO ENFORCE ORDINANCE PROHIBITING DOGS RUNNING AT LARGE IS ULTRA VIRES AND ILLEGAL.

A contract entered into between a city and a humane society, having jurisdiction in such city, such society being organized under sections 10062 *et seq. General Code, wherein such society agrees to enforce the ordinance regulating and prohibiting the running at large of dogs is illegal as being ultra vires of the purposes for which such humane society is organized.*

COLUMBUS, OHIO, February 7, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Under date of January 21, 1918, you submit the following inquiry to this department:

"We are respectfully requesting your written opinion upon the following matter:

We enclose herewith copy of an agreement between the city of Youngstown and the Youngstown humane society.

QUESTION: Is such contract authorized by law and legal?"

A copy of the contract is submitted with your inquiry. It is not necessary to copy said contract in this opinion. The contract was entered into under authority of an ordinance of council which directed the director of public safety to enter into such contract "with any incorporated society for the prevention of cruelty to animals having jurisdiction in said city, for the capture and impounding of all unlicensed dogs, and for the maintenance of and shelter for lost, strayed or homeless dogs."

It is further provided that the city is to turn over to said society its dog pound and said society is thereafter to maintain the same at its own expense and to employ all necessary help. Said society further agrees to seize and impound all dogs found running at large and to furnish competent persons and apparatus and appliances needed for such purpose. Said society further agrees to enforce the provisions of the ordinances of the city and the laws of the state relating to dogs running at large and agrees to indemnify the city from all loss arising therefrom. The society is to furnish all necessary books, licenses, certificates and tags for the registration of dogs. All moneys received by the city clerk for licenses and redemption fees during the life of the contract are to be paid to said society. The contract is to continue in force from year to year or until terminated by resolution, on thirty day's notice.

Section 3633 G. C. gives the municipal corporation the power to regulate or prohibit the running at large of dogs and other animals. This section reads as follows:

"To regulate, restrain and prohibit the running at large, within the corporation, of cattle, horses, swine, sheep, goats, geese, chickens and other fowls and animals, and to impound and hold them, and on notice to the owners, to authorize the sale of them for the penalty imposed by any ordinance, and the cost and expenses of the proceedings, to regulate or prohibit the running at large of dogs, and provide against injury and annoyance therefrom, and to authorize the disposition of them when running at large contrary to the provisions of any ordinance."

The regulation of the running at large of dogs is a police regulation and it does not necessarily apply to the prevention of cruelty to animals.

I assume from your letter and the contract that the humane society in question is organized under authority of sections 10062 et seq., General Code.

The objects of such society are stated in section 10063 G. C. as follows:

"The objects of such society, and all societies organized under sections ten thousand and sixty-seven and ten thousand and sixty-eight, shall be the inculcation of humane principles, the enforcement of laws for the prevention of cruelty, especially to children and animals, to promote which objects such societies may respectively acquire property, real or personal, by purchase or gift. All property acquired by gift, devise, or bequest, for special purposes, shall be vested in a board of trustees consisting of three members elected by the society, which board must manage such property, and apply it in accordance with the terms of the gift, devise, or bequest, with power to sell it and reinvest the proceeds."

The object of such society is to inculcate humane principles and to enforce the laws for the prevention of cruelty, especially to children and animals. This would

not include the power to enforce ordinances or laws to regulate the running at large of dogs or other animals.

Section 10067 G. C. provides as follows:

> "Societies for the prevention of acts of cruelty to animals may be organized in any county, by the association of not less than seven persons. The members thereof, at a meeting called for the purpose, shall elect not less than three of their members directors, who shall continue in office until their successors are duly chosen."

Section 10070 G. C. reads:

> "Such societies may appoint agents who are residents of the county or municipality for which the appointment is made,for the purpose of prosecuting any person guilty of an act of cruelty to persons or animals, who may arrest any person found violating any provision of this chapter, or any other law for protecting persons or animals or preventing acts of cruelty thereto. Upon making such arrest, such agent shall convey the person so arrested before some court or magistrate having jurisdiction of the offense, and there forthwith make complaint on oath or affirmation of the offense."

This section authorizes such society to appoint agents and such agents are authorized to prosecute any person guilty of an act of cruelty to persons or animals.

Section 10071 G. C. requires that such appointments shall be approved by the mayor or by the probate judge. Section 10072 G. C. provides the method of paying the compensation of such agents.

The powers of a society organized under the provisions of the above sections commonly known as "humane societies" are specifically provided by statute, and they have only such powers as are granted by statute or which may be necessarily implied in order to carry out the powers specifically granted.

The powers granted do not include the right to enforce ordinances or laws to regulate or prohibit the running at large of dogs or other animals. Therefore the contract entered into by the humane society of Youngstown is beyond the powers granted to such society and is therefore *ultra vires*.

The above is sufficient reason for declaring the contract in question void. There may be other reasons given which would make such contract illegal.

In the case of Fox v. The Mohawk and Hudson River Humane Society, 165 N. Y. 517, the law was declared unconstitutional which granted to a humane society the power and authority to grant licenses to persons owning or harboring dogs and to receive the fees therefor for the purpose of enforcing such law and "for its own purposes."

The act therein construed was afterwards amended, the objectionable features eliminated, and was held to be constitutional, in the case of People v. Delaney, 130 N. Y. Supp. 833.

The above cases are referred to and commented upon in volume III Corpus Juris, at page 75.

At section 243, Vol. III Corpus Juris, page 75, it is said:

> "But an act requiring the owners of dogs to pay a license to a humane society for its own use is unconstitutional as being an unauthorized appropriation of public moneys. Such legislation has been upheld, however, where the society is not organized by the voluntary act of individuals under

a general statute, but is incorporated by special act, and all license fees are devoted to carrying out the provisions of the act, or retained as compensation tor enforcing it."

Section 244 reads as follows:

"A statute requiring the owners of dogs to pay a license fee, and permitting a society for the prevention of cruelty to animals to appropriate and dispose of unlicensed dogs, or, in its discretion, to keep them without the payment of any fee, is unconstitutional. Such a statute conflicts with the provision which forbids the grant of exclusive privileges and immunities."

It is not necessary, however, to pass upon the constitutionality of the ordinance now in question and the contract made in pursuance thereof.

I am of the opinion that said contract is illegal and void because it is *ultra vires* of the powers granted to a humane society organized under authority of sections 10062 et seq., General Code.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

999.

BONDS ISSUED BY MUNICIPALITY UNDER SECTIONS 7910 AND 15093 NOT SUBJECT TO LIMITATIONS OF LONGWORTH ACT.

Bonds issued by a municipal corporation under authority of sections 7910 *et seq., and sections 15093 et seq., General Code, are not subject to the* 1, $2\frac{1}{2}$ *and* 5 *per cent. limitations of the Longworth act.*

COLUMBUS, OHIO, Februray 8, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Your favor of recent date is received in which you submit the following inquiry:

"We are referring you to the opinion of a former attorney-general recorded in the annual reports of the year 1909, page 237, and would respectfully state that in statutes other than the Longworth act authorizing the issuance of bonds, in most instances specific provision is made by such statutes excluding such bond issues from the limitations of the Longworth act when such was the intention of the legislature.

For illustration, bonds issued under the Bense act, section 1259 et seq. G. C., the Terrel bill, O. L. 107, page 575, etc.

However, there are other statutes authorizing the issuance of bonds other than the Longworth act which do not make specific provision for the excluding of such bonds from the limitations of the Longworth act.

Query. In cases where bonds are issued under authority other than that of the Longworth act when the sections of authority do not specifically provide that they are excluded from the Longworth act limitations, such as municipal university bonds, under section 7910 to 7914 G. C., Cincinnati Southern Railway bonds, under section 15093 et seq., are such bonds excluded from the limitations of the 1, $2\frac{1}{2}$ and 5 per cent. limitations set forth in the Longworth act?"

Your question is general in form and will apply to all bonds issued by a municipal corporation.

You call attention however, to bonds issued by a municipality owning a university under authority of sections 7910 et seq., General Code, and also bonds issued by the Cincinnati Southern Railway under authority of sections 15093 et seq., General Code. I deem it advisable to limit the answer to your question to those bonds to which you have particularly called attention. To consider all bonds which may be issued by a municipality by statutes, other than the Longworth act, would make the opinion of needless length.

It is not necessary to consider those acts which specifically provide that the limitations of the Longworth act shall not apply to bonds issued thereunder.

Bonds authorized by the Longworth act and the limitations thereto are provided for in sections 3939 et seq., General Code.

Section 3939 General Code as amended in 107 Ohio Laws 553 reads in part as follows:

> "When it deems it necessary, the council of a municipal corporation, by an affirmative vote of not less than two-thirds of the members elected or appointed thereto, by ordinance, may issue and sell bonds in such amounts and denominations, for such period of time, and at such rate of interest, not exceeding six per cent. per annum, as said council may determine and in the manner provided by law, for any of the following specific purposes: * * *"

Here follows twenty-seven purposes or subdivisions for which bonds may be issued under authority of this section. This section does not provide for the issuing of bonds for the purposes of a municipal university or of a municipal railroad. Therefore the issue of bonds as authorized by sections 7910 et seq., and 15093 et seq., General Code, are not included in the Longworth act.

Section 3940 G. C., as amended 107 O. L. 578, reads as follows:

> "Such bonds may be issued for any or all of such purposes, but the total indebtedness created in any one fiscal year, by the council of a municipal corporation under the authority conferred in the preceding section, shall not exceed one-half of one per cent. of the total value of the property in such municipal corporation as listed and assessed for taxation."

Section 10 of said act in 107 O. L. 578, reads as follows:

> "This act, in so far as it amends section 3940 of the General Code, shall become effective upon the expiration of the present fiscal year of the municipal corporations to which it applies, and shall otherwise go into effect within the time prescribed by law."

Prior to this amendment, the limitations contained in section 3940 G. C., was one per cent. of the tax valuation of the property.

Section 3941 G. C. reads as follows:

> "The net indebtedness created or incurred by the council under the authority granted it in section one (1) (G. C. 3939) of this act, and in an act passed April 29th, 1902, to amend sections 2835, 2836 and 2837 and to repeal section 2837a of the Revised Statutes (O. L. v. 95, p. 318) together with its subsequent amendments, shall never exceed four (4) per cent. of the

total value of all property in such municipal corporation as listed and assessed for taxation."

Section 3948 G. C. reads as follows:

"The net indebtedness created or incurred by a municipal corporation under authority of sections one and four of this act and under the authority of an act passed April 29th, 1902, to amend sections 2835, 2836 and 2837 and to repeal section 2837a of the Revised Statutes (O. L. v. 95, p. 318) together with its subsequent amendments, shall never exceed in total eight (8) per cent. of the total value of all property in such municipal corporation as listed and assessed for taxation."

Section 3952 G. C. reads:

"That from and after the passage of this act and until and including the 30th day of September, 1911, the limitations of four and eight per cent. prescribed in this act shall be applied to and based upon the total value of all property listed and assessed for taxation in such municipal corporation as determined by the duplicate for the year 1910. On and after the first day of October, 1911, the said four per cent. limitation shall be reduced to two and one-half per cent., and the said eight per cent. limitation shall be reduced to five per cent., and such reduced limitations shall be applied to and based upon the value of all the property listed and assessed for taxation in such municipal corporation as determined by the duplicate then or thereafter in force."

The foregoing sections are the limitations upon the amount of bonds which may be issued by a municipal corporation under the provisions of the Longworth act. Said sections specifically limit such limitations to the bonds issued under authority of said act and the amendments thereto and the act in 95 O. L., 318.

Section 7910 G. C. reads as follows:

"Any municipal corporation having a university supported in whole or part by municipal taxation, may issue bonds for the erection of additional buildings or the completion of buildings not completed, for such municipal university, and for the equipment thereof."

Section 7911 G. C. reads:

"Such bonds may be issued under ordinance of the council of such municipality with the approval of the mayor, but only upon the receipt of a certified resolution from the board of directors of such university of the necessity of such issue. The resolution and ordinance must specify the amount of the issue, the denomination of bonds, their rate of interest, their dates, and the times of their maturity."

Section 7912 G. C. provides:

"The bonds so issued shall be sold according to the provisions of law for the sale of municipal bonds, and the proceeds thereof, excepting the premiums and accrued interest, shall be placed in the treasury of such municipality and be used only for the purpose of erecting or completing and equipping such

additional buildings as may have been specified in the resolution and ordinance calling for their issue."

The above sections authorize a municipal corporation having a university to issue bonds for the erection of buildings for such university and for the equipment thereof. It is specifically provided that such bonds shall be sold according to the provisions of law for the sale of municipal bonds. There is no provision, however, that such bonds shall be subject to the limitations of the Longworth act, nor that they shall be excepted from such limitations.

Section 15093 G. C. authorizes an issue of bonds by a city of the first class, having a population exceeding 150,000 for the purpose of constructing a railroad. Said section reads in part as follows:

> "That whenever, in any city of the first class, having a population exceeding one hundred and fifty thousand inhabitants, the city council thereof shall, by a resolution passed by a majority of the members elected thereto declare it to be essential to the interests of such city that a line of railway, to be named in said resolution, should be provided between termini designated therein, one of which shall be such city, it shall be lawful for a board of trustees, appointed as herein provided, and they are hereby authorized to borrow as a fund for that purpose, not to exceed the sum of ten millions of dollars, and to issue bonds therefor in the name of said city, under the corporate seal thereof, bearing interest at a rate not to exceed seven and three-tenths per centum per annum, payable at such times and places, and in such sums, as shall be deemed best by said board. * * *"

Section 15107 G. C. reads in part as follows:

> "That it shall be lawful for the board of trustees appointed under the act to which this is supplementary, and they are hereby authorized to borrow as a fund for the completion of the line of railway for which they are trustees, a sum in addition to the amount authorized by said original act, not to exceed six millions of dollars, and to issue bonds therefor in the name and under the corporate seal of the city owning the line of railway."

Section 15119 G. C. reads in part as follows:

> "That it shall be lawful for the board of trustees, appointed under the acts to which this is supplementary, and they are hereby authorized to borrow, as a fund for the completion of the line of railway for which they are trustees, a sum, in addition to the amounts authorized by said acts, not to exceed $2,000,000, and to issue bonds therefor in the name and under the corporate seal of the city owning the line of railway. * * *"

There are other supplementary acts which authorize the trustees of the railroad to issue bonds wherein the amount of bonds to be issued is specifically limited and there is no provision therein that such bonds shall be subject to the restrictions and limitations contained in the Longworth act, nor that they shall be excepted therefrom.

As stated above, the purposes for which bonds may be issued under sections 7910 et seq. and 15093 et seq., General Code, are not authorized by section 3939 G. C., being a part of the Longworth act.

You call attention to the opinion of the Attorney-General in the annual report of the Attorney-General for the year 1909, at page 237. The conclusion of Hon. U. G. Denman, Attorney-General, is stated in the last paragraph of said opinion as follows:

"No place in the Longworth act is there the provision that the purposes provided for therein are the only purposes for which the political units referred to therein may issue bonds. Under the acts referred to in your inquiry the issuance of bonds was legalized for purposes not enumerated in the Longworth act. I therefore conclude that the bonds referred to in your inquiry are not to be considered in the limitation fixed by said Longworth act. In support of this conclusion see the case of Columbus v. Lazarus, et al., 15 Ohio Dec. at page 187."

His conclusion is based upon the case of Columbus v. Lazarus, 15 Ohio Dec. 187. The first, second and fifth branches of the syllabus in this case read as follows:

"The act of April 29, 1902 (95 O. L. 318, Sec. 2835 Rev. Stat. et seq., commonly called the Longworth bond act), does not exclusively enumerate the purposes for which municipal bonds may be issued and sold, nor does it provide the exclusive tax levy to pay for municipal bonds which are authorized by and issued under other express statutory authority. Said act simply limits the amount of bonds which may be issued for the purposes therein enumerated, together with the minimum tax levy to pay the same.

A municipal corporation has express power under section 53 of the Municipal Code (96 O. L. 41, sections 1536-213 Rev. Stat.) to issue and sell street intersection bonds and may levy a tax thereunder upon the taxable property within the municipality to pay the same without reference to the one per cent tax levy limitation provided in section 2835 Rev. Stat. et seq. No authority for the issue of such bonds is conferred by said act, and the tax levy limitation therein provided does not, therefore, apply.

Section 100 of the new Municipal Code (96 O. L. 53, section 1536-292 Rev. Stat.) simply saves or retains the Longworth act in its entirety as a part thereof, and the tax levy limitation of one per cent therein provided has reference only to levies made for purposes enumerated in said act, and not to levies for municipal purposes which are otherwise provided for in the code."

Bigger, J., says at page 191:

"The Longworth act simply limits the amount of bonds which may be issued under the authority of that act in any one year for any or all of the purposes therein enumerated. If the bonds are not issued under the authority of that act and for a purpose therein enumerated, then the limitation therein provided does not apply to such bonds."

The above opinion is to the effect that the Longworth act limits the amount of bonds that may be issued for the purposes therein enumerated. This is clear from the specific provisions of sections 3940, 3941 and 3948 G. C., above quoted.

In the case of Cleveland v. Cleveland, 16 C. C. n.s. 471, it is held:

"Bonds of municipal corporations issued to abolish grade crossings under authority of 95 O. L. 356, and bonds to pay the municipality's portion of street and sewer improvements, are both subject to the provisions of the Longworth act."

The bonds in question in the above case are specifically provided for in subdivisions 14 and 26 of section 3939 G. C. This opinion therefore does not control the present question.

It is my opinion therefore that bonds issued by a municipal corporation, under authority of sections 7910 et seq., and sections 15093 et seq., General Code, are not subject to the 1, 2½ and 5 per cent limitations of the Longworth act.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1000.

TEACHERS ENTITLED TO FULL PAY WHEN SCHOOLS CLOSED BY REASON OF HEAVY SNOWS AND COAL SHORTAGE.

Where schools are closed on account of heavy snows and coal shortage caused by severe cold weather and lack of transportation facilities, teachers are entitled to full pay for time lost, under the provisions of section 7690 General Code.

COLUMBUS, OHIO, February 9, 1918.

HON. P. A. SAYLOR, *Prosecuting Attorney, Eaton, Ohio.*

DEAR SIR:—Under date of January 28, 1918, you submit the following inquiry:

> "I desire very much to have your construction of section 7690 G. C. in relation to the following facts:
>
> Lanier township has a centralized high school, and the pupils of the township are all conveyed, or are to be conveyed to this central building. Owing to the fact that the roads for a part of the time were impassable by reason of heavy snows, and owing to the fact that for a part of the time they had not sufficient coal to heat the building, there was no school.
>
> The question turns on whether the teachers are entitled to full pay for all the time.
>
> Second: Are the hack drivers entitled to full pay for all the time?"

Section 7690 General Code to which you refer, reads as follows:

> "Each board of education shall have the management and control of all of the public schools of whatever name or character in the district. It may appoint a superintendent of the public schools, truant officers, and janitors and fix their salaries. If deemed essential for the best interests of the schools of the district, under proper rules and regulations, the board may appoint a superintendent of buildings and such other employes as it deems necessary and fix their salaries. Each board shall fix the salaries of all teachers, which may be increased, but not diminished during the term for which the appointment is made. Teachers must be paid for all time lost when the schools in which they are employed are closed owing to an epidemic or other public calamity."

This section requires that teachers shall be paid for time lost on account of the closing of the schools "owing to an epidemic or other public calamity."

The word "calamity" is defined at page 1116 of Vol. IX, corpus juris:

> "Any occurrence, especially when sudden and unexpected, that causes great or wide-spread distress, trouble, or affliction to individuals or to the community, as the failure of crops, an earthquake, the devastation of war or plague, or an extensive fire or flood. By context, mischance or misfortune."

The present situation is brought about because of the world war, the severe cold weather and heavy snows, causing a shortage of coal through lack of transportation facilities. This condition is such that it has had and now has the attention of local, state and federal authorities. It is a national situation, which has caused widespread "distress and trouble." It is my opinion a public calamity of large magnitude.

The teachers, therefore, would be entitled to pay for time lost under such circumstance, under the provisions of section 7690 General Code.

The answer to your second question will depend upon the terms of the contract with the hack-driver. I do not deem it advisable to answer your second question without a copy of the contract. If you will submit a copy of the contract I will answer the second question.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1001.

MERCHANT COMMENCING BUSINESS IN COUNTY AFTER THE DAY PRECEDING THE SECOND MONDAY OF APRIL SHOULD REPORT TO THE COUNTY AUDITOR THE AVERAGE VALUE OF THE PERSONAL PROPERTY TO BE USED IN SAID BUSINESS—DUTY OF AUDITOR IN CASE OF REFUSAL OF SUCH MERCHANT.

A merchant commencing business in any county after the day preceding the second Monday of April in any year is amenable to the provisions of section 5387 General Code, requiring such merchant to report to the auditor of the county the probable average value of the personal property intended to be employed in such business until the day preceding the second Monday of April thereafter. In case of refusal on the part of such merchant to make the report required by section 5387 General Code the auditor of the county should proceed under the provisions of section 5390 General Code to ascertain the probable average value of the personal property intended to be employed in the business of such merchant and add thereto fifty per cent., the amount thus increased to be the basis of taxation for that year.

The fact that such merchant is a corporation does not affect the application of the statutory provisions just noted.

COLUMBUS, OHIO, February 9, 1918.

HON. ADDISON P. MINSHALL, *Prosecuting Attorney, Chillicothe, Ohio.*

DEAR SIR:—As previously acknowledged, I am in receipt of your letter of January 11, 1918, in which you ask my opinion on certain questions therein stated. Your letter in full reads as follows:

> "The auditor of Ross county has requested me to obtain from you an opinion as to his duties arising from the following state of facts:
>
> Since the army cantonment has been in operation in this county many merchants have started business in and near this city. The auditor has asked the following questions:
>
> 'First. Is it my duty as auditor of Ross county, and in case of the failure of a person to make a return as required in section 5387, to demand a tax return as provided for therein, and in case of the failure or refusal of the person so engaging in business to proceed according to the provisions of section 5390 of the General Code, if necessary, to secure such return?

Second. Would the fact that the business, commenced after last tax listing day, was owned by an incorporated company relieve the company from making a return?' "

Sections 5382 and 5385 General Code provide for the taxation of merchants and manufacturers' stock on the basis of the average stock on hand for the previous year instead of a tax on the aggregate of each and every item possessed on the day preceding the second Monday of April of a given year.

The provisions of section 5387 General Code noted in your communication are cognate to those of sections 5382 and 5385 General Code, and read as follows:

"Section 5387. When a person commences business as a merchant or manufacturer after the day preceding the second Monday of April in any year, the average value of whose personal property employed in such business has not been previously entered on the proper assessor's list for taxation, such person shall report to the auditor of the county the probable average value of the personal property by him intended to be employed in such business until the day preceding the second Monday of April thereafter."

Section 5390 General Code, likewise referred to in your letter, is general in its terms, providing a sanction by way of penalty with respect to returns for taxation required to be made by other appropriate statutory provision, and reads as follows:

"When a person, company, or corporation refuses or neglects to make return, or, on being requested to do so, refuses or neglects to swear to it, the assessor shall return the fact of such refusal or neglect by the words 'refused to list,' or 'refused to swear,' as the case may be. In such case, and in every case in which a company or corporation whose duty it is to make return of taxable property to the auditor refuses or neglects to make or verify such return, the auditor shall add to the amount returned, or ascertained, fifty per cent. of such amount, and the amount thus increased shall be the basis of taxation for that year."

It will be noted that the assessor has nothing to do with the return for taxation required to be made by the provisions of section 5387 General Code, and it is the duty of the county auditor to apply and enforce the provisions of section 5390 General Code in cases where returns required under section 5387 General Code are not made in the manner therein provided. Assuming therefore that the business of the merchants which you have in mind comes within the provisions of section 5387, I am of the opinion that your first inquiry should be answered in the affirmative.

With respect to your second question, it will be noted that section 5404 General Code makes special provision for the return for taxation of the property of corporations other than real estate not necessary to the daily operations of the company, while section 5405 General Code makes provision, in proper cases, for the apportionment by the county auditor to the proper taxing districts within the county of the tax valuation of the property of corporations after the deduction of the value of all real estate included in the return on the basis therein provided for.

As a matter of some significance in consideration of this question it will be noted that section 4 of Article XIII of the state constitution provides that the property of corporations now existing or hereafter created shall forever be subject to taxation the same as the property of individuals.

Section 5328 General Code provides that all real and personal property in this state belonging to individuals or corporations, and all moneys, credits, investments in bonds, stocks, or otherwise, of persons residing in this state, shall be subject to taxation, except only such property as may be expressly exempted therefrom.

More immediately to the point perhaps is section 5320 General Code, which provides that the word "person" as used in the particular title of the General Code relating to taxation, includes firms, companies, associations and corporations.

In an opinion to the tax commission of Ohio, under date of September 13, 1911 (report of Attorney-General for 1911, volume 1, page 676), my predecessor, Hon. T. S. Hogan, referring to the provisions of sections 5382, 5385 and cognate sections with respect to the taxation of merchants' and manufacturers' stock says:

> "The above statutes applicable to the return of merchants' and manufacturers' stock and property used in such business constitute not a separate rule of taxation, but merely a separate and peculiar method of *valuation* of certain kinds of personal property. The general assembly has recognized the inequality of applying to merchants and manufacturers the rule applicable to ordinary individuals, namely, that the value shall be affixed to specific property which it possesses on the day preceding the second Monday of April of a given year, and that only such personal property shall be returned for taxation as is owned by the taxpayer on the said day. As a substitute for this rule, the legislature has provided, in effect, that a merchant's or manufacturer's stock shall be regarded as an entity and shall be valued by determining, not the aggregate value of specific articles, which constitute it, on the day preceding the second Monday of April, but by determining the average value of such specific articles on hand during the year preceding that date.
>
> The corporation engaged in the manufacturing business and required to make returns as a corporation to the county auditor of all its personal property must value that portion thereof which is used or partly used in the process of manufacturing and which consists of completed manufactured articles on hand during the year as manufacturer's stock. There seems to be very little question as to this conclusion. Courts have practically adopted it wherever the application of the sections relating to the valuation of manufacturer's stock to corporations have been involved.
>
> Brewing Company v. Hagerty, 8 C. C., 330,
>
> Bridge Company v. Yost, 22 C. C., 376.
>
> I mention this point because both the sections relating to the return of merchants' stock and that relating to the return of manufacturers' stock expressly provide that when a person is required to make his *return to the assessor* he shall proceed as therein provided. Corporations, of course, do not make their returns to the assessor. However, the controlling principle is that already alluded to, namely, that the rules applicable to individuals are presumed to be applicable likewise to corporations, unless a contrary intent clearly appears."

The opinion of Mr. Hogan, though immediately directed to certain questions relating to the taxation of the property of a manufacturer, has direct application to the question presented by you, and inasmuch as upon independent investigation of the question presented by you I have found no reason to question the correctness of the conclusion reached by Mr. Hogan, I am of the opinion, in answer to your second question, that the fact that the business in question was owned by an incorporated company would not relieve such company from making the return provided for in section 5387 General Code, if such company is otherwise within the provisions of this section.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1002.

FEES RECEIVED BY SHERIFF IN STATE CRIMINAL CASES MUST BE PAID INTO HIS FEE FUND.

The sheriff must pay into his fee fund fees received by him for serving warrants issued to him by a magistrate in state criminal cases.

COLUMBUS, OHIO, February 11, 1918.

HON. J. W. WATTS, *Prosecuting Attorney, Hillsboro, Ohio.*

DEAR SIR:—I have your letter of recent date as follows:

"The question upon which I would like to have your opinion is as fol lows:

Is there any law authorizing a sheriff to collect and keep, in addition to his regular salary, his costs accruing in a criminal case on a warrant issued to him by a magistrate wherein the state fails to convict or in misdemeanors upon conviction where the defendant proves insolvent?

Since the decision of the appellate court of the eighth district in the case of Edmond B. Haserodt, clerk of courts, etc., et al., plaintiffs in error v. The State of Ohio, ex rel., E. R. Wilcox, city solicitor, etc., defendants in error, holding that chiefs of police in state criminal cases can collect no fees for such services in police courts and since the bureau of inspection and supervision of public offices finds that the same objection exists as to the fees of a marshal in state criminal cases, our mayor has been issuing some of his war rants in state criminal cases to the sheriff of the county upon the theory that he would be allowed his fees and would not have to perform such services for nothing, particularly if the state should fail or if there should be a conviction of a misdemeanor and the defendant proved insolvent.

Section 13500 G. C. provides that warrants may be directed by the magistrate, issuing the same, to the sheriff of the county.

Section 2846 G. C. provides as follows:

'Upon the certificate of the clerk and the allowance of the county commissioners, the sheriff shall receive from the county treasurer, in addition to his salary, his legal fees for services in criminal cases wherein the state fails to convict and in misdemeanors upon conviction where the defendant proves insolvent, but not more than three hundred dollars shall be allowed for the services rendered in any one year of his term.'

Section 2983 G. C. provides for the payment at the end of each quarter into the county treasury of all fees, costs, etc., collected during the said quarter by all county officers.

Section 1296-28 provides that the salary of county officials shall be in lieu of all fees, costs, etc.

I find no other sections of the law bearing upon the above question and there seems to be no specific method laid down in the Code for the collection of fees in such cases."

Section 13500 of the General Code, to which you refer, provides that warrants may be directed by the magistrate, issuing the same, to the sheriff of the county. When the sheriff, therefore, is serving these warrants, he is doing so as sheriff.

Section 2996 G. C. provides:

"Such salaries shall be instead of all fees, costs, penalties, percentages, allowances and all other perquisites of whatever kind which any of such officials may collect and receive, provided that in no case shall the annual salary paid to any such officer exceed six thousand dollars."

From a reading of section 2996, just quoted, it will be seen that any fees collected by the sheriff in serving the warrants referred to must be paid into the sheriff's fee fund unless some specific statutory authority can be found taking this case out of the general rule. Section 2846, to which you refer, is the only exception found in the statutes. This section is set forth above in your communication.

It will be noted that section 2846 G. C. provides that the sheriff in criminal cases where the state fails to convict, and in misdemeanors upon conviction, where the defendant proves insolvent, may be allowed his fees upon the certificate of the clerk and the allowance by the county commissioners. The fact that these fees must be allowed upon the certificate of the clerk would indicate that the section refers only to cases in the court of common pleas and not to cases in the mayor's court, police court and courts of justices of the peace. This being so, this section would offer no assistance in the situation you refer to.

It is therefore my opinion that any fees received by the sheriff in state cases for serving warrants, issued to him by a magistrate, must be paid into the sheriff's fee fund.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1003.

PROSECUTING ATTORNEY—OFFICE EXPENSES—HOW SAME SHOULD BE PAID.

Prosecuting attorney should have judge of common pleas court fix amount to be expended by such prosecuting attorney in ordinary conduct of office, under section 2914 *General Code.*

COLUMBUS, OHIO, February 11, 1918.

HON. J. H. FULTZ, *Prosecuting Attorney, Lancaster, Ohio.*

DEAR SIR:—In your request for my opinion you say:

"Do you advise prosecuting attorneys to obtain funds under section 3004 G. C. for the payment of expenses in the ordinary conduct of their offices, or should they have a judge of the common pleas court fix an amount only under section 2914 to be by them expended?

You will note the U. S. Government has drafted prosecuting attorneys to perform many duties in connection with the selective draft law, for which they receive no compensation or expenses."

Section 3004 G. C. reads in part:

'There shall be allowed annually to the prosecuting attorney, in addition to his salary and to the allowance provided by section 2914, an amount equal to one-half the official salary, to provide for expenses which may be

incurred by him in the performance of his official duties and in the furtherance of justice, *not otherwise provided for.* * * *"

It will be seen that the allowance made to the prosecuting attorney under this section is for the payment of expenses incurred by him in the performance of his official duties and in the furtherance of justice "not otherwise provided for."

Section 2914 G. C. provides:

"On or before the first Monday in January of each year in each county, the judge of the court of common pleas, or if there be more than one judge, the judges of such court in joint session, may fix an aggregate sum to be expended for the incoming year, for the compensation of assistants, clerks and stenographers of the prosecuting attorney's office."

It will be seen from a reading of this section that provision is made therein for the employment of assistants, clerks and stenographers by the prosecuting attorney. Therefore the allowance made to the prosecuting attorney under section 3004 cannot be used for the payment of such assistants, clerks and stenographers.

Section 2419 G. C. provides as follows:

"A court house, jail, offices for county officers, and an infirmary, shall be provided by the commissioners when, in their judgment, they, or any of them, are needed. Such buildings and offices shall be of such style, dimensions and expense, as the commissioners determine. They shall provide all rooms, fire and burglar proof vaults and safes, and other means of security in the office of the county treasurer, necessary for the protection of public moneys and property therein."

Quoting from opinion No. 185, rendered by this department on April 13, 1917:

"Under this section (2419) it is the duty of the county commissioners to furnish an office 'of such style, dimensions and expense as the commissioners determine' for the prosecuting attorney, and there being, therefore, express and ample provision for this expense, I am of the opinion that the same may not be paid under section 3004 G. C."

For the reasons set forth in the opinion and the different sections of the General Code, quoted, I must advise you that prosecuting attorneys may not use the allowance made to them under section 3004 G. C. for the payment of expenses incurred in the ordinary conduct of their office, but such matter should be taken care of as provided in sections 2914 and 2419 of the General Code, above quoted.

Very truly yours,
JOSEPH MCGHEE,
Attorney General.

1004.

COURTS OF DOMESTIC RELATIONS IN THE COUNTIES OF LUCAS, MAHONING, MONTGOMERY AND SUMMIT HAVE EXCLUSIVE JURISDICTION OF PROSECUTIONS UNDER SECTION 1655—PROSECUTIONS UNDER SECTION 12970 MAY BE BROUGHT BEFORE MAYOR OR JUSTICE OF THE PEACE.

Prosecutions for violations of section 1655 G. C., in the counties of Montgomery Mahoning, Summit and Lucas, should be brought in the court of domestic relations for

the reason that such court in those counties has been given exclusive jurisdiction in juvenile matters; and prosecutions under section 12970 *G. C. may be brought before the different mayors and justices of the peace in those counties having courts of domestic relations in the same manner as such prosecutions were had prior to the passage of these acts.*

COLUMBUS, OHIO, February 11, 1918.

The Board of State Charities, H. H. Shirer, Secretary, Columbus, Ohio.

GENTLEMEN:—I have your letter of recent date as follows:

"In the development of the so called courts of domestic relations, there seem to have been inserted certain new requirements which have occasioned a few interesting inquiries at this office.

The act creating such a court for Montgomery county (O. L. 106 p. 424) provides that all cases involving the care and custody of children shall be assigned to this court. A similar provision appears in the act creating such a court for Mahoning county (O. L. 107 p. 721).

In section 3 of the act creating a similar court in Lucas county (O. L. 107 p. 732) there is an extensive list of violations of the law relating to children, with the special proviso that all minor courts shall refer such cases to the court of domestic relations.

One query has arisen especially in connection with the courts in Montgomery and Mahoning couties, viz., does this requirement prohibit any case involving the care, custody and treatment of children from being begun in any other court than the court of domestic relations? The act relating to Summit county seems to provide that this may be done, but the case must be referred to such court.

Another question is, do the specific provisions mentioned in the acts creating such courts have any effect upon the general law requiring a grand jury indictment before a person can be convicted for non support, under the provisions of sections 13008 and 13009 of the General Code."

The cases "involving the care, custody and treatment of children," to which you refer, are, you inform me, cases involving the violation of the following sections:

"Section 1655. Whoever is charged by law with the care, support maintenance or education of a minor under the age of eighteen years, and is able to support or contribute toward the support or education of such minor, fails, neglects or refuses so to do, or who abandons such minor, or who unlawfully beats, injures, or otherwise ill treats such minor, or causes or allows him or her to engage in common begging, upon complaint filed in the juvenile court, as provided in this chapter, shall be fined not less than ten dollars, nor more than five hundred dollars, or imprisoned not less than ten days nor more than one year, or both. Such neglect, non support, or abandonment shall be deemed to have been committed in the county in which such minor may be at the time of such neglect, non support, or abandonment. Each day of such failure, neglect, or refusal shall constitute a separate offense, and the judge may order that such person stand committed until such fines and costs are paid."

"Section 12970. Whoever, having the control of or being the parent or guardian of a child under the age of sixteen years, wilfully abandons such child, or tortures, torments, or cruelly or unlawfully punishes it, or wilfully, unlawfully or negligently fails to furnish it necessary and proper food, cloth-

ing or shelter, shall be fined not less than ten dollars nor more than two hundred dollars or imprisoned not more than six months or both."

"Section 13008. Whoever, being the father, or when charged by law with the maintenance thereof, the mother, of a legitimate or illegitimate child under sixteen years of age, or the husband of a pregnant woman, living in this state, being able by reason of property, or by labor or earnings, to provide such child or such woman with necessary or proper home, care, food and clothing, neglects or refuses so to do, shall be imprisoned in a jail or workhouse at hard labor not less than six months nor more than one year, or in the penitentiary not less than one year nor more than three years."

"Section 13009. Whoever, being the father of a legitimate child under sixteen years of age, or, being the husband of a pregnant woman, leaves, with intent to abandon, such child or pregnant woman, shall be imprisoned in a jail or workhouse at hard labor not less than six months nor more than one year, or in the penitentiary not less than one year nor more than three years."

In the juvenile court law, as amended in 103 O. L., pp. 868 to 879, section 1659 G. C. was made to read as follows:

"Section 1659. When a minor under the age of eighteen years is arrested, such child, instead of being taken before a justice of the peace or police judge, shall be taken directly before such juvenile judge, or, if the child is taken before a justice of the peace or a judge of the police court, it shall be the duty of such justice of the peace or such judge of the police court, to transfer the case to the judge exercising the jurisdiction herein provided. The officer having such child in charge shall take it before such judge, who shall proceed to hear and dispose of the case in the same manner as if the child had been brought before the judge in the first instance."

The juvenile court act conferred exclusive jurisdiction on the juvenile courts of the state with reference to all law violations by minors under eighteen years of age, except in certain felony cases, but the jurisdiction of the juvenile court to hear and determine prosecutions against adults for violations of laws relating to the custody, care and treatment of children was not made exclusive in all cases.

It will be seen from a reading of section 1659 that the prosecutions brought under that section must be had in the juvenile court, but so far as the juvenile court laws are concerned prosecutions for violations of section 12970 may be had in the juvenile court, common pleas court or magistrate's court. Prosecutions under sections 13008 and 13009 may only be had upon indictment in a court of common pleas, since the violation of these sections is a felony.

McKelvy v. State, 87 O. S., 1.

It is plain here that if prosecution of the violations of the sections to which you refer cannot be, in some counties, in any court other than the domestic relations court the authority for this exclusive jurisdiction of such court must be found in the acts creating such courts. An examination of these different statutes is therefore necessary to determine this question of jurisdiction.

The act creating the Montgomery county court of domestic relations is found in 106 O. L., page 424, and reads in part:

"In addition to the judges hereinbefore provided for * * * there shall be elected * * * a judge of the court of common pleas for the county of

Montgomery * * *, with the powers, jurisdiction and duties as herein after provided and the same compensation as other judges of the court of common pleas of Montgomery county. He and his successors shall, however, be elected and designated as a judge of the court of common pleas, division of domestic relations, and all the powers provided for in title 4, chapter 8, of the General Code, relating to juvenile courts, shall be exercised in Montgomery county by said judge of said court of common pleas, and on and after January 1, 1918, there shall be assigned to the judge elected in pursuance of this act all juvenile court work and all divorce and alimony cases and cases involving the care and custody of children in said county, with concurrent jurisdiction in all criminal matters, * * *."

It will be seen from a reading of this act that the so called domestic relations court of Montgomery county is not a separate and distinct court, but simply a division of the court of common pleas, to which division certain business of the common pleas court has been exclusively assigned by statute, including all the juvenile court work. There is nothing in the provisions of this act that in any way limits or affects the jurisdiction of the magistrates with reference to the hearing of prosecutions under section 12970, or the jurisdiction of such magistrates to hear, as examining magistrates, prosecutions under sections 13008 and 13009.

The act creating the domestic relations court in Mahoning county is found in 107 O. L., page 721, and reads in part:

"Section 1. From and after the passage and taking effect of this act, there shall be one additional judge of the court of common pleas in and for Mahoning county, * * *. He shall have the same qualifications and receive the same compensation as is provided by law for the judges of the court of common pleas in Mahoning county. He shall exercise the same powers and have the same jurisdiction as is provided by law for judges of the court of common pleas. He and his successors shall, however, be elected and designated as a judge of the court of common pleas, division of domestic relations to such judge, shall be assigned all juvenile court work arising under title four, chapter eight of the General Code, and all divorce and alimony cases, and cases involving the care and custody of children in said county. * * *."

The wording of this act is practically identical with that found in the act creating the Montgomery county court and observations made in connection with that act apply with equal force to the Mahoning county domestic relations court act.

The act creating the Summit county domestic relations court is found in 107 O. L., p. 703, and reads in part:

"Section 1. From and after the passage and taking effect of this act, there shall be one additional judge of the court of common pleas in and for Summit county, who shall reside therein. * * *.

He shall have the same qualifications and shall receive the same compensation as is provided by law for the judges of the court of common pleas in Summit county. He shall exercise the same powers and have the same jurisdiction as is provided by law for judges of the court of common pleas. He and his successors shall, however, be elected and designated as a judge of the court of common pleas, division of domestic relations, and all the powers provided for in title four, chapter eight, of the General Code, relating to juvenile courts, shall be exercised in Summit county by such judge of said court of common pleas, and on and after the appointment of such judge, there shall

be assigned to said judge and his successors, elected or appointed, in pursuance of this act, all juvenile court work in said county. * * *."

This act is practically the same as the act creating the Montgomery and Mahoning counties courts and the same remarks are applicable.

The Lucas county court of domestic relations was created by the act found in 107 O. L., 732. This act reads in part:

"Section 1. There is hereby created a court of domestic relations for the county of Lucas in this state, which court shall be organized and opened for the exercise of its jurisdiction September first, nineteen hundred and seventeen, and shall be a court of record having a seal."

"*Section* 3. The clerk of the court of common pleas of said Lucas county shall be by virtue of his office, clerk of said court of domestic relations. Said clerk shall keep such records of the proceedings of the said court of domestic relations as are now required by law to be kept by said clerk of the proceedings of the court of common pleas. Of the proceedings relating to minors, and the support of women whose husbands are dead, such records shall be kept as may be prescribed by the rules of said court of domestic relations. The clerk of said court of domestic relations shall tax such costs in said proceedings as are now authorized by law to be taxed by the clerk in similar proceedings in courts exercising jurisdiction. On and after September first, nineteen hundred and seventeen, said court of domestic relations shall have exclusive jurisdiction within said Lucas county in and over all matters or proceedings, actions and causes that are now or may hereafter be within the jurisdiction conferred on a juvenile court or a juvenile judge or judges of the juvenile court, by chapter 8, title 4, part one, or under section 11181-1 of the General Code of this state including the granting of allowance for the partial support of women who are poor and have children to support as provided in said chapter 8, of said juvenile court act and shall have concurrent jurisdiction to issue writs of habeas corpus; also shall have concurrent jurisdiction in all the following proceedings, causes and actions; divorce, alimony and divorce and alimony cases and in cases involving the care, custody and control of minors; excluding cases within the civil jurisdiction of the probate court pertaining to guardians and wards and adoptions, also in all cases of violation of any law relating to the prevention of cruelty to children or the neglect or failure to provide proper home, food, clothing, shelter or care of a minor child or children; also in all cases of violation of any law, relating to the abandonment, non-support or ill-treatment of a child by its parents; also in all cases of violation of any law relating to the abandonment or ill-treatment of a child under sixteen years by its guardian; also in all cases of violation of any law relating to the employment of a child under fourteen years of age in public exhibitions or vocations, injurious to health, life or morals or which cause or permit it to suffer unnecessary physical or mental pain; also in all cases of violation of any law relating to the regulation, restriction or prohibition of the employment of minors. Also in all cases of violation of any law relating to the torturing, unlawfully punishing, ill-treating or depriving of any one of necessary food, clothing or shelter; also in bastardy cases wherein the accused is recognized for trial by the examining court or magistrate. Whenever any magistrate or court having jurisdiction in any cause, proceeding or prosecution shall find the controversy to be within the jurisdiction conferred upon the court of domestic relations, whether said cause or proceeding be civil or criminal, such magis-

trate or court shall immediately certify such cases to the court of domestic relations and proceed no further therein. But such court of domestic relations shall have jurisdiction to transfer and certify any such case or cause for trial to any judge of said common pleas court or magistrate or other judge in said county having jurisdiction of the subject matter, whether said case was originally commenced in said court or certified thereto. The board of county commissioners may require the clerk, in addition to the bond now required by law, to give a bond in not less than ten thousand nor more than thirty thousand dollars, conditioned that he will truly and faithfully pay over all moneys that may be received in his official capacity as clerk of said court of domestic relations; that he will enter a record of orders, decrees, judgments and proceedings of the court which he is by law required to enter and record, and faithfully and impartially perform all the duties of the said office."

"Section 6. Said court of domestic relations shall have the same power to issue process to compel the attendance of witnesses, to enforce obedience of its orders, judgements and decrees, as is possessed by the several courts of common pleas of this state. Said court shall be in session from day to day and without terms of court, provided, however, that the judge of said court shall have full power to order adjournments of the sitting of said court from time to time as he may deem advisable."

Quoting from an opinion of this department rendered January 23, 1918, addressed to Hon. James M. Cox:

"The Lucas county statute is different from the others in that it is the first which sought to make a distinct and separate court of domestic relations. In Hamilton, Mahoning and Summit counties the statute only pro vided for a division of the labor among the different judges of the court of common pleas providing that certain classes of cases should go to the common pleas judge who is selected to serve in the division of domestic relations of that court. * * *.

All that is done by the act is to call this one judge by a different name, or rather as an addition to his title, and then provides by statute for the assignment of these duties to him instead of having the judges make the assignment as in other cases."

It will be noted that the act creating the Lucas county court provides in section 3:

"* * * On and after September first, nineteen hundred and seventeen, said court of domestic relations shall have exclusive jurisdiction within said Lucas county in and over all matters or proceedings, actions and causes that are now or may hereafter be within the jurisdiction conferred on a juvenile court or a juvenile judge or judges of the juvenile court, by chapter 8, title 4, part 1, or under section 11181-1 of the General Code of this state, including the granting of allowance for the partial support of women who are poor and have children to support as provided in said chapter 8, of said juvenile court act, and shall have concurrent jurisdiction to issue writs of habeas corpus; also shall have concurrent jurisdiction in * * * cases involving the care, custody and control of minors; * * * also in all cases of violation of any law relating to the prevention of cruelty to children or the failure to provide proper home, food, clothing, shelter or care of a minor child or children; also in all cases of violation of any law relating to the

abandonment, non support or ill treatment of a child by its parents; also in all cases of violation of any law relating to the abandonment or ill treatment of a child under sixteen years by its guardian; also in all cases of violation of any law relating to the employment of a child under fourteen years of age in public exhibitions or vocations, injurious to health, life or morals or which cause or permit it to suffer unnecessary physical or mental pain; also in all cases of violation of any law relating to the regulation, restriction or prohibition of the employment of minors. Also in all cases of violation of any law relating to the torturing, unlawfully punishing, ill treating or depriving of any one of necessary food, clothing or shelter; also in bastardy cases wherein the accused is recognized for trial by the examining court or magistrate. Whenever any magistrate or court having jurisdiction in any cause, proceeding or prosecution shall find the controversy to be within the jurisdiction conferred upon the court of domestic relations, whether said cause or proceeding be civil or criminal, such magistrate or court shall immediately certify such cases to the court of domestic relations and proceed no further therein. But such court of domestic relations shall have jurisdiction to transfer and certify any such case or cause for trial to any judge of said common pleas court or magistrate or other judge in said county having jurisdiction of the subject matter, whether said case was originally commenced in said court or certified thereto. * * *."

The supreme court, in the case of State ex rel. D'Alton v. Ritchie et al, decided December 11, 1917, passed upon this statute and held:

"5. Section 3 of the act of the general assembly of Ohio, passed March 21, 1917 (107 O. L. 732), entitled 'An act to provide a court of domestic relations for Lucas county, Ohio, and prescribing the jurisdiction of said court,' is in conflict with section 26 of article II of the constitution of Ohio, in so far as it purports to confer jurisdiction upon that court to the exclusion of the jurisdiction conferred upon the common pleas court by the general laws of this state; but is valid as conferring jurisdiction concurrent with the jurisdiction of the common pleas court."

Donahue, J., says in the opinion:

"The entire act should not be held invalid merely because the attempt to make that jurisdiction exclusive of the jurisdiction of the common pleas court of Lucas county is unconstitutional.

This act is unconstitutional in so far as it purports to confer such exclusive jurisdiction, but it is valid as conferring jurisdiction concurrent with the common pleas court of that county.

This act contains a further provision requiring that, 'whenever any magistrate or court, having jurisdiction in any cause, proceeding, or prosecution, shall find the controversy to be within the jurisdiction conferred upon the court of domestic relations, whether said cause or proceeding be civil or criminal, such magistrate or court shall immediately certify such cases to the court of domestic relations, and proceed no further therein.'

If this provision is mandatory, then it is equally objectionable to section 26 of article II, for it would in effect deprive the common pleas court of Lucas county of jurisdiction conferred upon it by the general laws of this state. It is, however, a mere detail in furtherance of the exercise of the jurisdiction conferred upon the court of domestic relations, and similar pro-

visions, not purporting, however, to be mandatory, are found in the several acts creating local courts, which acts have been held constitutional by this court."

It will be noted that the supreme court viewed this provision as "a mere detail in furtherance of the exercise of the jurisdiction conferred upon the court of domestic relations." The court does not decide whether or not this provision of section 3 applies to all cases of which the court of domestic relations has jurisdiction, or to only those cases in which such court has exclusive jurisdiction. If it were construed to apply to all cases of which the court of domestic relations had jurisdiction, then the effect of this provision would be to confer exclusive jurisdiction upon the court of domestic relations in all cases coming properly before it. Inasmuch, however, as section 3 of the act sets out in much detail the different classes of cases in which the court of domestic relations shall have only a concurrent jurisdiction, it would seem that the provision referred to by Judge Donahue as being merely directory and as being "a mere detail in furtherance of the exercise of the jurisdiction conferred upon the court of domestic relations" refers only to juvenile court matters, exclusive jurisdiction of which is attempted to be conferred upon the court of domestic relations. From the fact, then, that only a concurrent jurisdiction is conferred upon the court of domestic relations of Lucas county in cases involving the care, custody and treatment of children, and viewing the provision of section 3 as to the transfer of cases from other courts to the court of domestic relations, as affecting only cases in which the domestic relations court has exclusive jurisdiction, I can see nothing in the act which in any way affects the jurisdiction of magistrates to hear and determine prosecutions under section 12970.

From a consideration of these different acts and sections of the General Code and the decision of the supreme court referred to, it is my opinion that prosecutions for violations of section 1655 of the General Code, in the counties of Montgomery, Mahoning, Summit and Lucas, should be brought in the court of domestic relations for the reason that such court in those counties has been given exclusive jurisdiction in juvenile matters; and prosecutions under section 12970 of the General Code may be brought before the different mayors and justices of the peace in those counties having courts of domestic relations in the same manner as such prosecutions were had prior to the passage of these acts.

Answering your second question, beg to advise that the supreme court of Ohio as before noted in the McKelvy case, held:

"As the punishment provided by section 13008, General Code of Ohio, for failure by a father to support his illegitimate child, may be imprisonment in the penitentiary, this makes such offense a felony, and a justice of the peace therefore has no jurisdiction to try a person accused of violating said section, but is only authorized to conduct a preliminary examination and either discharge the accused or recognize him to appear before the proper court."

Violations of sections 13008 and 13009 G. C. being felonies, prosecution thereof must be had upon indictment by the grand jury in the court of common pleas and the provisions of the several acts creating courts of domestic relations herein considered do not affect in any way such prosecutions under such sections.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1005.

COUNTY DITCHES—CLEANING AND REPAIRING.

The only methods for cleaning out and keeping in repair county ditches and removing obstructions therefrom are found in chapter 8 of the title on drainage and in the sections supplementary thereto, 6726-1 to 6726-4, and as to township or other public ditches there is no other proceeding than that prescribed in such chapter as it stood before the enactment of these sub-sections.

The above provisions furnish the only method of enforcing a removal of obstructions from tile ditches of such public character as above described, and in the same manner.

COLUMBUS, OHIO, February 11, 1918.

HON. C. A. STUBBS, *Prosecuting Attorney, Celina, Ohio.*

DEAR SIR:—Under date of December 27, 1917, you addressed the following inquiry to this office:

> "This is to inquire concerning the method of making repairs on county ditches. I am aware of the provisions of G. C. 6691 et seq., and G. C. 6726-1 et seq., but neither of these methods seem to take care of the difficulty which in brief is as follows:
>
> In a number of county ditches in Mercer county, the tile have broken down and the ditches are inefficient. The amount of repairs needed would make it impracticable to use either of the above methods as the cost of procedure would in many cases exceed the cost of repair.
>
> My inquiry is directed as to the manner in which these repairs should be made. Is it permissible for the county commissioners to make these repairs and pay for them out of the general county fund? If not, should the land owner on whose land the repair is needed be held to make the repair? In most of cases this would be inequitable.
>
> Will thank you for an early opinion as to exactly what should be done in these cases."

The sections of the statute mentioned by you above seem to be the only ones touching the subject of cleaning or repairing public ditches. It is true, as you suggest, that either of the proceedings provided for is cumbersome and costly for a trifling repair to a tile ditch. This criticism, however, is one that frequently applies to all these drainage proceedings, especially to those of small cost which could always be constructed, if the interested parties could agree, at great saving in cost.

An examination of chapter 8 of title 3, the drainage title, shows that it is intended to have application to the kind of a case you mention. This chapter provides the general scheme, which seems applicable to only open drains. The modus operandi is for the township ditch supervisor to divide the ditch into sections, apportioning such part of the length thereof to each land owner according to benefits, then requiring each to clean out the section apportioned to him, and in the event of failure, to sell out the work and have the cost certified to the county auditor to be collected as taxes. The chapter, however, is expressly made applicable to tile ditches by section 6709, which is as follows:

> "When a county, joint county or township ditch, or part thereof, has been tiled, it shall be subject to the provisions of this chapter. If in the judgment of the ditch supervisor, or supervisors of the township or townships

through which such ditch runs, said tile is small and insufficient to provide the necessary drainage, the surface ditch shall be kept open by the provisions of this chapter."

It is worthy to note that the chapter generally provides not only for the cleaning out of ditches but also for the keeping of them in repair, which last provision has special application to tile ditches. The very beginning of the first section in the chapter is a reference to both cleaning and keeping in repair of township, county and joint county ditches, and a number of other sections contain the phrase "keeping in repair."

As to the liability of the owner of the land on which a given part of the ditch is located, it is attempted to be provided for in section 6718, which reads:

"Obstructions found in the ditch, except those arising from the deposit of earth, sand and gravel, the growth of grass, weeds and brush, and floodwood, naturally and without artificial obstructions to cause them, shall be deemed to have been placed there by the act of the owner of the land. A land owner shall be liable for all acts and omissions of his tenants, pertaining to the ditch."

Applying this section to tile ditches, the obstruction will always consist of the "deposit of earth, sand and gravel," for if the tile be broken or dislocated, the obstruction of the ditch by earth is certain to take place. Of course in the nature of the case it is impossible to make just and proper or even a sensible division of the labor of removing such obstruction, as usually it cannot be known where it exists and usually it only exists for a short distance, so that if each owner, to whom a section is assigned would simply investigate as to whether the obstruction was within his limit, the one who found it would then have all the work to do, which would be a sort of lottery though it would be possible, and really proper, for the township ditch supervisors to locate and investigate the difficulty before making the apportionment.

The apportionment so made, of course, exists for future "clean outs" and again the element of chance enters into it, as there is no general means of predicting where another obstruction will be located.

There is no provision of the statutes, so far as I know, permitting the commissioners to pay for these repairs out of the general fund. It might be done by having the ditch supervisor apportion to the county the section containing the obstruction This might be done if any county road were benefited by the ditch. Of course this apportionment being a permanent one, the same thing could not be done again when another obstruction occurred in another place. If the repair were made by the county the payment would naturally be from the general fund.

The other provision mentioned by you applies to county ditches only. It is the act of March 12, 1913, found in 103 O. L., page 185, and carried in Page and Adams Supplement as section 6726-1 to section 6726-4. It provides a method which can be used for any county ditch in keeping the same in repair, and aside from the objection you make to it, as to its being top heavy and complicated and expensive for a trifling improvement, it furnishes a satisfactory and thorough method for keeping county ditches in repair. Unless by some means these trifling repairs can be made by agreement, the two methods you mention furnish the only solution to your question.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1006.

DELINQUENT LANDS—ADVERTISING FEE CANNOT BE COLLECTED WHEN TAXES PAID BEFORE CERTIFICATION.

The fee of sixty cents for advertising delinquent lands (G. C. Sec. 5713, 107 O. L 737) can not be exacted when the delinquent taxes have been paid before the date of certification.

COLUMBUS, OHIO, February 11, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of January 28th requesting my opinion upon the following question:

> "In the event that a person pays the taxes and penalty on a piece of property advertised in the delinquent list prior to the second Tuesday in February, can the county auditor charge the 60 cents item for advertising against such person or does this fee not attach until after the property becomes duly certified, as provided in section 10 of the delinquent tax law, to be found in 107 O. L. 737?"

Your question is answered, in my opinion, by the following provisions of sections 9 and 10 of the act referred to, therein designated as sections 5712 and 5713 of the General Code.

Section 9 provides generally for making up the delinquent land tax certificate. It provides that the county treasurer and the county auditor shall, on the second Tuesday in February, make such certificate "for each tract of land * * * contained in such advertisement, on which the *taxes, assessments and penalty have not been paid.*"

Section 10 provides that

> "The state shall have a first and best lien on the premises *described in said certification,* for the amount of taxes, assessments and penalty, together with interest * * *, and the additional charge of twenty-five cents for the making of said certification, and sixty cents for advertising."

Section 10 is the only section which authorizes the imposition of the charge of sixty cents for advertising. It is a charge only against the "premises described in said certification." No premises are to be certified unless "the taxes, assessments and penalty have not been paid." The last quoted clause occurring in section 9 is, in my opinion, definitive and not descriptive in import, and the county treasurer and the county auditor in making up the certificate are required to determine the fact in question as of the second Tuesday in February. In other words, the certificate does not include all lands contained in the advertisement, but only such lands on which the taxes, assessments and penalty have not been paid. Lands on which the taxes, assessments and penalty have been paid on the second Tuesday in February do not belong in the certificate and the sixty cent charge for advertising, being limited as it is to the lands which are described in the certificate can not be charged against the lands nor exacted from their owners, though the advertisement of the lands has actually been made.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1007.

APPROVAL OF BOND ISSUE—SPRINGFIELD CITY SCHOOL DISTRICT —$160,000.00.

COLUMBUS, OHIO, February 12, 1918.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE—Bonds of the Springfield city school district in the sum of $160,000.00 for the purpose of purchasing sites for and erecting school houses thereon and for enlarging, repairing and furnishing school houses in said school district.

I have carefully examined the corrected transcript of the proceedings of the board of education of the Springfield city school district, relating to the above issue of bonds, which, subject to the approval of this department, was purchased by the resolution adopted by you under date of February 6, 1918.

My examination of the corrected transcript of the proceedings relating to this issue shows that said proceedings are in substantial compliance with the provisions of the General Code of Ohio, relating to bond issues of this kind.

I am therefore of the opinion that properly prepared bonds of said school district, covering the above issue, will, when the same are properly executed and delivered, constitute valid and subsisting obligations of said school district.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1008.

COUNCIL MAY DIRECT MUNICIPAL WATER WORKS OFFICIALS TO FURNISH WATER WITHOUT CHARGE FOR STREET WATER TROUGHS AND DRINKING FOUNTAINS.

The council of a municipality has authority to direct the officials in control of a water works owned by the municipality to furnish water without char e for street water troughs and drinking fountains. This will apply to cities as well as to villages. There is no obligation upon the officials in charge of the water works to furnish such water free except upon authority and direction of the council.

COLUMBUS, OHIO, February 13, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Under recent date you submit the following inquiry:

"We are referring you to opinion of the attorney-general recorded in the annual reports of 1912, page 1977, and call your attention to the first paragraph of the synopsis.

We also refer you to an opinion of the attorney-general recorded in the annual reports of 1914, page 756.

We respectfully request your written opinion upon the following questions:

(1) Must a municipal water works furnish water without charge for street watering troughs and drinking fountains when such watering troughs and drinking fountains are in no way connected with a public building?

We will frankly state that in all of our city water works examinations we have constantly held that such water should *not* be furnished free.

(2) Does your ruling apply in both cities and villages?"

You call my attention to the opinion of Hon. Timothy S. Hogan, attorney-general, at page 1977, of the Annual Reports of the Attorney-General for 1912. The first branch of the syllabus in this opinion reads as follows:

"The purposes for which free water may be supplied by the board of trustees of public affairs having been specified in section 3963 General Code, and street improvements not being included as one of said purposes, said board has not only the right but is bound in duty, to charge a rental to council for water used for said purposes."

The other opinion to which you refer is by Hon. Timothy S. Hogan, attorney-general, and reported at page 756, of the Annual Reports of the Attorney-General for 1914. The syllabus in this opinion is as follows:

"The board of trustees of public affairs can not require the village council to pay for water furnished for watering troughs or public drinking fountains installed on a village street, said water being furnished from a municipally owned plant. Such board of public affairs cannot charge for water furnished and used in village city hall, even though part of such hall is rented as a lodge room."

This is directly upon the question which you now submit. You do not state in your inquiry whether the water troughs or drinking fountains have been established by the municipality or by charitable institutions, or by private individuals. For the purpose of this opinion it will be assumed that they are established and maintained by the municipal corporation.

Section 3963 G. C. specifies certain provisions for which water may be furnished without charge by a water works owned by a city. This section is also made applicable to water works owned by a village.

Said section 3963 G. C. reads in part as follows:

"No charge shall be made by the director of public service in cities, or by the board of trustees of public affairs in villages, for supplying water for extinguishing fires, cleaning fire apparatus, or for furnishing or supplying connections with fire hydrants, and keeping them in repair for fire department purposes, the cleaning of market houses, the use of any public building belonging to the corporation, or any hospital, asylum, or other charitable institutions, devoted to the relief of the poor, aged, infirm, or destitute persons or orphan or delinquent children, or for the use of public school buildings; * * *."

Before considering the provisions of this section, I desire to review two recent opinions rendered by me.

Under date of March 20, 1917, opinion No. 128 was given to your department in which it was held that the council of a village which owns and operates a municipal light plant has authority to direct the trustees of public affairs to furnish current for street lighting without charge.

Under date of December 24, 1917, in opinion No. 888, given to your department, the conclusion therein reached is as follows:

> "It is within the discretion of council of a municipality to require a gas or electric plant owned and operated by such municipality, to furnish gas or electric current free of charge to such municipality for any and all municipal purposes."

In the case of gas or electric light plants owned and operated by a municipality there is no provision of statute which provides that gas or electricity may be furnished for municipal purposes without charge. In fact no specific grant of such power is necessary. The reasoning of the above opinion would apply with equal force to a water works system owned by a municipality unless these principles are changed by virtue of the provisions of section 3963 General Code.

In the case of Sewickley Water Works Commissioners v. Sewickley Borough, 159 Pa. St., 194, the act in question authorized a board of water commissioners to construct and operate a system of water works for the borough, the money therefor being furnished by the borough. It was held in the opinion:

> "(2) That the borough could without the consent or permission of the commissioners, use the water from the water works to sprinkle the streets and to lay sewers."

In the case of Board of Water Commissioners v. Detroit City Street Railway Company, 131 Mich., 1, it is held that where the city owns a water works, the city could not charge for sprinkling the streets. In this case the water works was in charge of a board of water commissioners.

In the case of Twitchell v. City of Spokane, 104 Pac., 150 (Wash.) the fourth branch of the syllabus reads as follows:

> "A city owning its own water works may furnish water for city and charitable purposes free."

In neither of these cases does it appear that there was a statute which specifically authorized the furnishing of water to the city free of charge.

In the opinion of the attorney-general, first above referred to, in construing the provisions of section 3963 G. C., it is said:

> "The legislature in enacting section 3963 General Code, supra, has seen fit to designate exactly the purposes for which free water shall be supplied by the board of trustees of public affairs and under the general rule of law "expressio unis est excluso alterius" the legislature not having seen fit to provide that free water can be furnished for street improvement, I am of the opinion that the board of trustees of public affairs has the right to charge for water used in the construction of street improvement; not only that they have the right but, for the reason above stated, it is the duty of such trustees so to do."

The above conclusion is reached by applying the maximum *expressio unius est exclusio alterius.*

In opinion No. 913, given to your department under date of January 5, 1918, in construing the above section 3963, this language is used:

"This section enumerates the purposes for which a city or village may furnish water free of charge. The enumeration of these purposes excludes all others."

There are exceptions to the rule of construction that the mention of certain specific things excludes others. It is my opinion that the above statements in construing the said section 3963 G. C. should receive some limitation.

The general rule of this maximum is stated at section 491 of Lewis' Sutherland on Statutory Construction. He states the rule as follows:

"What is expressed is exclusive only when it is creative, or in derogation of some existing law, or of some provisions in the particular act."

At section 495 he enumerates some of the exceptions to the general rule. He says:

"The maxim does not apply to a statute the language of which may fairly comprehend many different cases, in which some only are expressly mentioned by way of example merely, and not as excluding others of a similar nature. So where the words used by the legislature are general and the statute is only declaratory of the common law, it will extend to other persons and things besides those actually named. If there is some special reason for mentioning one, and none for mentioning a second which is otherwise within the statute, the absence of any mention of the latter will not exclude it."

It will be observed that in section 3963 G. C. there is provision for supplying water free of charge for certain municipal purposes and also for certain charitable purposes.

In opinion No. 913, above referred to, the question of furnishing water to departments, institutions or public buildings was under consideration. The departments supplied with free water were not designated. The question submitted was general and the general principle of law was applied thereto.

It appears from the cases above cited that a municipality owning a water works system may furnish water free for municipal purposes without any specific grant of statute. Therefore, when it was provided in section 3963 General Code that water could be furnished free for the purpose of extinguisting fires, of cleaning market houses and for the use of any public building belonging to the corporation, it did not grant any power which was not already possessed by council under its general authority to manage and control the affairs of the municipality. In such case the principle of construction, that the expression of one excludes others, does not apply.

The question as to whether the supplying of water to a public watering trough or to a public drinking fountain is a public use or purpose is one that needs no citation of authority. The public watering trough and town pump are institutions which have come down to us from time immemorial and it is now rather late to question their public character. The fact that this is now being furnished through a system of pipes and springs rather than by wells or springs does not change the public character of these troughs or fountains.

It is necessary, however, to consider the provisions of other sections before reaching a final conclusion.

Section 3958 reads as follows:

"For the purpose of paying the expenses of conducting and managing the water works, such director may assess and collect from time to time a

water rent of sufficient amount in such manner as he deems most equitable upon all tenements and premises supplied with water. When more than one tenant or water taker is supplied with one hydrant or off the same pipe, and when the assessments therefor are not paid when due, the director shall look directly to the owner of the property for so much of the water rent thereof as remains unpaid, which shall be collected in the same manner as other city taxes."

Under authority of this section, the director of public service is directed to assess and collect water rents upon all tenants and premises supplied with water. There is no provision, however, which requires him to collect water rent from the municipal corporation.

Section 3959 G. C. reads as follows:

"After paying the expenses of conducting and managing the water works, any surplus therefrom may be applied to the repairs, enlargement or extension of the works or of the reservoirs, the payment of the interest of any loan made for their construction or for the creation of a sinking fund for the liquidation of the debt. The amount authorized to be levied and assessed for water works purposes shall be applied by the council to the creation of the sinking fund for the payment of the indebtedness incurred for the construction and extension of water works and for no other purpose whatever."

Section 3977 G. C. reads:

"For the purpose of paying the interest on the money borrowed for the erection and completion of water works, during the erection and completion thereof, and before they are put in operation, a tax of sufficient amount shall be assessed and collected each year in the usual manner of levying and collecting taxes in the corporations upon all the taxable property thereof."

Section 3978 G. C. reads:

"For the purpose of paying the interest on any loan which a municipality has made for the erection or extension of water works, and after they have been put in operation, and for building of machinery, a tax of sufficient amount may be assessed and collected, in addition to the amount authorized by law, by the council each year upon all the taxable property, both real and personal, in such municipality."

These sections authorize the levying of taxes for the purpose of paying interest upon money borrowed for the erection of the water works. It is apparent that the amounts received as water rent are not the only funds which are or may be received by the municipality for the use of the water works system.

In the case of Board of Water Commissioners v. Detroit Citizens Street Railway Co., 131 Mich., 1, cited above, it is held:

"The duty to erect fire hydrants, devolving upon the board of water commissioners of the city of Detroit, carries with it the duty to supply them with water, and hence, in the absence of statutory provisions, the board is not entitled to compensation for water taken from such hydrants for a general public purpose, e. g., the sprinkling of the city streets."

In this case the sprinkling of the streets was done by a private corporation, but was required by council. At page 3, Hooker, J., says:

> "It has been shown that the object of the act was to furnish water for the public and private uses of the inhabitants of the city; and there is no express provision for payment for water used for the general and ordinary public purposes, such as fire and street uses. On the other hand, there is an evident intention to keep the reasonable control of the use of water for these purposes in the board, so far as it is practicable, and not to give to the council or any other board, unlimited control and power to make requisitions upon the water board, although the use of the hydrant, etc., is confided to the proper departments."

In the case of Board of Water Commissioners v. Commissioners, 126 Mich. 459, it was held by a divided opinion, the court standing three to two, that the water commissioners were not bound to furnish water free for parks and public grounds under charge of the park commissioners. The majority opinion was upon the theory that the water works was to be maintained by the consumers and not by taxation.

Grant, J., rendering the majority opinion, says at page 461:

> "We are therefore of the opinion that the relator is empowered to charge reasonable rates for water furnished for public purposes, and that the legislature alone possesses the power to exempt the city from the payment of water rents."

This, however, was not the view in the later case of Board of Water Commissioners v. Detroit Citizens Street Railway Co., supra.

It appears from the dissenting opinion that the statutes provided as to the collection of rates as follows:

> "Said commissioners shall from time to time, cause to be assessed the water rate to be paid by the owner or occupant of each house or other building having or using water, upon such basis as they shall deem equitable."

This provision is very much like that contained in section 3958 G. C., above cited.

At section 1803, McQuillin on Municipal Corporations says:

> "Statutes often authorize a plant owned by a municipality to furnish supplies free to charitable institutions. And, independent of statute, the 'right of the city to furnish water for municipal and charitable purposes free can hardly be doubted.' "

It is clear that independent of statute council would have authority to require the director of public service to furnish water free of charge to the municipality for municipal purposes. The mere fact that the director of public service is given authority to assess and collect water rents does not give him authority to collect such rents from the municipality. In the absence of express provision to charge for water used by a municipality, it is my opinion that the council has authority to require the furnishing of free water for municipal purposes.

It is my opinion, therefore, that the council of a municipality has authority to direct the officials in control of a water works owned by the municipality to furnish water without charge for street watering troughs and drinking fountains. This will apply to cities as well as to villages. There is no obligation upon the officials in charge of the water works to furnish such water free except upon authority and direction of the council.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1009.

APPROVAL OF CONTRACT BETWEEN THE BOARD OF TRUSTEES OF THE COMBINED NORMAL AND INDUSTRIAL DEPARTMENT OF WILBERFORCE UNIVERSITY AND THE BABCOCK & WILCOX CO.

COLUMBUS, OHIO, February 14, 1918.

MR. WILLIAM A. JOINER, *Superintendent Combined Normal and Industrial Department, Wilberforce University, Wilberforce, Ohio.*

DEAR SIR:—On behalf of the board of trustees of the combined normal and industrial department of Wilberforce University you have submitted the contract entered into between said board of trustees and The Babcock & Wilcox Co. under date of September 7, 1917, for the construction and supervision of the completion of one Babcock & Wilcox boiler without soot blower in the power house of your institution, said contract calling for the payment of $5,613.00. At the same time you submitted a bond securing said contract.

I have carefully examined the contract and finding the same to be in compliance with law and the auditor of state having certified that there are funds available for the purpose of said contract, I have this day approved the same and filed the same in the office of the auditor of state.

I am herewith enclosing you a duplicate copy of the bond which you submitted with the papers in question.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1010.

WHEN BONDS ARE ISSUED TO ERECT CHILDREN'S HOME COSTING IN EXCESS OF $25,000.00, A BUILDING COMMISSION MUST BE APPOINTED—METHOD OF PROCEDURE WHEN COUNTY BUILDINGS COST IN EXCESS OF $25,000.00—WHEN BUILDING COMMISSION REQUIRED, COUNTY COMMISSIONERS HAVE NO AUTHORITY TO EMPLOY ARCHITECT TO DRAW PLANS.

Where bonds are issued by a county under authority of sections 5638 *et seq., General Code, to erect a county children's home costing in excess of twenty-five thousand dollars, a building commission must be appointed under authority of section* 2333, *General Code.*

Where a county building costs in excess of twenty-five thousand dollars, sections 2333 *to* 2342 *General Code do not provide a separate and distinct method of procedure from that provided by sections* 2343 *to* 2366 *General Code. All of these sections govern the building commission in the construction of such building.*

Where the appointment of a building commission is required under section 2333 General Code, the county commissioners have no authority to employ an architect to draw plans for such building, and a contract entered into by the county commissioners for that purpose before the appointment of a building commission is invalid.

COLUMBUS, OHIO, February 14, 1918.

HON. MELL G. UNDERWOOD, *Prosecuting Attorney, New Lexington, Ohio.*

DEAR SIR:—Under date of February 5, 1918, you submit the following inquiries to this department:

> "At the general primary election held in this county on April 25, 1916, a vote was taken under sections 5638, 5639-1, 5640-1, 5641-1 and 5642-1 of the General Code of Ohio, on the proposition of erecting a children's home in this county and the issuing of bonds to derive funds out of which to pay for the same. The proposition carried for the issuing of $42,000.00 in bonds, for the erection, furnishing and equipping of a children's home for Perry county.
>
> The board of county commissioners propose to erect a children's home costing that amount, independent of the cost of any land or site upon which said home is to be erected, that is to say—the building furnished, heated, lighted and ready for occupancy will cost that amount.
>
> Do the provisions of section 2333 to section 2342 of the General Code of Ohio apply, and is it mandatory to have a building commission under said sections?
>
> The board of county commissioners, on May 25, 1916, acting under authority of section 2343 of the General Code of Ohio, contracted with an architect for the making of drawings and specifications for use in the construction of said children's home.
>
> Do the provisions of sections 2333 to 2342, inclusive, of the General Code of Ohio, and sections 2343 to 2366 of the General Code of Ohio provide separate and distinct methods of procedure in the construction of a children's home?
>
> In case your opinion should be that it is necessary for a building commission to be appointed in the construction of said children's home, costing the amount stated, would the act of the board of county commissioners in employing an architect previous to the appointment of such commission be valid and binding?"

Section 2333 General Code provides as follows:

> "When county commissioners have determined to erect a court house or other county building at a cost to exceed twenty-five thousand dollars, they shall submit the question of issuing bonds of the county therefor to vote of the electors thereof. If determined in the affirmative, within thirty days thereafter, the county commissioners shall apply to the judge of a court of common pleas of the county who shall appoint four suitable and competent freehold electors of the county, who shall in connection with the county commissioners constitute a building commission and serve until its completion. Not more than two of such appointees shall be of the same political party."

Section 2343 General Code provides:

> "When it becomes necessary for the commissioners of a county to erect or cause to be erected a public building, or substructure for a bridge, or an

addition to or alteration thereof, before entering into any contract therefor or repair thereof or for the supply of any materials therefor, they shall cause to be made by a competent architect or civil engineer the following: full and accurate plans showing all necessary details of the work and materials required with working plans suitable for the use of mechanics or other builders in the construction thereof, so drawn as to be easily understood; accurate bills, showing the exact amount of the different kinds of material, necessary to the construction, to accompany the plans; full and complete specifications of the work to be performed showing the manner and style required to be done, with such directions as will enable a competent builder to carry them out, and afford to bidders all needful information; a full and accurate estimate of each item of expense, and of the aggregate cost thereof.

Nothing in this section shall prevent the commissioners from receiving from bidders on iron or reinforced concrete substructures for bridges the necessary plans and specifications therefor."

Sections 5638 et seq. General Code, referred to by you, authorize the county commissioners to issue bonds for the erection of county buildings upon submitting the same to a vote when the cost exceeds fifteen thousand dollars. It is not necessary to quote from these sections.

The first question presented by you was decided by Hon. Timothy S. Hogan in an opinion to Hon. Charles F. Adams, prosecuting attorney, Elyria, Ohio, as shown at page 251 of the Annual Report of the Attorney-General for 1914. In that opinion the fact was that bonds had been issued under authority of sections 5638 et seq. General Code for the erection of an infirmary building. The first branch of the syllabus reads:

"Section 2333 General Code governs and must be followed by the commissioners proceeding to construct county buildings at a cost exceeding twenty-five thousand dollars."

The same conclusion was reached by Hon. Edward C. Turner, attorney-general, in an opinion reported at page 2507 of the Opinions of the Attorney-General for 1915, as to the building of a children's home. He held:

"When a county children's home is to be erected in any county at a cost to exceed twenty-five thousand dollars, a building commission is required to be appointed under the provisions of section 2333 General Code."

In the above opinion the fact was that bonds had been issued under authority of sections 3077 and 3078 General Code.

There are other opinions by my predecessors to the same effect. I concur in the above conclusions and hold that the appointment of a building commission is necessary where a county builds a county children's home costing in excess of twenty-five thousand dollars.

As applying to your second question, in an opinion of Hon. Edward C. Turner, attorney-general, as shown at page 216 of the Opinions of the Attorney-General for 1916, the second branch of the syllabus reads:

"Section 2338 General Code, as amended by the adoption of the Code in 1910, limits the powers of building commissions as granted in the original act creating them, and the provisions of sections 2343 to 2366 General Code, applying to the erection of public buildings must be observed by said commission. In case of the erection of an infirmary, the county commissioners

must approve the plans as provided by sections 2349 General Code, and the prosecuting attorney must approve the contracts as provided by section 2356 General Code."

The appointment of a building commission only applies when the cost of the building exceeds twenty-five thousand dollars. Sections 2343 et seq. General Code apply to all county buildings and also to bridges.

Sections 2333 to 2342 General Code are not distinct from sections 2343 to 2366 General Code, where a building commission is appointed and the cost is in excess of twenty-five thousand dollars. Sections 2333 to 2342 General Code do not apply when the cost is less than twenty-five thousand dollars. Sections 2343 to 2366 General Code do apply to such cases. To that extent they provide distinct methods of procedure.

It appears that a building commission has not been appointed, and that the county commissioners employed an architect to draw plans and specifications.

Section 2339 General Code authorizes the building commission to employ an architect. Said section reads:

> "The commission may employ architects, superintendents and other necessary employes during such construction and fix their compensation and bond."

As the appointment of a building commission is required and they are empowered to employ an architect, it necessarily follows that the county commissioners cannot employ an architect for the erection of a building which is to be built under supervision of the building commission.

It is my opinion that the act of the county commissioners in employing the architect is invalid.

The above conclusions are supported by the case of State ex rel. v. Green, 22 C. C., n. s., 1, wherein it is held:

> "A building commission, constituted under the provisions of section 2333, is by virtue of the terms of G. C. section 2338 governed by the provisions of G. C. section 2343, requiring accurate and complete plans and specifications, and also by the provisions of G. C. section 2355, that such contract shall be awarded to the person who offers to perform the labor and furnish materials at the lowest price."

A motion was made in the supreme court to certify the record in the above case, but was overruled for the reason that no error had intervened, although the question was one of public interest.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1011.

DISAPPROVAL OF BOND ISSUE OF WILLIAMS COUNTY—BONDS ISSUED BY COUNTY COMMISSIONERS UNDER SECTION 1223 G. C. ARE REQUIRED TO MATURE IN NOT MORE THAN TEN YEARS—RESOLUTION BY THE INDUSTRIAL COMMISSION TO PURCHASE THE WHOLE OF SAID ISSUE, WHEN ALL OF SAID BONDS DO NOT MATURE WITHIN TEN YEARS, INVALID.

All the bonds covering an issue provided for by the county commissioners under section 1223 G. C., are required to mature in not more than ten years after their issue, and

where it appears by the resolution of the board of county commissioners providing for the issue of said bonds that some of the bonds covering said issue will mature after said period of time, and the resolution of the industrial commission providing for the purchase of said issue of bonds does not indicate any intention to purchase any amount or part of said bonds less than the whole of said issue is invalid with respect to the right of the industrial commission to complete the purchase of said bonds under said resolution.

COLUMBUS, OHIO, Februray 16, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of Williams county, Ohio, in the sum of $36,000.00 to pay the shares of said county and benefited property and a part of the share of Madison township, said county, in the improvement of a certain section of inter-county highway No. 306 in said county and township.

I am herewith returning, without my approval, transcript of the proceedings of the board of county commissioners of Williams county, Ohio, and other officers relating to the above bond issue.

The board of county commissioners of said county has provided for the issue of said bonds under the authority of section 1223 G. C. for the purpose of providing funds to pay the shares of said county and benefited property to be assessed for the improvement, as well as for the purpose of paying a part of the cost and expense of said improvement to be paid by Madison township in said county.

A resolution providing for the issue of these bonds states that said bonds in the denomination of $500.00 shall be dated February 1, 1918. By said resolution the first of these bonds is made payable March 10, 1919; the balance of the bonds are made payable at subsequent intervals of six months each, in such manner that two of said bonds become due and payable March 10, 1928, and the last two bonds covering said issue become due and payable September 10, 1928.

It is evident that the resolution of the board of county commissioners providing for this issue of bonds, insofar as the same provides for the maturities of the bonds covering this issue, is in conflict with the following provision of section 1223 G. C.:

> "Such bonds shall state for what purpose issued and bear interest at a rate not to exceed five per cent. per annum, payable semi-annually, and in such amounts and to mature in not more than ten years after their issue as the county commissioners shall determine."

In an exact sense it may, perhaps, be said that bonds are not issued until executed and delivered, and if any intention on the part of the county commissioners to defer the execution and delivery of these bonds until September 10, 1918, were here indicated, another view with respect to the validity of this resolution might be presented. Nothing of this kind appears, however, and as a practical proposition I have no hesitation in saying that said resolution providing for the issue of these bonds offends against the express provisions of section 1223 G. C. in the respect above indicated.

A question of some interest is presented with respect to the validity of such of the bonds covering this issue as by the resolution mature within the ten year period prescribed by section 1223 G. C., but inasmuch as your resolution providing for the purchase of these bonds, subject to the approval of this department, does not indicate any intention on your part to purchase any part of this issue less than the whole,

I do not deem it necessary to discuss this question, and feel that I have no discretion to do otherwise than to disapprove the issue for the reason above noted.

A number of other defects and uncertainties which forbid my approval of this issue on the present transcript is disclosed by an examination of the same. In the first place not enough facts are disclosed to indicate clearly whether the proceedings relating to this bond issue, other than the resolution immediately providing for same, are governed by the provisions of the Cass law or by the later provisions of the White-Mulcahy law. This question would probably be cleared up by the insertion in the transcript of copy and date of the order of the state highway commissioner approving for construction the particular section of this road for the improvement of which these bonds are issued.

Again, the consideration of this transcript is confused by the fact that some of the proceedings indicated therein contemplate the improvement of this road by the state highway commissioner under the statutes relating to inter-county highways, while other of said proceedings contemplate the improvement of said road by the board of county commissioners under the provisions of section 6906 et seq. of the General Code, while still other of said proceedings partake of the nature of both of said schemes of road improvement.

A serious question with respect to the validity of these bonds is presented by the fact that they are issued for the purpose, in part, of providing money to pay a portion of the cost and expense of the improvement to be ultimately paid by Madison township in said county.

By a resolution directing the state highway commissioner to proceed with the construction of this improvement, the county commissioners of Williams county attempted to apportion the cost and expense of said improvement between the state of Ohio, Williams county, Madison township, and the abutting land owners. In said resolution it is recited that the estimated cost of said improvement is $60,000.00, and inasmuch as the portion therein assessed to Madison township is 35 per cent. of the cost and expense of the improvement this would amount to $21,000.00, as the part of the cost and expense of said improvement to be paid by Madison township. It appears, however, by the transcript that the board of county commissioners, acting under authority of section 1223 G. C., has heretofore issued and sold bonds of the county in the sum of $21,000.00 for the purpose of paying Madison township's share of the improvement. On this basis, therefore, it is evident that the county commissioners have in fund the full amount of Madison township's share of this improvement, and there would be, therefore, no authority to include such share, or any part thereof, in the proposed bond issue here under consideration.

However, the final resolution adopted by the board of county commissioners, under date of July 18, 1917, recites that the estimated cost and expense of the improvement is $72,700.00, all of which amount over and above the sum of $15,000.00 to be contributed by the state, is assumed in the first instance by the county, as required by section 1218 G. C.

I may here state parenthetically that the transcript does not clearly show why the state is not paying 50 per cent. of the cost and expense of the improvement as provided by section 1213 G. C.; but with respect to this question I assume that there are one or more improvements to be made in the county and that the cost and expense thereof exceed twice the amount apportioned by the state to the county, and that the $15,000.00 to be paid by the state in this instance is the amount agreed upon between the state and the board of county commissioners; or, in other words, that this sum is the full amount now credited to the county.

On the basis of an estimated cost of $72,700.00, it is evident that if the township is still to pay 35 per cent. of the cost and expense of the improvement, the $21,000.00 received by the county as the proceeds of said former bond issue will not be sufficient to pay the township's share of the cost and expense of the improvement. However,

I fail to find in the transcript anything requiring said township to pay more towards the cost and expense of this improvement than is apportioned to it by the provisions of section 1214 G. C., to wit: 15 per cent. thereof exclusive of the cost and expense of bridges and culverts.

Under section 1217 G. C. it is competent for the township trustees of a township to waive a part or all of the apportionment of the cost and expense of such improvement to be paid by the county and assume any part or all of the cost and expense of such improvement in excess of the amount received from the state.

I fail to find any such agreement as this on the part of the trustees of Madison township. The transcript does show that in a resolution adopted by the trustees of said township July 29, 1916, the trustees agreed to pay and cause to be paid that part of the cost and expense of constructing and improving said road which may be apportioned to and assessed against Madison township.

It is quite clear to my mind that the resolution of the township trustees incorporating this agreement was adopted in contemplation of the improvement of this road by the county commissioners. In any event I am not convinced that this agreement is sufficient to make Madison township liable for any part of the cost and expense of this inter-county highway improvement in excess of the amount apportioned to it by the statute.

There are other defects in the transcript, all of which, perhaps, might be corrected by further information. For instance, the transcript does not contain any statement as to the amount of outstanding bonds issued by the county for the construction of inter-county highway improvements. This information, of course, is required in order that it may be determined whether or not the proposed issue, taken together. with outstanding bonds of the county issued for like purpose, exceed 1 per cent. of the tax duplicate of the county, and in this connection I may say that the transcript does not contain any statement of the tax duplicate valuation of the taxable real and personal property in said county.

Further to the point the transcript does not state the existing tax rates in said county, nor those in Madison township and the municipalities therein. Neither does it advise as to the tax duplicate valuation of the taxable real and personal property in Madison township; nor for that matter are we advised, except inferentially, as to the portion of the cost and expense of this improvement to be paid by Madison township, which is covered by this proposed bond issue.

As above indicated, these last named objections may, perhaps, be removed by further information, but inasmuch as I feel that I am required to disapprove said bond issue on the present legislation of the bo rd of county commissioners for the specific reason first above stated, I am returning said transcript to you with the advice that you do not purchase said bonds.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1012.

SHERIFF NOT ENTITLED TO FEES FOR WORK PERFORMED UNDER SECTIONS 5652-1 TO 5652-15 G. C.—EXPENSE OF POSTING NOTICES, HOUSING, FEEDING, ETC., OF DOGS PAID FROM GENERAL COUNTY FUND.

1. *Sheriff not entitled to be paid anything for work performed under sections* 5652-1 *to* 5652-15 *inclusive, G. C.* (107 *O. L.* 534).

2. *Expenses of serving or posting notices, housing and feeding of dogs and selling and destroying of same, to be paid from general fund of county.*

COLUMBUS, OHIO, February 16, 1918.

HON. OTHO W. KENNEDY, *Prosecuting Attorney, Bucyrus, Ohio.*

DEAR SIR:—I am in receipt of your inquiry which is to the following effect:

"I desire your construction of sections 5652-1 to 5652-15 of the General Code of Ohio. The part that I am especially concerned about is this:

1. Can the sheriff be paid anything for the work performed by him under these sections?

Section 5652-10, among other things, says: 'Seizing dog and delivering to pound by sheriff, $1.00', but it does not say that the sheriff is to be paid this sum of $1.00. This same section provides: 'Filing affidavit and issuing order to sheriff by justice of the peace, $0.50'. But in the latter part of the section there is a special provision that the justice of the peace shall be paid, from the general fund of the county, the sum of fifty cents. It seems that no like provision is made in respect to the sheriff.

2. Section 5652-8 provides that the county commissioners shall provide for the employment of deputy sheriffs, etc. I assume this means to say that they shall pass a resolution making such provision, but there is no provision in these statutes that expressly says how these deputies are to be paid, or if they are to be paid, out of what fund they are to be paid. My own notion would be that they should be paid so much for each dog seized, and that the same should be paid out of the general fund of the county. I desire your opinion on this point.

Section 5652-10 further provides for the serving or posting of notices, housing and feeding of dogs, and selling or destroying of same.

I desire your opinion fully on these matters, as to whether or not they can make arrangements for the sheriff to take care of all of these matters and pay him this money out of the general fund of the county."

In regard to your first inquiry, to wit, can the sheriff be paid anything for the work performed by him under sections 5652-1 to 5652-15 inclusive, G. C. (107 O. L. 534), you call specific attention to the provisions of section 5652-10, wherein it is provided that costs shall be assessed against every dog seized and impounded under the provisions of the act, as follows:

"Filing affidavit and issuing order to sheriff by justice of peace	$0 50
Seizing dog and delivering to pound by sheriff	1 00
Serving or posting of notice to owner by sheriff	25
Housing and feeding dog per day	25
Selling or destroying dog	50."

Under the provisions of section 5652-12 G. C. it is found that all costs collected under sections 5652-10 and 5652-11 G. C. shall be deposited in the county treasury and placed to the credit of the county general fund. I do not find any provision of the statute which states that the sheriff shall be paid anything out of such fund, while section 5652-10 does provide that the justice of the peace shall be paid from the general county fund the sum of fifty cents for filing each affidavit and issuing order thereon to the sheriff. The only reason that I can gather why said provision is made is because the justices of the peace are compensated on the fee basis and the sheriff is compensated by an annual salary.

It is therefore my opinion, in answer to your first question, that the sheriff can not be paid anything for the work performed by him under sections 5652-1 to 5652-15, supra.

Your second question relates to the manner in which the county commissioners shall provide for the employment of deputy sheriffs, etc. This matter was considered in opinion No. 861, rendered to Hon. Perry Smith, Zanesville, under date of December 15, 1917, and opinion No. 973, rendered to Hon. John V. Campbell, Cincinnati, on January 29, 1918, copies of which opinions I am herewith enclosing.

You further inquire, however, in your second question, as to whether or not the county commissioners shall provide, under section 5652-10 G. C., for the serving or posting of notices, housing and feeding of dogs, and selling or destroying them, from the ge eral fund of the county.

There is no other fund provided, out of which the same can be paid and it is therefore my opinion that the county commissioners should provide for the above named expenses out of the general county fund. All the costs collected under sections 5652-10 and 5652-11 G. C. are deposited in the county treasury to the credit of the general county fund, and all the registration fees under section 5652-13 G. C. constitute a special fund known as the dog and kennel fund, the disposition of which is otherwise provided for.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1013.

DEPOSITORY OF TOWNSHIP FUNDS MAY GIVE THE TREASURER OF THE TOWNSHIP UNITED STATES BONDS IN LIEU OF DEPOSITORY BOND.

Under the authority of the last sentence of section 4295 *G. C.* (103 *O. L.* 113), *a depository of township funds is authorized to secure such deposit by the securities set out in said section* 4295 *G. C.*

COLUMBUS, OHIO, February 16, 1918.

HON. CLARE CALDWELL, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR:—I have your communication of January 16, 1918, in which you ask my opinion upon the following question:

> "The question has arisen as to whether it is possible for a depository of township funds to give to the treasurer of the township, as security, bonds of the United States, in lieu of a depository bond."

We will note the language of the statutes relating to depositories for township funds. These sections are 3320 to 3326 inclusive, G. C. The sections which particularly cover the security that is to be given by the bank or banks with which township money is deposited are 3322 and 3324 G. C.

Section 3322 G. C. provides:

> "* * * Such bank or banks shall give a good and sufficient bond to be approved by the township trustees, for the safe custody of such funds in a sum at least equal to the amount deposited. * * *."

Section 3324 G. C., in delaing with depositories in cases where there is only one bank located in the township, provides:

"Such bank or banks shall give good and sufficient bond to the approval of the township trustees in a sum at least equal to the amount deposited for the safe custody of such funds, * * *."

It will be seen that the language in these sections is specific and definite, to the effect that a lawful bond is to be furnished by the depositories of township funds, in a sum at least equal to the amount deposited. There is no alternative therein set forth.

Section 3326 G. C. provides:

"When such depository is provided and the funds are deposited therein *as herein directed*, the treasurer of the township and his bondsmen shall be relieved of any liabilities occasioned by the failure of the bank or banks of deposit * * *. On failure of the trustees of any township to provide a depository according to law the trustees and their bondsmen shall be liable for any loss occasioned by their failure to provide such depository, * * *."

It is clear that the legislative intent was that the statutes relating to said depositories should be strictly followed by township officials. So that from a consideration of these sections alone, it is my opinion that the township trustees could not select an alternative proposition of accepting bonds of the United States, the state of Ohio, or of any political subdivision thereof, in lieu of the lawful bond provided for by the act itself.

We are strengthened in this opinion when we consider what seems to have been the general policy of the general assembly. In those cases in which it desired that public officials depositing money in banks as depositories should be authorized to accept bonds of the United States, of the state or of political subdivisions of the state, the legislature has always specifically granted this authority.

In the matter of depositories for school funds, section 7605 G. C. provides:

"* * * Such bank or banks shall give a good and sufficient bond, or shall deposit bonds of the United States, the state of Ohio, or county, municipal, township or school bonds issued by the authority of the state of Ohio, at the option of the board of education, * * *."

Section 2732 G. C. provides, relative to depositories of county funds, as follows:

"In place of the undertaking provided for herein, the commissioners may accept as security for money so deposited the following securities: (Then follows a list of securities, viz., United States bonds, bonds of the state of Ohio, and bonds of the particular subdivision of the state.)"

To the same effect is the provision relative to depositories for municipalities, found in section 4295 G. C., and also that covering state depositories, in section 330 G. C.

So in considering the general policy of the legislature in reference to securities furnished by depositories of public funds, it would not be logical to conclude that the legislature intended that township depositories might furnish United States bonds, etc., in lieu of the lawful bond provided for by statute.

The courts, generally, are also against such a construction being placed upon such statutes as provide for township depositories.

13 Cyc. 814 lays down the following proposition:

> "A depository of public funds is commonly required by statute to furnish security for the deposit. Where the statute expressly specifies the character of the security, the depositing officer has no power to accept any other in lieu of that prescribed.'

In Vlissingen v. Commissioners, 54 Minn. 555, we find the following principle in the syllabus:

> "The statute requires that banks designated by the board of auditors of a county as depositories of the funds collected by county treasurers shall secure deposits to a specified amount by bonds, with sureties approved by the county commissioners. No other or different security is contemplated as a condition of receiving such deposit."

On page 561 in the opinion the court say:

> "The kind of security which a bank is required to give as a condition of receiving a deposit of funds from the county treasury must be of the character above described (as provided by statute), and neither the board of auditors nor the board of commissioners have any discretion or authority under the statute to accept any other."

Hence from the authorities I am of the opinion that the township trustees would not be authorized to accept, in lieu of a lawful bond, a deposit of bonds of the United States, of the state of Ohio, or of any political subdivision of the state.

However, I am not unmindful of a decision of our circuit court which might be construed to hold opposite to what I have above held. In State ex rel. v. Rehfuss, Treasurer, 7 C. C. (N. S.) 179, the court was passing upon the constitutionality of the statutes which provided that a depository of school funds should "give a good and sufficient bond of some approved security company." The question was as to whether it would be legal to demand that a bond must be signed by a security company. In the opinion the court say:

> "It is the duty of the court to uphold the law establishing a depository for the benefit of the public, if it can be done. In order that it may be done and that the deposit may be secured by a lawful bond, the court is authorized we think, to regard the words designating the character of the security as directory merely, and not vital to the purpose of the statute."

If this language of the court were construed as broadly as it might be, the opinion rendered by me herein would be wrong, but it is my view that it was not the intention of the court that this language should be construed in its broadest sense. In the first place it must be remembered that the court was attempting to sustain the constitutionality of an act and hence went the limit in placing such a construction upon the section in question. Then too, the court had in mind merely the question of a lawful bond and was not thinking about the proposition as to whether collateral security could be deposited with a public official, in lieu of a lawful bond. This is fairly evident from the first branch of the syllabus, which reads as follows:

> "Inasmuch as the primary purpose of section 3968, providing for the designation of an official depository for school funds, is to obtain a revenue from the idle moneys of school boards, the provision of the act that the de-

> pository s' all give a good and sufficient bond 'of some approved surety company' is incidental merely, and indicates a purpose to require a good and sufficient lawful bond, and nothing more."

Therefore it is my opinion that the decision of the circuit court in the above case should not be extended to the point that a requirement of a statute for a lawful bond is merely directory, when the term "lawful bond" is used in contrast with "collateral security."

If our conclusion were to be based upon the sections of the General Code above quoted and no other the above undoubtedly would be correct, but there are two other sections which must be considered. One of these sections is section 4295 G. C., which was enacted, in almost its present form, on March 5, 1913, and is found in 103 O. L. 113. It states that council may provide for the deposit of all moneys coming into the hands of the treasurer, in banks which will give "a good and sufficient bond issued by a surety company authorized to do business in the state, or furnish good and sufficient surety." The section then provides that the bank or banks may secure the moneys deposited with them by the treasurer of the municipality by depositing interest bearing obligations of the United States, including bonds of the District of Columbia; bonds of the state of Ohio, or of any other state of the United States; legally issued bonds of any city, village, county, township or other political subdivision of this or any other state or territory of the United States, with certain conditions attached to the last security mentioned in the section.

The legislature then added a rider to the section, which reads as follows:

> "And whenever any of the funds of any of the political subdivisions of the state shall be deposited under any of the depository laws of the state, the securities herein mentioned, in addition to such other securities as are prescribed by law, may be accepted to secure such deposits."

It will aid us, in understanding this section, if we remember that as it was enacted in 97 O. L. 270 the provision relating to security to be furnished by the depository of a municipality was as follows:

> "And give a good and sufficient bond issued by a surety company authorized to do business in Ohio, or furnish good and sufficient surety, in a sum not less than twenty per cent. in excess of the maximum amount at any time to be deposited."

In 102 O. L. 122, the legislature amended this section and made it read practically as it is found in 103 O. L. 113 and practically as it now reads.

So it will be seen that the legislature had in mind two different objects, in amending said section as found in 102 O. L. 122 and 103 O. L. 113. The one object was to provide that the depositories of municipal funds might, in lieu of furnishing a lawful bond to protect the municipality in reference to such deposits, secure said moneys by a deposit of bonds as above set out.

The second object which the legislature sought to accomplish in the rider attached to this section was that any other political subdivision of the state might accept the securities set out in said section, in addition to such other securities as are prescribed by law and which particularly apply to each political subdivision.

The question of course immediately arises as to whether this latter object which the legislature had in mind would cover the deposit of funds by township trustees. If so, the township trustees, in lieu of accepting a lawful bond as provided in the sec-

tions above quoted, might accept any of the securities mentioned in section 4295 as above set out.

We will consider the meaning of "securities," in order to decide whether this latter provision of section 4295 G. C. can be made to apply to township depositories. When we remember that this section originally provided for nothing but a lawful bond, and that in 102 O. L. 122 the legislature amended the section by adding a number of kinds of bonds which might be accepted in lieu of the lawful bond, and when we remember that at the same time it made these additions it also added the provision pertaining to all other political subdivisions, to the effect that they might accept, in addition to such other securities as are prescribed by law, the securities mentioned in this section, it is clear that the legislature intended that "securities" should not cover a lawful bond, but that it merely had in mind those evidences of indebtedness which were added to said section and which might be accepted as security in lieu of the lawful bond.

The court in Bank of Commerce v. Hart, 37 Neb. 197, 202, made the following statement in reference to the word "securities":

> "True, it (the bank's charter) says 'to purchase securities of every kind,' but certificates of stock are not securities within the meaning of this provision, nor such as the word imports in commercial or banking phraseology. 'Securities,' as here used, mean notes, bills of exchange and bonds; in other words, evidences of debt, promises to pay."

I believe the court placed the correct construction upon the word "securities," and that in the section under consideration the legislature had in mind not a lawful bond, but only those evidences of indebtedness which might be deposited with the municipality as security for funds deposited, in lieu of a lawful bond.

While there is no doubt that the legislature, in using the word "securities" in the rider to section 4295, hereinbefore set out, meant the security other than a lawful bond, nevertheless it is my opinion that the legislature intended to extend the right to take the securities set out in section 4295 G. C. to the other political subdivisions of the state, irrespective of whether or not said subdivisions were authorized theretofore to accept securities in the place of the lawful bond. The right to so take said securities was not made conditional on the fact that the said subdivision was elsewhere authorized to accept collateral securities in lieu of a bond, but was authority to take such collateral securities whether theretofore authorized or not, and if elsewhere authorized, the securities set out in said section 4295 were a further extension of the kind of securities which it could take.

In other words, as I view it, the legislature in the enactment of said rider to section 4295 G. C., intended that all political subdivisions of the state could accept the securities set out in said section, in lieu of the lawful bond and in addition to the securities, if any, which they had theretofore been authorized to take.

Therefore, answering your question specifically, it is my opinion that by reason of the enactment of the rider in section 4295 G. C., a depository of township funds is authorized to give the treasurer of the township, as security, bonds of the United States in lieu of a depository bond.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1014.

APPROVAL OF BOND ISSUE—MAHONING COUNTY, OHIO, IN THE SUM OF $4,000.00.

COLUMBUS, OHIO, February 19, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of Mahoning county, Ohio, in the sum of $4,000.00, for the purpose of creating a fund for the payment of Austintown township's share of the cost and expense of improving section P of the Akron-Youngstown road, I. C. H. No. 18, in Austintown township.

I have carefully examined the corrected transcript of the proceedings of the board of county commissioners of Mahoning county, Ohio, and of other officers, relating to the above bond issue, such examination being supplemented by an examination of the files in the office of the state highway commissioner relating to said improvement. As a result of such examination, I am of the opinion that said proceedings are in conformity to the provisions of the General Code of Ohio relating to bond issues of this kind and that properly prepared bonds covering said issue will, when properly executed and delivered, constitute valid and subsisting obligations of said county.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1014½.

PROBATE COURT MAY REMIT PENALTY FOR FAILURE TO PAY THE COLLATERAL INHERITANCE TAX WITHIN ONE YEAR IN CERTAIN CASES—ERRONEOUS ORDER OF REMISSION BINDING UNLESS MODIFIED OR REVERSED ON APPEAL.

The probate court has jurisdiction to relieve, in proper cases, against the penalty for failure to pay the collateral inheritance tax within one year from the death of the decedent.

That the settlement of the state was delayed beyond the year in anticipation of contest proceedings that were never brought; that the problems of administration are not determined within the year, or that the executor and residuary legatee is poor, are severally insufficient as reasons for such remission.

An erroneous order of remission is binding on the county auditor unless modified or reversed on appeal.

COLUMBUS, OHIO, February 10, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your letter of January 21st requesting my opinion upon a question submitted by Hon. L. E. St. John, probate judge of Miami county, concerning the imposition of penalties on collateral inheritance taxes. The letter of the probate judge is as follows:

"I wish to know what your ruling is in the matter of the court's power, determining collateral inheritance tax, to order that the penalty for delin-

quency in making settlement within a year, be waived, when circumstances are such, in the opinion of the court to warrant it.

For example: Tax arising under a will would have to meet the statutory requirement of the lapse of one full year before the right of contesting of will could be determined.

Second: Administration upon the estate would require another full year before the problems of administration can be determined.

Where the executor of the estate is the residuary legatee, poor and unable to raise the tax until her rights are determined, the tax should not be determined until all other rights were barred or satisfied. Some delay incidenta to the problems carries the payment of the tax beyond the year. The court finds such delay was reasonable and it would be equity to waive the collection of the penalty arising under section 5335. Can the auditor obey the court's mandate?"

The probate court of the proper county is by section 5344 of the General Code given jurisdiction "to hear and determine all questions in relation to such tax that arise." The first problem involved on the above quoted inquiry is to determine whether jurisdiction thus conferred embraces the power to treat the statutory penalties as a court of chancery treats a penalty on a bond, for example.

The general doctrine is stated in Cyc. as follows (volume 30, page 1342):

"A court may relieve against unreasonable penalties in private contracts, but not against those created by law, unless empowered by statute so to do."

Again, under the heading of "Taxation" the rules are stated in 37 Cyc., page 1544, as follows:

"The courts will not enforce a penalty against the taxpayer where he makes a good defense against its imposition or shows a legally sufficient excuse for the delinquency charged. It is held a sufficient ground for refusing to enforce the penalty that the officers did not give the taxpayer the notice or demand to which he was entitled; that the tax was illegal or illegally levied; that he tendered or offered to pay so much of the tax as was legal * * *; that he made an honest mistake as to the amount, extent, or value of his taxable property; that he entertained a sincere and reasonable belief that the particular property was * * * not taxable, or was the subject of judicial consideration, or such as fairly to warrant a resort to the courts. In some cases also impossibility of performance has been accepted as a sufficient excuse." (Citing one case from Pennsylvania and another from Texas.)

"* * * a court, when the matter is properly before it, may remit, reduce, or refuse to enforce a penalty unlawfully or inequitably imposed, if the person complaining shows that he has done all that the law requires of him and is equitably entitled to such relief."

These general principles are sound, in my opinion, and it follows that the general assembly by conferring upon the probate court the jurisdiction to determine all questions in relation to the tax that arise has vested in that court authority to remit the penalty when it is inequitable to do otherwise.

In fact such a remitter was in effect made in the case of *In Re Bates*, 7. N. P., 625, on the universally recognized ground that the law imposing the inheritance tax

was supposed, because of previous decisions of the court, to be unconstitutional and its constitutionality was not settled until the tax became technically delinquent.

But it does not follow that anything that may appeal to the sense of fairness of the probate court is a good "equitable" ground for remitting the penalty. The examples stated by the probate judge clearly do not fall within that category. The statute, section 5335, provides that interest at the rate of eight per cent.—which may fairly be regarded as a penalty inasmuch as it exceeds the legal rate—must be charged after the expiration of one year from the death of the decedent, and counterbalances this provision by offering an inducement to earlier payment in the form of a discount of one per cent. a month for each month that payment has been made prior to the expiration of the year. In point of fact these provisions might with some appropriateness be regarded as not in the nature of penalties, but the contrary was held in *In Re Bates*, supra, and I am content to follow the opinion of the court in that case.

However, the statute is very explicit in the respects now under consideration. The conditions to which the probate judge calls attention in his first two examples are such as obtain with respect to all estates of the classes referred to. The fact that a full year's time must elapse before the right of contesting a will would be barred, and that thereafter some further time must elapse before the problems of administration can be determined, would not constitute, in my judgement, a valid reason for remitting the penalty, because the legislature must be deemed to have had these everyday conditions in mind in fixing the limit at one year. In order to afford ground for the equitable remission of the penalty the delay in the settlement of the estate must be due, in my opinion, to some extraordinary occurrence or actual impossibility not within the probable contemplatation of the legislature. An example has been given in referring to *In Re Bates*, and the principle therein embodied may be enlarged by stating that the existence of any question of law as to the interpretation of the inheritance tax statutes themselves will afford good ground for remission. So also, in my opinion, would the pendency of actual litigation, such as a suit to contest the will. Clearly where interests of inheritance under a will are not vested as of the date of the testator's death and it is impossible therefore to assess the tax, the penalty should not commence to run at the expiration of the year unless the impossibility is removed before that time, and in such case there is reason for doubt as to whether or not the year would begin to run at the date of the testator's death or at the date of the vesting of the interst. But where the conditions are merely those ordinarily obtaining in the settlement of any e tate the legislature must be deemed to have taken such conditions into consideration in fixing the period at one year instead of two, and their existence therefore does not afford sufficient reason for remission.

I have pointed out in other opinions that in an ordinary case of this sort the penalty can be avoided by estimating the cost of administration the probate court being given authority sufficiently broad to enable it to settle the tax upon the basis of such an estimate before the actual costs are definitely ascertained.

I am therefore of the opinion that the mere fact that the full and complete determination of all problems of administration is reasonably delayed beyond one year would not justify the probate court in remitting the penalty on that account.

A closer question is presented by the suppositious fact last suggested by the probate court. Where the executor is also the residuary legatee and is poor and unable to raise the tax until final distribution, it would seem just to remit the penalty. However, I am unable to find any authority justifying a remitter in such cases, especially in view of the fact that by virtue of section 5339 "administrators, executors and trustees may sell so much of the estate of the deceased as will enable them to pay said tax in like manner as they are empowered to do for the payment of his debts." This section affords means to the executor or administrator to raise money to pay the tax if he has not sufficient assets of his own to advance the tax, and he may do so before final settlement of the estate. On this account I feel obliged to come to the conclu-

sion that the last fact suggested by the probate judge would not be a sufficient ground for remitting the penalty.

The foregoing comments, however, do not fully cover all the matters set out in the inquiry of the probate judge, for he asks whether the county auditor should obey his mandate if he should enter an order of remitter upon facts which would, in accordance with the principles above stated, make that order erroneous.

In my opinion the answer to this question is in the affirmative. The probate judge has jurisdiction of the case and power to remit the penalty in proper cases. Therefore his order would not be wholly void though erroneous, and would be binding upon all parties concerned until set aside by proceedings in the nature of a direct attack. Such proceedings are provided for in section 5344, which provides that the jurisdiction of the probate court shall be exercised "subject to appeal as in other cases, and the prosecuting attorney shall represent the interests of the state in such proceedings." If, therefore, the probate judge should erroneously enter an order of remitter his order could only be attacked by appropriate proceedings in his own court to secure a modification of the order, or by appeal as provided for in the section quoted. Such appeal should be prosecuted by the prosecuting attorney.

I am of the opinion, therefore, that none of the grounds suggested by the probate judge in his inquiry would be sufficient upon which to predicate an order of remitter; but that the probate court has jurisdiction to order remitters in proper cases, and if it makes an erroneous order of this character it is binding upon the county auditor until set aside by himself or on appeal.

In connection with this general subject I may say that some inheritance tax laws expressly authorize the remission of the penalty in case of "unavoidable delay in settling the estate."

See In re Banks, 5 Pa. Co. Ct., 614;
In re Moore, 90 Hun., 162, 35 N. Y. Suppl. 782.

The Ohio law contains no such express provision and must, therefore, be interpreted with greater strictness than the laws of states which do contain such a provision.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1015.

TAX COMMISSION NOT REQUIRED TO CERTIFY BY REGISTERED MAIL ITS ACTION DETERMINING THE BASIS OF FRANCHISE FEES OR EXCISE TAX.

The tax commission is not required to certify by registered mail its action determining the basis of franchise fees or excise taxes.

COLUMBUS, OHIO, February 19, 1918.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your letter of February 6, 1918, requesting my opinion as follows:

"The commission respectfully requests your official opinion as to whether section 5611-1 G. C. requires us to certify to a corporation or utility by reg-

istered mail, the action of the commission in determining the basis of franchise and excise fees as provided by sections 5465-5475, 5477, 5498 and 5502."

Section 5611-1 G. C. (107 O. L. 550), referred to by you, is as follows:

"Whenever the tax commission of Ohio determines the valuation, or liability, of property for taxation, whether in case of an original valuation or other original proceeding of such board, or in case of a determination of an appeal from the decision of a county board of revision, it shall, by registered mail, certify its action to the person in whose name the property is listed, or sought to be listed, at the same time and in the same form in which such action is certified to the county auditor, and such determination shall become final and conclusive for the current year, unless reversed, vacated, or modified as hereinafter provided."

This section provides a basis for the review of determinations by the tax commission, relating to the valuation or liability of *property* for taxation and to no other subject.

There is some doubt as to just what property valuations the above quoted section and those which follow it relate, but this question is not raised by your inquiry. The section itself answers your question. There is no inference to be drawn from the section, that the procedure therein and in the other related sections was intended to apply to such determinations as the commission must make in connection with the assessment and collection of franchise and excise taxes.

Your question is therefore answered in the negative.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1016.

COUNTY AUDITOR REQUIRED TO PERFORM THE DUTIES PRESCRIBED BY SECTIONS 2572 AND 6511 G. C.—CLERK OF COUNTY COMMISSIONERS WITHOUT AUTHORITY TO PERFORM SUCH DUTIES.

The duties prescribed by sections 2572 *and* 6511 *of the General Code must be performed by the county auditor. The clerk of the county commissioners appointed under the provisions of section* 2409 *G. C. is without authority to perform such duties.*

COLUMBUS, OHIO, February 19, 1918.

The Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I have your letter of February 8, 1918, as follows:

"We respectfully request your written opinion upon the following matters:

In some counties of the state where the county commissioners have employed a clerk under the provisions of section 2409 G. C., it is contended by the auditors of some of those counties that the clerk of the board of commissioners is required to keep the bill docket provided for by section 2572 G. C., and also to make complete records of ditches as provided by section 6511 G. C. This department is asked whether it is legal for the clerk of

the board of county commissioners, employed by them under the provisions of section 2409 G. C., to keep these books, or whether it is a duty specifically enjoined upon the county auditor?"

Section 2566 of the General Code reads:

"By virtue of his office, the county auditor shall be the secretary of the county commissioners, except as otherwise provided by law. When so requested, he shall aid them in the performance of their duties. He shall keep an accurate book, records, maps and papers required to be deposited and kept in his office."

Section 2409 G. C. reads:

"If such board finds it necessary for the clerk to devote his entire time to the discharge of the duties of such position, it may appoint a clerk in place of the county auditor and such necessary assistants to such clerk as the board deems necessary. Such clerk shall perform the duties required by law and by the board."

Section 2406 G. C. reads:

"The clerk shall keep a full record of the proceedings of the board, and a general index thereof, in a suitable book provided for that purpose, entering each motion with the name of the person making it on the record. He shall call and record the yeas and nays on each motion which involves the levying of taxes or the appropriation or payment of money. He shall state fully and clearly on the record any question relating to the power and duties of the board which is raised for its consideration by any person having an interest therein, together with the decision thereon, and shall call and record the yeas and nays by which the decision was made. When requested by a party interested in the proceedings or by his counsel, he shall record any legal proposition decided by the board, the decision thereon and the votes by which the decision was reached. If either party, in person or by counsel, except to such decision, the clerk shall record the exceptions with the record of the decision."

It is clear that from section 2566 the county auditor is by virtue of his office secretary of the county commissioners, except as otherwise provided by law; that under the provisions of section 2409 the county commissioners, if they find it necessary, may appoint a clerk to devote his entire time to the discharge of the duties of the clerk to the board. It is also clear that whether the county auditor acts as clerk, or whether a clerk to the board is appointed under section 2409, the duties of such clerk are those found in the provisions of section 2406, above quoted.

Jones, Auditor, v. Board of Commissioners, 5 O. C. D., 152.

On August 8, 1917, this department rendered an opinion, No. 504, in which it was held that the clerk of the board of county commissioners, appointed under the provisions of section 2409, is not authorized to perform the duties imposed upon the county auditor by virtue of section 2342 of the General Code, which section makes it the county auditor's duty to keep a record of the proceedings of the building commission on the journal of the county commissioners. That opinion was based largely upon the decision of the court in the case of State v. Edmondson, 12 N. P., n. s., 577. The first branch of the syllabus in that case reads:

"A distinct legislative intent appears in the provisions of section 2342, P. & A. Anno. G. C., that the county auditor shall act as the recording officer of a commission to build a new court house, and a writ of mandamus will issue requiring him to so act, notwithstanding the earlier, and in some measure conflicting, provision for the appointment of a clerk of the board of county commissioners in place of the auditor."

At page 586 the court said:

"The commissioners of Hamilton county have availed themselves of section 2409 and have appointed a clerk to take the place of the auditor as their secretary, and it is argued that by reason thereof said clerk should perform the duties specifically enjoined upon the auditor under sections 2341 and 2342. In addition to the fact that the building commission act is a later act and charges such duties upon the auditor specifically and not upon the secretary of the clerk of the board of county commissioners, and the further fact that section 2409 is by its terms and context applicable only to the duties of the auditor in connection with the proceedings of the county commissioners. Section 2409 also contemplates that such duties of the clerk shall be such as to require him 'to devote his entire time' to such duties, leaving no time for him to act for the building commission. The legislature therefore provided that the auditor should act as recording officer of the building commission. For these additional duties he can adequately provide appointment, if necessary, of a deputy under section 2563.

The recording officer of the building commission is therefore the county by the auditor, or a deputy appointed by him for such purpose."

Section 2572 of the General Code reads:

"A bill or voucher for the payment of money from any fund controlled by the commissioners or infirmary directors must be filed with the county auditor and entered in a book for that purpose at least five days before its approval for payment by the commissioners or infirmary directors. When approved, the date thereof shall be entered on such book opposite the claim, and payment thereof shall not be made until after the expiration of five days after the approval has been so entered."

Section 6511 of the General Code reads:

"The auditor, in a suitable book to be provided for that purpose at the expense of the county, shall make a complete record of each ditch improvement made in his county under the provisions of this chapter. Such record shall include the petition, bond, reports of the surveyor or engineer, and all journal entries made, with all plats and other papers necessary to show a complete history of all that is done in each case up to and including the final order made by the county commissioners."

From a reading of section 2572 it is clear that the duties imposed upon the county auditor by that section are such as are imposed upon him, not as clerk of the county commissioners, but as auditor of the county. The provisions of the section relate to the duties which are, in their very nature, attached to the position of auditor. They are not mere clerical duties to be performed in connection with the keeping of records for the county commissioners. This is also true to some extent of section 6511. While the indications as found in section 6511 are not as forcible as those found

in section 2572, yet a reading of section 6524 dissolves all doubt with reference to the application of section 6511.

Section 6524 G. C. reads:

> "The county auditor shall receive for filing each paper belonging in the case, three cents; for recording each hundred words, three figures to count as one word, excluding calculations not necessarily included in the record, six cents; for each copy, including certificate, when necessarily a part of the copy, and for all notices, six cents for each hundred words, three figures to count as one word, but he shall receive no fees for printed notices; for each warrant drawn on the county treasurer, and for each certificate, three cents; for each tabular statement furnished the printer, six cents per hundred words, three figures to count as one word; and for each copy of specifications furnished, six cents per hundred words, three figures to count as one word, to be paid by the party demanding it.

From this section it will be seen that a fee is provided for the county auditor covering such work as he does under section 6511. In view of the fact that the county auditor receives no fees for his services as clerk to the county commissioners, and inasmuch as the clerk to the county commissioners is not an officer and can receive no statutory fees, it is clear that section 6511, which casts certain duties upon the county auditor, fees for which may be collected under section 6524, has application to the county auditor as such officer and not to the county auditor as clerk of the county commissioners.

For these reasons it is my opinion that the duties prescribed in sections 2572 and 6511 G. C. are not such as may be performed by the clerk of the county commissioners appointed under the provisions of section 2409 of the General Code.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1017.

GERMAN CARP MAY BE TAKEN ANY TIME DURING THE YEAR IN THE WATERS MENTIONED IN SECTION 1453 G. C.

German carp may be taken at any time of the year, by reason of the provisions of section 1453 of the General Code, in the waters therein mentioned, and that the provisions of this section are in no way affected by the various sections of the General Code relating to the licensing of fishermen in the Lake Erie fishing district during certain seasons of the year.

COLUMBUS, OHIO, February 19, 1918.

The Department of Agriculture, Bureau of Fish and Game, Columbus, Ohio.

GENTLEMEN:—I have your letter of February 8, 1918, as follows:

> "Inquiries received at this office relative to the taking of German carp in the Lake Erie district makes it imperative that a decision be rendered to determine as to the legality of carp being taken or caught at any time in the bays, rivers, marshes, estuaries or inlets bordering upon, flowing into or in any manner connected with Lake Erie, with any seine having meshes not less than four inches, stretched mesh, factory measure, as defined in section 1453.

Note section 1425, which designates the inland and lake districts, and section 1434, which provides for an open and closed season in the Lake Erie district.

Will you at your earliest convenience render an opinion as to the legality of taking carp at any time as provided in section 1453, regardless of the open and closed season as provided under section 1434? "

On May 9, 1908, an act was passed entitled "An act to revise and consolidate the l ws relating to the appointment, powers and duties of the commissioners of fish and game." Section 38 of that act, now section 1425 G. C., defined the Lake Erie and inland fishing districts. Section 46 of the act, now section 1434 G. C., provided:

"For the Lake Erie fishing district there shall be two seasons, the spring fishing season beginning on the fifteenth day of March and including and closing on the thirty-first day of August, and the fall fishing season beginning on the first day of September and including and closing on the thirtieth day of November. The fish and game commission for the purpose of obtaining spawn of fish for the fish hatcheries shall have the right to place men in any boat used in the taking of fish and pay for such spawn such amount as they may fix. And it shall be unlawful for any person engaged in fishing to refuse to take such men in any boat owned by him or under his control, or refuse to afford them opportunity to take spawn, or to do anything to hinder them in any way in the performance of their duty. No person shall draw, set, place, locate or maintain a pound net, gill net, trap net or any fish net whatever in the Lake Erie fishing district of this state between the thirtieth day of November and the fourteenth day of March, both inclusive."

Section 47 of the act, now section 1435 of the General Code, provided:

"No person, firm, or corporation shall use or operate for the purpose of catching fish, a boat, net or device, other than hook and line with bait or lure, in the Lake Erie fishing district of this state, without a license from the commissioners of fish and game. Applications for licenses and all licenses herein required shall be in such form as the commissioners of fish and game prescribe."

Section 48 of the act, now section 1436, provided for the charges to be made for licenses issued in the Lake Erie fishing district. Section 55 of the act, now section 1441 G. C., contains certain provisions as to the size of the meshes of nets to be used in the Lake Erie fishing district.

From these provisions it is clear that in order to fish with nets and other fishing devices in the Lake Erie fishing district, it was necessary, after the passage of this act, to secure a license and after such license was secured the licensee could fish with such device only during the seasons provided for the Lake Erie fishing district, viz., from the 15th day of March to the 31st day of August, and from the 1st day of September to the 30th day of November. It is also clear that the licensee was under obligations to observe certain other provisions of the law concerning the kind of nets to be used, the size of mesh, etc. Section 65 of that act, now section 1453 G. C., provided:

"Nothing in this act shall prohibit the taking or catching of German carp in the bays, marshes, estuaries or inlets bordering upon, flowing into or in any manner connected with Lake Erie, which may be caught at any time with any seine, constructed out of netting having meshes not l ss than

four inches, stretched mesh. Other nets or devices may be used if authorized by the commissioners of fish and game. Written permission to catch carp in such waters shall be granted to any person who shall make application to the commissioners of fish and game for such privilege and satisfies the commissioners that he will not in any manner violate any law for the protection of fish. Such permission may be revoked by the commissioners upon conviction of the holder thereof for taking fish contrary to law."

It will be noted from a reading of this section that fishing for German carp in certain waters connected with Lake Erie was regulated in a manner different from and independent of the other provisions of the act which regulated fish generally in the Lake Erie fishing districts. It will be noted that section 65, above quoted, provided that "*nothing in the act shall prohibit* the taking and catching of German carp," etc., "*which may be caught at any time* with any seine constructed out of netting having meshes not less than four inches, stretched mesh. Other nets or devices may be used if authorized by the commissioners of fish and game."

In the case of Jackson v. State, 22 O. C. C., 181, the court said, in speaking of this section:

"The purpose of this legislation was, of course, to destroy carp; carp being deemed not especially of value, and in some respects pernicious because of their destructiveness to other fish, and perhaps otherwise; and for this reason they were not deemed entitled to the protection of the law like fish of value. The legislature, having this in mind, and knowing the extent to which carp were beginning to frequent the waters adjacent to Lake Erie, and connected therewith, passed this law excepting from the prohibitive operation of the law the fishing for this class of fish; and they made the law pretty broad. It looks a little as if the legislature used all the terms that occurred to them at the time of the enactment to describe waters which would be so contiguous to Lake Erie that carp would readily go into Lake Erie from such waters, or from Lake Erie into them."

From these sections which have been quoted I believe it is apparent that after the passage of the act of 1908 referred to, German carp could be caught in the waters connected with Lake Erie at any time of the year and by any one given written permission to do so regardless of any provisions of the law concerning licenses for the Lake Erie fishing district and the provisions relative to the fishing seasons in such district. The only thing necessary was a written permission from the commissioners of fish and game. After this was exacted the fisherman had but one provision of law governing him in his fishing for German carp and this was that the seine used should be constructed of netting having meshes not less than four inches, stretched mesh. Even this provision, however, could be set aside by the commissioners of fish and game.

The various sections set out above have, from time to time, been amended, but all of them apppear in the General Code in practically the same form today as they are found in the act of 1908, above quoted.

Some little confusion, however, may be met with in a consideration of section 1453 for the reason that that section was twice amended by the last legislature. On March 21, 1917, an act was passed, known as Amended House Bill No. 115, and entitled "An act to supplement section 1087" and which contains amendments to a number of sections dealing with the various departments of the board of agriculture of Ohio. In this act, at page 489, section 1453 was amended to read as follows:

"German carp may be taken or caught at any time in the bays, marshes, estuaries or inlets bordering upon, flowing into or in any manner connected with Lake Erie, with any seine, having meshes not less than four inches, stretched mesh. Other nets or devices may be used if authorized by the secretary of agriculture. Written permission to catch carp in such waters shall be granted to any person making application to the secretary for such privileges who satisfies the secretary that he will not violate a law for the protection of fish. Such permission may be revoked by the secretary upon conviction of the holder thereof for taking fish contrary to law."

This act was approved by the governor March 29, 1917, and filed with the secretary of state on the 31st day of March, 1917. On March 21, 1917, the day upon which the bill just referred to was passed, another bill, known as house bill 163, and entitled "An act to amend section 1453 of the General Code, as amended by the 82nd general assembly by an act passed on the 10th day of March, 1917, known as house bill 115." This act read as follows:

"Section 1. That section 1453 of the General Code be amended to read as follows:

'Section 1453: German carp and mullet may be taken or caught in the bays, rivers, marshes, estuaries or inlets bordering upon, flowing into or in any manner connected with Lake Erie, with any seine, having meshes not less than four inches, stretched mesh factory measure. Provided however that German carp and millet shall not be taken or caught under the provisions of this act in the following streams except as hereinafter designated: In the Ottawa river no farther than the Ann Arbor bridge; in the Maumee river no farther than the Toledo country club; in the Portage river no farther than one-half mile past poor house flats; in Sandusky river no farther than the south mouth of Bar creek; and no farther up the La Carp creek, Little Portage river, Tousaint river, Turtle creek, and Ward's canal than the water level of Lake Erie extends in these streams.'

Section 2. That said original section 1453 of the General Code as amended by the 82nd general assembly by an act passed on the 10th day of March, 1917, known as house bill No. 115, be, and the same is hereby repealed."

This act was passed March 21, 1917, the same day upon which the act first referred to was passed. It was approved March 29, 1917, the same day upon which the other act was approved, but it was filed in the office of the secretary of state on March 30, 1917, one day earlier than the act first referred to.

This duplicate amendment of section 1453 was considered in opinion No. 659, rendered by this department on September 27, 1917, and it was therein held that section 1453, as amended by house bill No. 163, is in force and effect and repeals section 1453 as amended by amended house bill No. 115. In section 1453, as it now stands, the provision necessitating written permission from the board of agriculture, department of fish and game, to those taking German carp in the Lake Erie fishing district, does not appear other than this. There is no important difference between this section, in its present form, and the form in which it was found as section 65 of the act of 1908. As was noted before, the other sections, concerning the Lake Erie fishing district, the licensing of fishermen therein and seasons of fishing, are found in practically the same form in the present General Code as they appeared in the act of 1908, and practically the same relation now exists between these sections and section 1453 G. C., as existed when all of these sections were parts of the act of 1908.

I am therefore of the opinion that German carp may be taken at any time of the year, by reason of the provisions of section 1453 of the General Code, in the waters

therein mentioned, and that the provisions of this section are in no way affected by the various sections of the General Code relating to the licensing of fishermen in the Lake Erie fishing district during certain seasons of the year.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1018.

APPROVAL OF BOND ISSUE—PERRY COUNTY, IN THE SUM OF $63,000.00.

COLUMBUS, OHIO, February 19, 1918.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of Perry county, Ohio, in the sum of $63,000 in anticipation of assessments apportioned to Perry county for the cost and expense of improving Rush creek, the same being a joint county ditch improvement located in Fairfield and Perry counties, Ohio.

I have lately received from the officials of Perry county, Ohio, a transcript of the proceedings relating to the above bond issue. These bonds are issued by Perry county in anticipation of the collection of a portion of the assessments for the construction and improvement of Rush creek, the same being a joint county ditch improvement located in Fairfield and Perry counties, Ohio. The proceedings indicated in said transcript, with the exception of the resolution providing for the issue of said bonds, are identical with those set out in the transcript submitted to me with respect to the bonds of Fairfield county, issued by said county in anticipation of assessments apportioned to it for the construction of said improvement and which bonds were approved by me by opinion No. 847, under date of December 12, 1917. The same considerations which led to my approval of the Fairfield county bonds, on the questions suggested by the transcript, relating to said bonds and discussed by me in said opinion, likewise leads to an approval of the bonds of Perry county, issued for the purpose of paying its share of this joint county ditch improvement.

I am therefore of the opinion that properly prepared bonds covering said issue will, when the same are properly executed and delivered, constitute valid and subsisting obligations of Perry county, Ohio.

In this connection I deem it my duty to say that I have been lately advised that a number of actions have been filed in the common pleas court of Perry county by persons assessed for the cost and expense of constructing this improvement in Perry county, for the purpose of enjoining the collection of assessments made against them. I am advised that there are 8 or 10 of these suits pending on the docket of said court undisposed of. The information given me with respect to these suits does not disclose whether or not the jurisdiction of the county commissioners of said county to construct said improvement is involved in any of these cases, or whether, on the other hand, the actions to enjoin these assessments have been brought on grounds and for reasons peculiar to the respective persons instituting such suits. Inasmuch as the treasurer of state requires a litigation certificate before turning over the money for the bonds purchased by you, the above information is given to the end that the same may be imparted to him. The treasurer of state in turn will then be in position, by the litigation certificate furnished to him, to ascertain the exact state of the litigation touching the validity of assessments, in anticipation of the collection of which the above bonds are issued.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1019.

HOW COSTS PAID IN PROSECUTION FOR VIOLATION OF BOILER LICENSE LAWS AND FOR CHARGING UNLAWFUL RATE OF INTEREST ON MONEY LOANED.

In prosecutions for the violation of boiler license laws the costs should be paid as provided in section 13439 *of the General Code.*

When such cases are carried to the common pleas court, the costs are to be certified, after the magistrate has been notified of the final action of the higher court, in the same manner as costs are paid under this section, when the case does not go beyond the justice court.

In prosecutions for charging unlawful rate of interest on money loaned, there being no special provision for the payment of costs, the only authority for payment of costs is section 3019 *G. C.*

COLUMBUS, OHIO, February 19, 1918.

The Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I have a letter from Hon. Oscar Redding, a justice of the peace, Toledo, Ohio, and since his request involves questions of costs, I am addressing the opinion to your bureau. The request reads as follows:

> "On January 20, 1915, Edward J. Hurley, as state inspector from your office, filed complaint against one Ed. Hecklinger, charging him with operating a boiler without a license. The case was tried before me and appealed on error to the court of common pleas and afterward dismissed in the common pleas court. I filed my costs bill with our county auditor for payment which he refused to pay.
>
> What I want to know is when a complaint is filed in justice court by an inspector from your office or department who is to pay costs providing the state fails.
>
> Also an inspector from your department, Hamilton DeWeese, filed complaint in my court charging Henry French with loaning money and charging unlawful rate of interest. This case was appealed on error. Providing the state fails, who is to pay the costs?
>
> We also have case from Arthur Sisco, an inspector of steam boilers, who filed case on January 31, 1917, charging Harry T. Bamforder and Francis Miller with operating steam boiler without license. Found guilty before me. Appealed to common pleas court. Who is to pay the costs in these cases?
>
> The county prosecutor refused to O. K. the cost bill in each of these cases."

I note from the above communication that two of the cases to which reference is made are violations of laws relating to the licensing of steam boiler operators.

Section 13423 of the General Code, as amended, 103 O. L., p. 539, reads in part:

> "Justices of the peace, police judges and mayors of cities and villages shall have jurisdiction, within their respective counties, in all cases of violation of any law relating to: * * *.
>
> 14. Offenses for violation of laws in relation to inspection of steam boilers, and of laws licensing steam engineers and boiler operators.
>
> * * * * * * * * * * * *."

Section 13439 G. C. reads:

> "In such prosecutions, no costs shall be required to be advanced or

secured by a person authorized by law to prosecute. If the defendant be acquitted or discharged from custody by nolle or otherwise, or convicted and committed in default of paying fine and costs, all costs of such case shall be certified under oath by the trial magistrate to the county auditor, who, after correcting errors therein, shall issue a warrant on the county treasury in favor of the person to whom such costs and fees are payable. All moneys which are to be paid by the county treasurer as provided in this chapter shall be paid out of the general revenue fund of such county."

It has frequently been held by this department that the words "in such prosecutions," used in section 13436 G. C., refer to the prosecutions enumerated in section 13423 G. C. See Annual Report of the Attorney-General for 1912, Vol. I, page 258; also opinion 823 of this department, rendered December 3, 1917.

The same argument applies with equal force to the words "in such prosecutions" used in section 13439, above quoted, since sections 13439 and 13436 were originally parts of Revised Statutes, section 3718a. This being so, it is clear that in the two cases relating to violations of boiler license laws, the costs should be paid as provided in section 13439 of the General Code.

In the first of these cases to which reference is made, the defendant was convicted in the justice court. On the case having been carried up to the common pleas court on error, such court discharged the defendant. Since section 13439 provides that the trial magistrate shall certify the costs in the case to the county auditor if the defendant be acquitted or "discharged from custody by nolle or otherwise," it is the duty of the justice in this case, upon being advised of the dismissal of the defendant by the court of common pleas, to certify the costs to the county auditor. See Opinion of the Attorney-General for 1916, Vol. II, page 1750, and opinion No. 959, rendered by this department under date of January 23, 1918. It then becomes the duty of the county auditor, after correcting the errors found therein, to issue a warrant on the county treasurer in favor of the person to whom such costs and fees are payable.

In the second of this class of cases to which reference is made, defendant was found guilty in the justice court and the case taken to the common pleas court. If the higher court sustains the conviction, the costs should be paid by the defendant unless it is necessary to commit him to jail in default of paying fines and costs, in which case they shall be paid upon the justice's certificate by the county auditor out of the county treasury. If the higher court reverses the judgment of the justice and orders the defendant dismissed, upon proper notice from such court of such action it will be the duty of the justice to certify his costs to the county auditor to pay such costs out of the county treasury.

The third case to which attention is called in the inquiry is one in which the defendant was charging an unlawful rate of interest on money loaned. This is a misdemeanor for which no special provision as to payment of cost has been made and it is subject, therefore, to the general rule relating to misdemeanors.

Section 3019 of the General Code provides:

"In felonies wherein the state fails, and in misdemeanors wherein the defendant proves insolvent, the county commissioners, at any regular session, may make an allowance to any such officers in place of fees, but in any year the aggregate allowances to such officer shall not exceed the fees legally taxed to him in such causes, nor in any year shall the aggregate amount allowed an officer exceed one hundred dollars."

It has frequently been held by this department that in misdemeanor cases, before officers may be allowed fees under section 3019, there must be, first, a conviction and, second, the defendent must prove insolvent. This is the view recently taken by the

common pleas court of Carroll county in an opinion rendered December 3, 1917, in the case of State ex rel. v. Marshall, Auditor.

Referring, then, to the case mentioned in the inquiry, concerning the violations of the loan shark law, beg to advise that, assuming for the purpose of this opinion that the justice court had jurisdiction to try this case, the costs may be paid as follows: If the higher court sustains the conviction and the defendant proves insolvent, fees may be allowed under section 3019 of the General Code, as above provided. If the higher court reverses the conviction, I know of no way to collect.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1020.

TAX LEVY AUTHORIZED BY SECTION 2434 G. C. IS SUBJECT TO LIMITATIONS OF THE SMITH ONE PER CENT. LAW.

The tax levy authorized by section 2434 G. C., as amended 107 O. L. 502, is subject to all the limitations of the Smith one per cent. law, section 5649-2 et seq. G. C.

COLUMBUS, OHIO, February 19, 1918.

HON. EUGENE WRIGHT, *Prosecuting Attorney, Logan, Ohio.*

DEAR SIR:—Under date of February 7, 1918, you submit for my opinion the following question:

> "Under section 2434 General Code of Ohio, as amended 107 O. L., page 502, is the levy of two tenths of one mill for every dollar of taxable property on the tax duplicate of a county within the fifteen mill limit, or is this levy outside of the fifteen mill limit?"

The amendment to section 2434, found in 107 O. L. 502, does not in anywise change the effect of the section in the particulars about which you inquire. In other words the levy therein provided for is not a new one authorized since the passage of the Smith one per cent. law. Even if it were, the Smith one per cent. law would in my opinion apply fully to the exercise of the authority to make such a levy, in the absence of express provisions in the later act excluding the levy from some or all of the limitations of the Smith law. The principle in such case would be that all levies, though authorized to be made in a particular number of mills, must be deemed subject to the limitations of the Smith law, unless otherwise specifically provided in the law authorizing the new levy.

In this case, however, as I have stated, no new levy is authorized, and the mere fact that section 2434 G. C. has been recently amended in other particulars, does not make the provisions now under consideration a subsequent one with respect to the Smith law. So much of the statute as is not verbally changed in process of repeal and re-enactment for the purpose of amendment, is upon most familiar principles deemed to have been the law all the time and speaks from the date of its original enactment, and not from the date of its amendment.

For both these reasons, then, I agree with you in the conclusion that the levy of two-tenths of one mill, authorized by section 2434 G. C., as amended, is subject to the fifteen mill limitation of the Smith one per cent. law so called. Indeed, I go further and state that it is my opinion this levy is subject to all the limitations of the Smith law, including the ten mill limitation of section 5649-2 G. C., and the three mill limitation of section 5649-3a G. C., as well as the fifteen mill limitation of section 5649-3d G. C., about which you particularly inquire. Very truly yours,

JOSEPH MCGHEE,
Attorney-General.

1021.

THE ACT CREATING A MUNICIPAL COURT OF ALLIANCE ABOLISHED THE OFFICE OF JUSTICE OF THE PEACE IN THE TOWNSHIPS OF LEXINGTON AND WASHINGTON, STARK COUNTY.

The act found in 107 O. L., 660, creating the municipal court for the city of Alliance, Ohio, and the townships of Lexington and Washington, county of Stark, abolished the office of justice of the peace in those two townships and that officer must turn over his dockets and files to the municipal court.

COLUMBUS, OHIO, February 20, 1918.

HON. FRANK M. SWEITZER, *Prosecuting Attorney, Canton, Ohio.*

DEAR SIR:—I have your communication asking for an opinion upon the following facts:

> "In 1917 the Ohio legislature enacted a law creating the municipal court in the city of Alliance, which, in substance, provides that all work heretofore handled by the justice of the peace in Lexington and Washington townships of Stark county, Ohio, be filed in the municipal court, also directing the justice of the peace of the two heretofore named townships to turn over their books to the municipal court of Alliance on January 1, 1918, or at the beginning of the new court.
>
> A. was elected justice of the peace of Lexington township for a term of four years and took office in 1916, consequently you can see that he has two years yet to serve in this office if he fills out the term for which he has been elected by the electorate of Lexington township. I would respectfully request that you give me your opinion as to whether or not he is compelled by this act creating a municipal court, found in Vol 107, Ohio Laws, page 660, to turn over his dockets and files and cease doing business as justice of the peace of Lexington township, or whether he has a legal right to fill out his term of office for which he has been elected."

Section 1 of article IV of the constitution, as adopted in September, 1912, reads:

> "The judicial power of the state is vested in a supreme court, court of appeals, courts of common pleas, courts of probate, and such other courts inferior to the courts of appeals as may from time to time be established by law."

Section 1711-1, General Code, as enacted in 103 O. L., page 214, reads:

> "That there be and is hereby established in each of the several townships in the several counties of the state of Ohio, except townships in which a court other than a mayor's court now exists or may hereafter be created having jurisdiction of all cases of which justices of the peace have or may have jurisdiction, the office of justice of the peace.
>
> The jurisdiction, powers and duties of said office, and the number of justices of the peace in each such township shall be the same as was provided by the laws in force on September 3, 1912. All laws and parts of laws in force on said date, in any manner regulating such powers and duties, fixing such jurisdiction or pertaining to such office or the incumbents

thereof are hereby declared to be and remain in force until specifically amended or repealed, the same as if herein fully re-enacted."

In the case of in re Hesse, 93 O. S., p. 230 Newman, J., says:

"The office of justice of the peace on January 1, 1913, ceased to be a constitutional office. Acting under the authority conferred upon it by section 1, article IV of the constitution, as amended in 1912, the general assembly, by an act filed in the office of the secretary of state April 30, 1913 (103 O. L., 214), established the office of justice of the peace in each of the several townships in the different counties of the state, excepting townships in which a court other than a mayor's court then existed or might thereafter be created having jurisdiction of all cases of which justices of the peace had or might have jurisdiction."

The act of creating the municipal court for the city of Alliance, Stark county, Ohio, is found in 107 O. L., p. 660. Section 1 reads:

"That there be and hereby is created a court of record for the city of Alliance and the townships of Lexington and Washington, in the county of Stark, state of Ohio, to be styled 'The Municipal Court of Alliance, Ohio' (the jurisdiction thereof, to be as herein and hereinafter fixed and determined)."

Section 2 provides for the election and compensation of one judge of such court, and further provides that

"Said judge shall be elected at the next regular municipal election after the going into effect of this act, for a term of four years, commencing on the first day of January next, after said election and shall hold said office until his successor is elected and duly qualified."

Section 3 of the act provides that:

"Said municipal court herein established shall have the same jurisdiction in criminal matters and prosecutions for misdemeanors, for violations of ordinances as mayors of cities and any justice of the peace, and in addition thereto shall have ordinary civil jurisdiction within the limits of said city of Alliance and townships of Lexington and Washington, in the county of Stark and state of Ohio, in the following cases:

(1) In all actions and proceedings of which justices of the peace, or such courts as may succeed justice of the peace courts, have or may be given jurisdiction. (Then follows an enumeration of seven other classes of civil actions of which the Alliance municipal court can take jurisdiction)."

Section 5 of the act provides:

"In all cases the municipal court shall have jurisdiction in every ancillary and supplemental proceeding, before and after judgment, including attachment of person or property, arrest before judgment, interpleader, aid of execution and the appointment of a receiver, for which authority is now, or may hereafter be conferred upon the court of common pleas, or a judge thereof, or upon justices of the peace."

Section 6 of the act provides:

"The municipal court shall have jurisdiction of all misdemeanors and of all violations of city ordinances of which police courts or the mayor in municipalities now have or may hereafter be given jurisdiction. In felonies the municipal court shall have the powers which police courts or the mayor in municipalities now have or may hereafter be given."

From these sections it will be seen that in this act there was created by the general assembly a court for the city of Alliance in the townships of Lexington and Washington, in Stark county, "other than a mayor's court * * * having jurisdiction of all cases of which justices of the peace had or might have jurisdiction." Since the office of justice of the peace is no longer a constitutional office, and since section 1711-1 of the General Code makes provision for the office of justice of the peace, only in those townships in which a court, other than the mayor's court having jurisdiction in all cases of which justices of the peace have jurisdiction, has not been created, it is plain that when the legislature enacted the Alliance municipal court law, found in 107 O. L., p. 660, the effect of such act was to abolish the office of justice of the peace in the townships of Lexington and Washington, Stark county. That the legislature had the authority to do this is plain from a reading of the case of in re Hesse, supra. In that case the Cincinnati municipal court law was being assailed for the reason that the act limited the jurisdiction of justices of the peace outside of Cincinnati township over criminal matters and robbed the justice of the peace in Cincinnati township of all jurisdiction in criminal matters. The court said:

"There can be no objection to the constitutional validity of these provisions. Although section 26 of article II of the constitution imposes a limitation upon the legislative power in requiring all laws of a general nature to have uniform operation throughout the state, yet it seems to be settled that, section 1, article IV, authorizing the establishment of inferior courts, being a special grant of legislative power upon a particular subject, the general assembly is vested with full power to determine what other courts it will establish, local if deemed proper, either for separate counties or districts, and to define their jurisdiction and power. The State ex rel v. Bloch, 65 Ohio St., 370; State ex rel v. Featman, 89 Ohio St., 44. It is to be observed that the jurisdiction of no constitutional court is invaded by the sections of the municipal court act under consideration. They abridge and limit the jurisdiction of a statutory court only."

In Mechem's Public Offices and Officers, section 465, I find the following:

"Where, then, an office is created by statute, it may, in the absence of constitutional prohibitions, be entirely abolished, or its term may be increased or diminished, or the manner of filling it may be changed, or its compensation may be altered, or its duties may be diminished or increased, at the will of the legislature at any time, even though done during the term for which the then incumbent was elected or appointed.

So the legislature may declare the office vacant or may transfer its duties to another officer, although the effect may be to remove the officer in the middle of his term, or to abolish his office by leaving it devoid of duties."

Section 37 of the Alliance municipal court act reads:

"All proceedings, judgment, executions, dockets, papers, moneys, property and persons subject to the jurisdiction of the mayor's court of the city of Alliance and the courts of any justice of the peace for Lexington and Washington townships in Stark county on December 31, 1917, shall be turned over to the municipal court herein created; and thereafter such causes shall proceed in the municipal court as if originally instituted therein, the parties making such amendments to their pleadings as required to conform to the rules of said court."

It is clear from the above statutes and authorities cited that the offices of justice of the peace in Lexington and Washington townships, Stark county, have been abolished and that such justices must now comply with the provisions of section 37 of the act just quoted.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1022.

HOW PENALTIES PROVIDED UNDER SECTIONS 5734 AND 5735 (BOTH SECTIONS REPEALED) RELATIVE TO THE REDEMPTION OF DELINQUENT LANDS COMPUTED.

The fifteen per cent penalty of section 5734 and the twenty-five per cent penalty of section 5735 of the General Code (both repealed in 1917) were not to be computed upon the amount of special assessments charged against the property redeemed from delinquent tax sale in addition to the general taxes charged.

COLUMBUS, OHIO, February 20, 1918.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your letter of February 4, 1918, requesting my opinion as follows:

"Can the holder of a tax 'certificate of purchase' under former section 5715 of delinquent lands or lots, collect the fifteen per cent penalty of former section 5734, General Code, or twenty-five per cent penalty of former section 5735 General Code, on the amount of special assessments charged against such property, which were paid by purchaser in addition to the general taxes charged?"

The following sections of the General Code, which have since been repealed, but which govern proceedings and causes of proceedings pending and existing at the date of their repeal, bear upon the answer to your question:

"Section 5734. A person desiring to redeem land or town lots sold at a delinquent tax sale within one year after the sale thereof, or within one year after the expiration of any of the disabilities named in the next preceding section, may deposit with the county treasurer, * * * an amount of money equal to that for which such land or town lot was sold, and the

taxes subsequently paid thereon by the purchaser, or those claiming under him, together with interest, and fifteen per cent penalty on the whole amount paid * * * ."

"Section 5735. A person desiring to redeem any land or town lot sold at a delinquent tax sale, after the expiration of one year from the sale thereof, and within the time limited by law for such redemption, may deposit with the county treasurer, * * * an amount of money equal to that for which such land or town lot was sold, and the *taxes* subsequently paid thereon by such purchaser, or those claiming under him, together with with interest and twenty-five per cent penalty on the whole amount paid, * * * ."

"Section 5715. The county auditor shall make and deliver to the purchaser of land or lots, sold for delinquent taxes as aforesaid, a certificate of purchase, therein describing the land or lots so sold, as described in the tax duplicate, and stating therein the amount of taxes, and penalty for which they were sold * * *."

"Section 5724. Upon the sale of land or town lots for delinquent taxes, the lieu which the state has thereon for taxes then due shall be transferred to the purchaser at such sale. If such sale should be invalid on account of irregularity in the proceedings of an officer, having a duty to perform in relation thereto, the purchaser at such sale shall be entitled to receive, from the owner of such land or lot, the amount of taxes, interest and penalty legally due thereon at the time of sale, with interest thereon from time of payment thereof, and the amount of *taxes* paid thereon by the purchaser subsequent to such sale. Such land or lot shall be bound for the payment thereof."

"Section 5738. Upon the demand of the purchaser, or his legal representative, and the surrender of the tax certificate, and upon the payment of the auditor's fees, the county auditor shall draw his warrant upon the county treasurer in favor of such purchaser, or his legal representative, for the amount of money so deposited as hereinbefore provided, with the treasurer."

Without abstracting the administrative machinery which is provided for by these related sections, and which I think is sufficiently intelligible from the face of said sections, I point out that your question necessitates an interpretation of the word "taxes" as used in three of them. In my opinion this word was used in its narrower significance, which is that sense which excludes the idea of special assessments.

Under the statutory scheme existing prior to 1917, of which these sections were a part, special assessments formed no part of the delinquent taxes for which lands were advertised and sold. The word "taxes" is used throughout the chapter, in which the sections are found, and in every instance of its use it means general taxes as distinguished from special assessments.

When, therefore, sections 5734 and 5735 G. C. provided that the redemptioner should pay an amount which included "the *taxes* subsequently paid thereon by the purchaser," it was intended that this part of the amount to be paid was to be computed upon the basis of general property taxes laid on the land, and those only. Of course the penalty was based on the whole amount made up as the sections required and the certificate holder was entitled under section 5738 G. C. to receive the amount deposited under section 5734 or 5735, and no more.

This statement sufficiently answers your question in the negative.

I may say that it is not to be inferred, from what I have held, that the assessments actually paid by the certificate holder on property, together with interest thereon, may not be recovered by the certificate holder from the owner of the property in a proper case. The facts which would support such a recovery need not be considered, as your question relates merely to the calculation of the penalties prescribed in sections 5734 and 5735, supra. But what I have said has made it clear that the deposit to be made with the county treasurer by the redemptioner is not to include the amount of the assessments paid by the certificate holder, but only the amount of the taxes.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1023.

APPROVAL OF BOND ISSUE—DELAWARE COUNTY—$33,600.00

COLUMBUS, OHIO, February 20, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

In re bonds of Delaware county, Ohio, in the sum of $33,600.00, in anticipation of the collection of special assessments for the improvement of certain single county ditches in said county.

GENTLEMEN:—I have carefully examined the transcript of the proceedings of the board of county commissioners and other officers of said county, relating to the above bond issue which was purchased by you under date of February 12, 1918.

I find that the proceedings relating to this bond issue are in substantial conformity to the provisions of the General Code, so far as any question touching the liability of the county on said bonds is concerned, and I am therefore of the opinion that properly prepared bonds covering said issue will, when the same are properly executed and delivered, constitute valid and subsisting obligations of said county.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1024.

HOW PUBLICATION OF THE RATES OF TAXATION SHOULD BE MADE—COUNTY TREASURER MAY SELECT NEWSPAPER—WHERE NEWSPAPER PUBLISHES WITHOUT DIRECTION FROM COUNTY TREASURER, SUCH PAPER NOT ENTITLED TO COMPENSATION—DUTIES OF TREASURER RELATIVE TO SUCH PUBLICATION.

Publication of the rates of taxation shall be made in two newspapers of opposite politics at the county seat, if there be such newspaper published thereat as provided in section 6252 General Code, and such publication shall be made for six successive weeks as provided in section 2648 General Code. There is no authority

therefore for the publication of such notice in a newspaper which is not published at the county seat, except in cities other than a county seat having a population of eight thousand inhabitants or more, as provided in the last sentence of section 6252 General Code.

Where a newspaper publishes the rates of taxation without direction from the county treasurer, such paper is not entitled to compensation therefor, and the county cannot pay the same either as a moral or legal obligation.

The county treasurer has authority, under section 2648 General Code, to select a newspaper in which publication of the rates of taxation shall be made.

Where the county treasurer selects a newspaper not published at the county seat in which to publish the rates of taxation, such newspaper cannot be paid for such publication.

Where a county treasurer selects some paper at the county seat in which to make publication of the rates of taxation, and another paper voluntarily publishes such rates, the county treasurer need not proceed to make additional publication in a newspaper of opposite politics to the paper which he selected to make such publication.

COLUMBUS, OHIO, February 20, 1918.

HON C. M. CALDWELL, *Prosecuting Attorney, Waverly, Ohio.*

DEAR SIR:—Your letter of January 10, 1918, is received, in which you make the following inquiries:

> "Please refer to sections 2648 and 6252 G. C.
>
> Our county treasurer authorized the rates of taxation to be published in The Waverly Watchman (printed at Waverly, the county seat) and in The Piketon Republican (printed at Piketon, five miles from the county seat). These being two newspapers of opposite politics and of general circulation in Pike county, and at the county seat.
>
> The Republican Herald (printed at the county seat), wthout any authority from the treasurer, also proceeded to publish said rates of taxation, taking the copy, we presume, from one of the other papers.
>
> As to the publication in The Waverly Watchman, there is no question, it being published at the county seat, and the publication authorized by the county treasurer.
>
> Both of the other papers named have presented bills to our county commissioners for the publication of said rates of taxation.
>
> *Query*:
>
> 1. The Republican Herald, not being authorized by the treasurer to publish said rates, can it collect for such publication; or is there any authority to pay for such publication?
>
> 2. Is not the county treasurer authorized to select the newspaper in which such notice is to be published? (See 9 Dec. Rep 644, 16 Bull. 69).
>
> 3. The Piketon Republican, not being printed at the county seat, can the treasurer authorize the publication of the 'rates of taxation,' in such paper? And can its bill be legally paid? Can the fact that it is generally circulated at the county seat be construed to be a publication at the county seat?
>
> 4. If neither of these bills can be legally paid, for reasons given, will the one publication in The Waverly Watchman be sufficient under section

2648, which provides for publication *'in a newspaper* having a general circulation in the county?' Or will mandamus lie to compel the county treasurer to proceed to publish in a newspaper of opposite politics to the Watchman, and printed at the county seat?"

The first question to be determined is the number of newspapers in which the rates of taxation shall be published.

Section 2648 General Code reads as follows:

"Upon receiving from the county auditor a duplicate of taxes assessed upon the property of the county, the county treasurer, shall immediately cause notice thereof to be posted in three places in each township of the county, one of which shall be at the place of holding elections in such township, and also be inserted for six successive weeks in a newspaper having a general circulation in the county. Such notice shall specify particularly the amount of taxes levied on the duplicate for the support of the state government, the payment of interest and principal of the public debt, the support of state common schools, defraying county expenses, repairing of roads, keeping the poor, building of bridges, township expenses and for each other object for which taxes may be levied on each dollar valuation."

The above section was originally passed March 12, 1831, as section 13 of an Act contained in 29 Ohio Laws, 291. This section reads, in part, as follows:

"That the county treasurer shall, between the first and fifteenth days of August annually, receive from the county auditor of his county, a duplicate of the taxes assessed by such auditor; and immediately after receiving said duplicate, he shall cause notice to be posted up in three places in each township throughout the county, one of which shall be the place of holding elections in the township, and also to be inserted in some newspaper having general circulation in his county, for six successive weeks * * *."

This section was amended May 1, 1854, by an Act in 52 Ohio Laws, 124, but the provision in reference to publication in some newspaper was not changed. This provision read the same until the adoption of the General Code in 1910, when the language was changed to its present form but no change was made in the substance. This provision requires publication to be made in some newspaper having general circulation in the county and this publication is to be made for six successive weeks.

Section 6252 General Code provides as follows:

"A proclamation for an election, an order fixing the times of holding court, notice of rates of taxation, bridge and pike notices, notice to contractors and such other advertisements of general interest to the taxpayers as the auditor, treasurer, probate judge or commissioners may deem proper, shall be published in two newspapers of opposite politics at the county seat, if there be such newspapers published thereat. In counties having cities of eight thousand inhabitants or more, not the county seat of such counties, additional publication of such notices shall be made in two newspapers of opposite politics in such city. This chapter shall not apply to the publication of notices of delinquent tax and forfeited land sales."

The town of Piketon to which you refer is a village according to the census of 1910, and therefore the provision of section 6252, supra, as to publication in cities of eight thousand inhabitants or more does not apply to the case cited by you.

The provisions of said section 6252 General Code were first enacted by an act in 73 Ohio Laws, 75, passed March 25, 1876. Section 2 of said act reads in part as follows:

> "That hereafter all proclamations by sheriffs for elections; orders fixing times of holding courts; treasurer's notice of rates of taxation; * * * shall be published in two newspapers, one of each political party, if there be two papers of different political principals printed within said county in each of the several counties of this state."

It will be observed that this act provided for the publication in two papers printed within said county, but did not provide that such papers should be published at the county seat.

This section was amended in 86 Ohio Laws, 258, by an act passed April 12, 1889, so as to read, in part, as follows:

> "Every proclamation for an election, order fixing the times of holding court, notice of the rates of taxation, * * * shall be published in two newspapers of opposite politics, at the county seat, if there be such published in the county seat, * * * ."

The above amendment provides that the matters therein specified "shall be published in two newspapers of opposite politics, at the county seat." This is the first restriction found in the statutes which require such publication to be made in newspapers at the county seat. This provision is now found in the present form of section 6252 General Code.

Section 2648 General Code was known as section 1087 of the Revised Statutes and section 6252 General Code was known as section 4367 Revised Statutes. These two sections, with others, were under consideration by Evans, J., in the case of *Elliott* v. *Board of Commissioners of Franklin county,* 16 Bull. 69. There is no syllabus to this case. Judge Evans in his opinion states that it is necessary to examine the provisions of the statute to determine the question then under consideration. He says in his opinion:

> "The provisions of the statutes touching the subject under consideration are contained in the Revised Statutes sections 1087, 2977, 4367 and 4368. These several provisions are in *pari materia,* and must be construed together and the legislative intent arrived at by giving to the language used in the several sections, its ordinary and natural import. The court is of the opinion that the county treasurer is the person who is authorized to cause to be published his notice of the rates of taxation, and under the limitations of the statute to select the newspapers in which the same may be published. Under section 1087, the county treasurer was authorized and required to publish his rates of taxation in some newspaper, which, when properly understood, means in one English paper. But section 4367 authorizes and requires him to publish his rates of taxation in two English newspapers of opposite politics. If there be more than two competent English newspapers, he shall, with regard to the limitations contained in the section, select the two in which publication may be made. The only authority which he has to make such publication is found in the sections above referred to; and as he is an officer having no authority to make any publication at the

expense of his county, unless authorized by statute, it follows that the language of the statute conferring its authority will show its true limit. The treasurer was authorized to make publication of his rates of taxation, by section 1087, in but one English newspaper, and by section 4367, in two English newspapers of opposite politics. The authority conferred by section 4367 cannot be construed as authorizing publication in more than two English newspapers.

The sheriff is authorized and required by section 2077 to publish his election proclamation, and under this section to publish it in but one English newspaper; and his authority to make publication thereof under section 4367 is the same as that of county treasurers to publish rates of taxation.

Upon the facts as we find them to exist in the proofs, and the application thereto of the law as we understand it, the plaintiffs cannot recover for either of said publications. Said publications, respectively, had been given to the Journal and Times before application was made to have them published in the Sunday Capital, and this fact was known to plaintiff, or his agent, at the time of such application, as well as the further fact that the board of county commissioners had resolved that they would pay but two English newspapers for the publication of said proclamation and rates. The legal presumption is that every person knows the law, and the evidence shows that plaintiff, or his agent, had due notice of all the material facts."

The date of this opinion is not given, but it is published in the Weekly Law Bulletin, issue of August 2, 1886. The date of the opinion therefore was evidently some time between March 25, 1876, when the original provisions of what is known as section 6252 General Code were passed, and April 12, 1889, when said act was first amended. At the time, therefore, when this opinion was rendered there was no provision in the statute that such publication should be made in two newspapers of opposite politics located at the county seat.

The above section 6252 General Code covers also the publication of an order fixing the time of holding court. Publication of such notice is also provided for in sections 1519 and 1534 General Code. It is provided in section 1519, among other things,

"the clerk shall cause a copy of the order to be published in one or more newspapers of general circulation in such county, once a week on the same day of the week, for three consecutive weeks."

Section 1534 General Code contains a like provision.

For the purpose of this opinion and the questions under consideration, these provisions are like the provisions contained in section 2648 General Code, and the conclusions reached would apply equally to each section.

In sections 4825 and 4827 General Code there is provision for the proclamation of election issued by the sheriff.

Section 4825 General Code contains the following provision:

"A copy of such proclamation shall be posted at each of the places where elections are appointed to be held and inserted in a newspaper published in the county."

A like provision is contained in section 4827 General Code. These provisions

are also subject to the same construction as that contained in section 2648 General Code, in so far as applicable to the present question.

In the case of *The Vindicator Printing Co.* v. *State of Ohio,* 68 O. S., 362, publications of a sheriff's proclamation of election and other publications were under consideration. Spear, J., says at page 366 as follows:

> "Publication of the sheriff's proclamation is authorized by section 2977, Revised Statutes. It is to 'be inserted in some newspaper published in the county, if any is published therein.' This is supplemented by section 4367, which requires publication in two newspapers of opposite politics, but taken together the meaning is one insertion in each newspaper."

It will be observed that Judge Spear holds that what is now section 6252 General Code is supplemental to section 4825 General Code.

In an opinion to Hon. R. H. Patchin, prosecuting attorney, under date of November 15, 1910, Hon. U. G. Denman, attorney-general, says:

> "You point out the fact that section 2648 provides simply that such notice 'shall be inserted for six consecutive weeks in a newspaper having general circulation in the county.' However, section 6252 of the General Code is to be read in connection with section 2648 of the General Code.
>
> * * *
>
> The notice provided in section 2648 of the General Code is required to 'specify particularly the amount of taxes levied on the duplicate' for the various purposes for which taxes are to be levied, and, in my judgment, is such a notice as is contemplated by section 6252 of the General Code.
>
> From all the foregoing it follows that said notice should be published in two newspapers of opposite politics at the county seat, if such there are."

In an opinion to the Bureau of Inspection and Supervision of Public Offices, under date of October 6, 1915, reported in Opinions of the Attorney-General for 1915, at page 1925, the first branch of the syllabus reads:

> "The provisions of section 6252 G. C. requiring the publication of the 'times for holding courts' to be made in two newspapers of 'opposite politics,' as therein specified, are supplementary to and control the provisions of the special statutes requiring such publications to be made in one or more newspapers of general circulation."

The above provisions of statute were again under consideration by Hon. Edward C. Turner, attorney-general, in an opinion to Hon. Henry W. Cherrington, prosecuting attorney, under date of November 13, 1916, and reported at page 1771 of Opinions of the Attorney-General for 1916. The syllabus of the opinion reads as follows:

> "Publication of order required by section 1519 G. C. should be made in accordance with section 6252 G. C."

Mr. Turner says at page 1772:

> "Section 6252 G. C. provides that if there are two newspapers of opposite politics at the county seat publication shall be made there. And if there are one or more newspapers of opposite politics in a city of eight

thousand inhabitants or more not a county seat in the county, such publication should be made there. There is nothing in the statute as to the number of insertions to be made. It may be possible that in certain county seats there are not two newspapers of opposite politics published, and if such is the case, then the publication would be made in only one newspaper. It does not seem to me, therefore, that there is such a conflict between the two statutes that it can be said that section 1519 G. C. is exclusive of the provisions of section 6252 G. C., but rather that the two may be read together without in any way doing violence to the language of either. If there are two newspapers of opposite politics at the county seat an order fixing the time of holding court should be printed in such newspapers. If in such county there is a city of eight thousand inhabitants or more, not a county seat, additional publication shall be made in two newspapers of opposite politics if there be such in such city, and under the provisions of section 6253 G. C. publication shall be made in a newspaper printed in the German language. The time of publication is fixed by the provisions of section 1519 G. C., section 6252 G. C. not providing for the time of publication."

It appears from the decisions and opinions above cited, that the provisions of section 6252 General Code are to be held as supplementary to the provisions of section 2648 General Code. It is clear also that the two sections are in *pari materia* as to the question now under consideration and that they are to be read and construed together.

The provisions of section 2648 General Code, requiring the publication of the rates of taxation in some newspapers having general circulation in the county, was first enacted and has been a part of the statute since 1831. The provisions now contained in section 6252 General Code were first passed in 1876, and in the original form they provided that such publication should be made in two newspapers of different political principles printed within said county. It is clear that under this form only publication in two newspapers was provided for. This was the situation when the case of *Elliott* v. *Commissioners of Franklin County,* supra, was decided.

Thereafter, the provisions which are now contained in section 6252 General Code were changed so that such newspaper should be published at the county seat. There was a further limitation upon the right of selecting the newspaper in which such publication should be made. This amendment did not increase the number of newspapers in which such publication should be made. A newspaper meeting the requirements of section 6252 General Code, as being published at the county seat, would also meet the requirements contained in section 2648 General Code, that such publication shall be made in a newspaper having a general circulation in the county.

If, therefore, the provisions of section 6252 General Code are supplementary to section 2648 General Code, they limit the publication to newspapers which are published at the county seat. It will be observed that section 6252 General Code does not specify the number of times such publication is made. Section 2648 General Code does state that such publication shall be made for six successive weeks.

It is my opinion, therefore, that the publication of the rates of taxation shall be made in two newspapers of opposite politics at the county seat, if there be such newspaper published thereat as provided in section 6252 General Code, and that such publication shall be made for six successive weeks as provided in section 2648 General Code. There is no authority therefore for the publication of such notice in a newspaper which is not published at the county seat, except in cities other than a county seat having a population of eight thousand inhabitants or more, as provided in the last sentence of section 6252 General Code.

Coming now to your specific questions, your first question is with reference to the right of The Republican Herald to be paid for the publication made by it.

It appears that this paper was not authorized to make such publication by the county treasurer. By virtue of section 2648 General Code the county treasurer has authority to select the newspaper in which such publication shall be made.

In the case of *McCormick* v. *City of Niles,* 81 O. S., 246, the first branch of the syllabus reads:

> "The liability of a municipal corporation to pay for the publication of ordinances, resolutions and legal notices required by law to be published, must rest on express contract, and not upon a mere account for the rendition of such services."

The same principle will apply to contracts for publication of legal notices by the county.

In the case of the Republican Herald there was no express contract to make the publication. This paper cannot, therefore, enforce collection against the county for payment for such services.

The second part of your first question, as to the authority of the county to pay for such publication, will be considered in connection with the answer to your fourth question.

Your second question is as to the authority of the county treasurer to select the newspaper in which such notice is to be published.

Under the provisions of section 2648 General Code it is the duty of the county treasurer to make such publication, and he has authority to select the newspaper or newspapers in which such publication shall be made.

Your third question is as to the right of the Piketon Republican to be paid for making publication under contract with the county treasurer. This paper does not meet the requirements of section 6252 General Code, for the reason that it is not published at the county seat. The county treasurer therefore was not authorized to have such publication made in this newspaper and it cannot be paid therefor.

Your fourth question is as to the sufficiency of the publication now made.

It appears that there are at the couty seat two newspapers of opposite politics which meet the requirements of section 6252 General Code. One of these papers has been officially selected by the county treasurer in which to make publication of the rates of taxation. The other paper has voluntarily made such publication without official selection by the county treasurer.

At page 360 of volume 28 of Cyc. it is said:

> "Failure to contract in writing for the publishing, as required by the charter, will not affect the validity of the publication."

This rule is stated in reference to the publication of ordinances of a municipal corporation.

The case of *McKusick* v. *Stillwater,* 44 *Minn., 372,* is cited in support of the above rule. In that case it was held:

> "Where the proposition of the proprietor of a newspaper to publish the ordinances, etc., of the city was accepted, and such paper declared to be the official paper of the city, and is thereafter treated as such, and notices and proceedings under the charter are duly and regularly published therein, the omission to comply with a provision of the charter requiring the con-

tract between the city and the publisher to be reduced to writing, and a bond to be executed by the latter, will not invalidate such published notices and proceedings."

In this case an attempt was made to select the paper making the publication as the official organ for making publications, but the requirements of the statutes as to making a contract were not complied with.

In the case of *Wright* v. *Forestal,* 65 Wis. 341, it is held:

"Where the common council has undertaken, in pursuance of the charter, to designate a newspaper as the official paper for a year, and all notices, etc., of the city government are published in such paper during the year, that paper is *de facto* the official paper, even though the designation was irregularly made, and the publication of a notice therein will be held valid in collateral proceedings."

In this case, however, the court held that the newspaper in question had been legally selected to make the publication in question.

These cases are decided upon the principle that the paper was *de facto* the official paper.

There is no provision of the statute which would permit a taxpayer to refuse to pay his taxes upon the ground that publication of the rates of taxation had not been made in accordance with the provisions of section 6252 General Code. So far as the taxpayers are concerned, they have had due notice of the rates of taxation, even though the one publication was made voluntarily by one of the newspapers. The taxpayer therefore could not take advantage of this situation.

It is my opinion that no further publication need be made of the rates of taxation in your county.

The further question then arises as to the authority of the county to pay for such voluntary publication. There is no legal obligation to pay for the same. If the right to pay exists, it would be upon the theory that it is a moral obligation.

McQuillin on Municipal Corporations, at section 2168, states the rule:

"While payment of claims which are neither legal nor equitable is an expenditure for other than public purposes, yet the payment by municipal corporations of claims founded in justice and supported by a moral obligation only, does not conflict with constitutional provisions forbidding the making of gifts."

A moral or equitable obligation usually arises where an effort has been made to enter into a legal contract, but through some irregularity the provisions of the statute have not been complied with. In the present case no attempt was made to designate the Republican Herald as the paper in which to make such publication. Such publication was made voluntarily. There would not under such circumstances be any moral or equitable obligation upon the county to pay for such publication.

At section 793 of Dillon on Municipal Corporations he says:

"A municipal corporation does not become liable for work and labor performed or services rendered by a mere volunteer without any request, either express or implied."

It is my opinion, therefore, that the county is not legally obligated to pay the bill of The Republican Herald, nor can it pay the same as a moral or equitable claim against the county.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1025.

SURETIES ON BOND OF CITY OFFICIAL LIABLE EVEN THOUGH ORIGINAL BOND LOST—LIABILITY OF CUSTODIAN.

The sureties on a bond of an officer or an employe of a city, as shown by the official record of such bond, may be held liable thereunder even though the original bond cannot be found.

The liability of the official in whose keeping such bond is placed will depend upon whether the city has suffered any loss on account of the failure to preserve the original bond, and his negligence in misplacing the same.

COLUMBUS, OHIO, February 25, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTEMEN:—Your letter of January 31, 1918, is received in which you submit the following inquiries:

"We would refer you to the provisions of section 4669 General Code, relative to officers giving bond, the filing and recording of same.

STATEMENT OF FACTS.

An officer of a municipality required to give bond has been found short in his accounts and restitution should be made. The bond given cannot be found or located in any manner. However, the record of the auditor shows the date of the bond and the persons who became sureties for the officer, etc.

1. Can the bondsmen as shown by the record of the auditor be held liable when the bond itself cannot be located?

2. Can the officer required by law to file and carefully preserve such bond be held liable?

3. Will the same ruling apply to employes, who are not officers, but who are required to give bond by law or ordinance?"

Section 4669 General Code, to which you refer, reads as follows:

"Each officer required by law or ordinance to give bond shall do so before entering upon the duties of the office, except as otherwise provided in this title. In its discretion council at any time may require each officer to give a new or additional bond. Except that of the auditor or clerk, each bond upon its approval shall be delivered to the auditor or clerk, who shall immediately record it in a record provided for that purpose and file and carefully preserve it in his office. The bond of the auditor or clerk shall be delivered to the treasurer, who shall in like manner record and preserve it."

Section 4 General Code reads:

> "Every officer, on receiving an official bond which by law is required to be filed or deposited with him, shall, on receiving such bond, record it in a book to be kept by him for that purpose. A certified transcript of the record of such bond shall be conclusive evidence of such record, and prima facie evidence of the execution and existence of such bond."

Section 4669 General Code provides for the filing and record of the official bonds. Section 4 General Code also provides for a record, and further, makes a certified transcript of the record "prima facie evidence of the execution and existence of such bond."

The fact that a written instrument may be lost does not affect the liability thereunder. It does affect the proof of the existence of the instrument and the terms thereof. As to bonds of officers the record thereof is made prima facie evidence of the existence of such bond. The record, therefore, takes the place of the bond and may be shown in order to fix the liability thereunder.

At page 1608 of volume 25 of Cyc., the rule is stated:

> "The loss or destruction of a written instrument in no way affects the liabilities of the parties to it, or changes the nature of the demand."

Answering your questions specifically:

The sureties on a bond of an officer of a city, as shown by the official record of such bond, may be held liable thereunder, even though the original bond cannot be found.

The liability of the official in whose keeping such bond is placed will depend upon whether the city has suffered any loss on account of the failure to preserve the original bond, and his negligence in misplacing the same. As the bond can be proved by the record, it does not appear that the city will suffer any loss. I do not deem it advisable to give a general answer to your second question. The facts of each case should be considered.

The principles above given will apply to bonds given by employes.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1026.

SPECIAL FUND IN STATE TREASURY MAY NOT BE USED UNTIL APPROPRIATED.

Fines and penalties received under section 1248-7 *G. C. become a special fund in the state treasury, but cannot be used until appropriated.*

COLUMBUS, OHIO, February 25, 1918.

HON. A. W. FREEMAN, *Commissioner of Health, Columbus, Ohio.*

DEAR SIR:—You have requested my opinion as follows:

> "Following is a copy of a letter I have received from the auditor of state:

'The books of account in this office show the following sums to have been credited to your appropriations:

$50 shown on your revenue voucher No. 1031, Oct. 31, 1917.

$50 shown on auditor of state's revenue voucher No. 1531 December 31, 1917.

Both amounts were fines collected under H. B. 470, filed in the office of the secretary of state, May 27, 1915. (Sec. 1248-7 G. C.)

Undoubtedly the intendment of the section mentioned was, among other things, to appropriate for the use of your department the fines collected in prosecutions under this act.

However, it would seem that under the operations of Art. II, Sec. 22, Ohio constitution, the virtue of 1248-7 G. C., as an appropriation act ceased at the end of the two years running from August 25, 1917 (90 days after the filing of the act as aforesaid), to August 26, 1917.

Therefore, it will be necessary to deduct the sum of $100 from your appropriation balances.'

The above refers to the administration of H. B. 470 (106 O. L. 321). The auditor of state seems to have fallen into the error of believing that section 8 of this bill appropriated $5,000 to the state board of health for the administration of this act. This section did not appropriate money to this department. The appropriation was made in H. B. 701 (106 O. L. 693). You will note that the purpose of this legislation is continuing. That is, that it was not the intent of the legislature that this department should administer the work in the prevention of blindness from inflammation of the eyes of the new born merely for the period of two years covered by house bill 701.

While no specific appropriation was made for the fiscal year beginning July 1, 1917, funds were appropriated for this purpose, but are not easily recognizable for the reason that in order to follow the budget classifications the items concerned in the prosecution of this work are divided. By referring to H. B. 584 (107 O. L. 214) you will find items which will identify the intent of the legislature that the work be continued. In making up our budget for the present fiscal year, the following items were included:

A-1.	1 public health nurse	$1,200 00
	1 stenographer, grade III	900 00
A-2.	Emergency nurses	500 00
A-3.	Reporting fees	500 00
	Physicians' fees	500 00
C-4.	Postage and office supplies	100 00
C-5.	Medical supplies	750 00
F-6a.	Transportation	750 00
F-9.	General plant service (for hospital treatment of cases)	200 00

This makes a total of $5,400.00 for the continuance of our work in the prevention of blindness.

Section 8 of H. B. 470 provides:

'The sum of $5,000.00 shall be annually appropriated for the use of the state board of health in enforcing and carrying out the provisions of this act. Any and all necessary and legitimate expenses that may be incurred in prosecuting a case under this act shall, on proper showing, be

met by the state board of health out of this appropriation. In addition thereto, all fines and penalties recovered hereunder shall be paid into the state treasury and shall constitute a special fund for the uses and purposes of the state board of health as herein enacted.'

During the two years ending June 30, 1917, fines and penalties recovered under this act were paid to the credit of the item 'for the prevention of blindness among infants, H. B. 470, approved May 27, 1915.'

I should like your opinion as to whether or not this department is entitled to be credited with the fines and penalties recovered from prosecutions under the provisions of this act and if so, your opinion as to what item in our appropriation for the current fiscal year should be credited with such amounts as may be paid into the state treasury."

In your letter you set out the provisions of section 1248-7, which is section 8 of H. B. 470 (106 O. L. 223) in full and this is the only section necessary to be considered in considering your request.

In the letter of the auditor of state to your department he says that the intendment of said section was, among other things, to appropriate for the use of your department the fines collected in prosecutions under said act. I do not agree that such is the intendment of the section.

So much of said section as is pertinent to this matter provides as follows:

"In addition thereto, all fines and penalties recovered hereunder shall be paid into the state treasury *and shall constitute a special fund* for the uses and purposes of the state board of health (state department of health) as herein enacted."

The only effect that can be given to such provision is that the moneys received by way of fines and penalties are to be credited separately in the state treasury as a special fund, and does not in any sense constitute an appropriation thereof. There are many funds in the state treasury which are special funds, but which cannot be paid out except in pursuance of a specific appropriation made by law. (Article II, section 22.) It is necessary, therefore, that an appropriation be made before such funds will become available.

We note what you say relative to the general appropriation bill found in 106 O. L. 693, to the effect that the legislature appropriated to the state board of health in section 2 thereof the sum of $5,000.00, which appropriation was made to extend from July 1, 1915, to June 30, 1917, and would also call your attention that it likewise appropriated in section 3 thereof, for the same purpose, the sum of $5,000.00 for the use of your board from July 1, 1916, to June 30, 1917. At the beginning of said appropriation bill it is provided:

"Appropriations enumerated in such sections (sections 2 and 3) for * * * boards * * * for the uses and purposes of which * * * *specific funds* in the state treasury are provided by law, are hereby made from such specific funds, in so far as such funds are subject by law to appropriation and expenditure for the purposes therein mentioned, and to the extent that the monies to the credit of such specific funds on July 1, 1915, or which may be credited thereto prior to June 30, 1917, shall be sufficient to satisfy such appropriations."

The intention of the legislature, therefore, was, so far as the appropriation referred to is concerned, that all moneys which were collected by way of fines and

penalties should be credited to a special fund and that such special fund would be available for the payment of the amount appropriated so far as it went to the payment of the amount so appropriated.

In the general appropriation bill found in 107 O. L., 187, the same language is used in section 1 thereof with different dates as was used in the prior general appropriation bill, and you inform me that of this appropriation as divided for your department $5,400.00 was the amount appropriated for the purpose of the prevention of blindness among infants.

Whatever fines and penalties were received by your board and paid into the state treasury should have been credited to the special fund provided for in said act and said special fund should have been used to pay the amount appropriated to the state board of health for the items enumerated in your letter, as those which are used "for the prevention of blindness among infants."

So that, answering your question specifically, I advise that your department is entitled to have credited to a special fund in the state treasury the fines and penalties recovered from prosecutions under the provisions of the act "for the prevention of blindness among infants, H. B. 470, approved May 27, 1915," and that such funds should be used so far as they will go to the payment of the items specified in your letter. They would not, however, be *in addition* to the appropriation of $5,400.00 which you have designated in your letter.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1027.

CONSTABLES HAVE BEEN ENTITLED TO RECEIVE ONE DOLLAR FOR SERVING WARRANTS IN CASES ENUMERATED IN SECTION 13423 G. C. SINCE JUNE 7, 1911.

By virtue of the amendment of section 2845 *G. C. in* 102 *O. L.,* 286, *constables have been entitled to* $1.00 *for serving warrants in cases enumerated in section* 13423 *of the General Code since June* 7, 1911.

A constable rendered a bill for services rendered by him for serving warrants in such cases, covering a period from June, 1910, *to March,* 1912. *At the time the costs were paid in these cases only thirty cents for serving such warrants was allowed the constable. HELD, that such constable is entitled to the payment of the additional seventy cents from the county for serving such warrants in those instances in which the following facts are established:*

1. *Such services must have been rendered in a case falling within the provisions of section* 13423 *G. C.*

2. *The services rendered must have been rendered on or subsequent to June* 7, 1911, *and the cost bill must have been certified by the trial magistrate to the county auditor within the last six years.*

3. *The defendant must have been acquitted or discharged from custody by nolle or otherwise or convicted and committed in default of paying the fine and costs.*

COLUMBUS, OHIO, February 25, 1918.

HON. JOHN D. D'ALTON, *Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR:—I have your letter of December 17, 1917, as follows:

"W. E. Stiles, a duly elected, qualified and acting constable of Washington township, has submitted to this office a bill aggregating some $186.00,

for services rendered by him in criminal cases covering period from June 8, 1910, to and including March 10, 1912, in serving warrants in criminal neglect cases.

It is his claim that under section 2845 of the General Code, as amended in 102 Ohio Laws, at page 286, he was given the right by virtue of sections G. C. 13436 and 13439 to charge $1.00 for serving a warrant. He only charged 30 cents, which is, as he claims, the amount allowed under the old law. He now asks for the difference of 70 cents on each warrant served, which is noted above, total sum $186.00.

Query: Should the county auditor be instructed to draw his warrant upon the county treasurer for this amount? Will you kindly furnish us your opinion upon this subject?"

After the receipt of this communication I wrote you:

"Under date of December 17, 1917, you asked my opinion concerning the payment of a bill amounting to $186.00 to W. E. Styles, constable of Washington township, your county, for services rendered in criminal cases from June 8, 1910, to March 10, 1912, in serving warrants in 'criminal neglect cases.'

Kindly advise me just what sort of cases these were so that I may know whether or not they all came within the provisions of section 13423 of the General Code."

Under date of January 30, 1918, you enclose me the following from W. E. Styles, constable, in reply to my inquiry:

"In reply to the above will say that all of the cases as presented in my bill came within the provisions of section 13423 of the General Code.

(Signed) W. E. STYLES."

Section 13423 of the General Code, as amended in 103 O. L., 539, reads:

"Justices of the peace, police judges and mayors of cities and villages shall have jurisdiction, within their respective counties, in all cases of violation of any law relating to:

1. Adulteration or deception in the sale of dairy products and other food, drink, drugs and medicines.
2. The prevention of cruelty to animals and children.
3. The abandonment, nonsupport or ill treatment of a child by its parents.
4. The abandonment or ill treatment of a child under sixteen years of age by its guardian.
5. The employment of a child under fourteen years of age in public exhibitions or vocations injurious to health, life or morals, or which cause or permit it to suffer unnecessary physical or mental pain.
6. The regulation, restriction or prohibition of the employment of minors.
7. The torturing, unlawfully punishing, ill treating, or depriving anyone of necessary food, clothing or shelter.
8. The selling, giving away or furnishing of intoxicating liquors as a beverage, or keeping a place where such liquor is sold, given away or furnished, in violation of any law prohibiting such acts within the limits of a township and without the limits of a municipal corporation.

9. The shipping, selling, using, permitting the use of, branding or having unlawful quantities of illuminating oil for or in a mine.

10. The sale, shipment or adulteration of commercial food stuffs.

11. The use of dust creating machinery in workshops and factories.

12. The conducting of a pharmacy, or retail drug or chemical store, or the dispensing or selling of drugs, chemicals, poisons or pharmaceutical preparations therein.

13. The failure to place and keep in a sanitary condition a bakery, confectionery, creamery, dairy, dairy barn, milk depot, laboratory, hotel, restaurant, eating house, packing house, slaughter house, ice cream factory, or place where a food product is manufactured, packed, stored, deposited, collected, prepared, produced or sold for any purpose.

14. Offenses for violation of laws in relation to inspection of steam boilers, and of laws licensing steam engineers and boiler operators.

15. The prevention of short weighing and measuring and all violations of the weights and measures laws."

Section 13436 G. C. reads:

"In pursuing or arresting a defendant and in subpoenaing the witnesses in such prosecutions, the constable, chief of police, marshal or other court officer shall have like jurisdiction and power as the sheriff in criminal cases in the common pleas court, and he shall receive like fees therefor."

It has frequently been held by this department that the words "in such prosecutions," used in section 13426 of the General Code, refer to the prosecutions enumerated in section 13423 of the General Code.

In an opinion found in the annual report of the attorney general for 1912, Vol. 1, page 258, former Attorney-General Hogan held:

"From the arrangement of the statutes before their codification, the intent is clear that the words 'such prosecution,' as they appear in section 13436, General Code, making fees of constables, chiefs of police and marshals similar to those of sheriff's fees in criminal cases, * * * refer to all cases coming under the jurisdiction of justices of the peace, police judges and mayors, as enumerated in section 13423, General Code."

This opinion was cited and approved in an opinion, No. 823, rendered by this department December 3, 1917.

Section 2845 of the General Code provides in part:

"For the services hereinafter specified, when rendered, the sheriff shall charge and collect the following fees and no more: For the service and return of the following writs and orders: * * * warrant to arrest, each person named in the writ, $1.00; * * ."

This provision of this section was enacted in 102 O. L., page 277, 266, May 31, 1911, approved by the governor June 7, 1911. So that from this date, viz., June 7, 1911, there was authority for constables charging $1.00 for the serving of warrants in any of the cases enumerated in section 13423 of the General Code, above quoted.

In your communication you advise me that the services in question rendered by the constable referred to were rendered during a "period from June 8, 1910, to

and inclusive of March 10, 1912." It is clear that some of the services rendered by the constable in these cases were rendered prior to June 7, 1911, and as to those services only a fee of thirty cents was properly chargeable. For such service as that rendered in these cases on and after June 7, 1911, the constable was entitled to a fee of $1.00 for each warrant served.

Section 13439 G. C., which provides for the payment of costs in those cases enumerated in section 13423, reads:

> "In such prosecutions, no costs shall be required to be advanced or secured by a person authorized by law to prosecute. If the defendant be acquitted or discharged from custody by nolle or otherwise, or convicted and committed in default of paying fine and costs, all costs of such case shall be certified under oath by the trial magistrate to the county auditor, who, after correcting errors therein, shall issue a warrant on the county treasury in favor of the person to whom such costs and fees are payable. All moneys which are to be paid by the county treasurer as provided in this chapter shall be paid out of the general revenue fund of such county."

It will be noted from this section that the county is to pay the costs in these cases only when the defendant is acquitted or discharged from custody by nolle or otherwise or when the defendant is convicted and committed in default of paying the fine and costs. In such case the costs must be certified under oath by the trial magistrate to the county auditor. From this section, and a consideration of the other statutes referred to, it is clear that the county should have paid the constable one dollar for serving the warrants in the cases wherein he rendered services on and after June 7, 1911, and which so terminated as to come within the provisions of section 13429 of the General Code, instead of paying but thirty cents, as was done.

The question here presents itself as to whether acceptance by the constable of a less sum than that allowed by statute was in accord and satisfaction, which would defeat any claim by him now to the balance.

In the case of Wolfe v. Humboldt County (— Nev. —, 131 Pac. 964), 45 L. R. A., N. S., 762, it was held:

> "1. To constitute an accord and satisfaction there must have been in fact and in reality a meeting of the minds in accord and in satisfaction.
>
> 2. Acceptance of the portion of a claim against a county for statutory fees of a constable which is allowed by the commissioners does not, since the demand is a liquidated one, *per se* bar a recovery of the residue, on the principle of accord and satisfaction, under a statute requiring presentation of demands for allowance, and authorizing suit if the board refuses to allow the same or any part thereof.
>
> 3. An agreement between a public officer and a board of county commissioners to accept less than statutory fees for the performance of services is void as against public policy."

This view is generally expressed by text writers and supported by many authorities and I do not believe, therefore, that the acceptance of the thirty-cent fee by the constable would, in itself, preclude him from claiming the balance due. However, attention is called to section 11222 of the General Code with reference to the limitation of actions. This section reads:

"An action upon a contract not in writing, express or implied, or upon a liability created by statute other than a forfeiture or penalty, shall be brought within six years after the cause thereof accrued."

It will be noted from a reading of this section that an action upon a liability created by statute other than a forfeiture or penalty must be brought within six years after the cause thereof has accrued.

I think this statute is clearly applicable in the case presented by your communication. It is clear from your statement of facts that in all of these cases certification was made by the trial magistrate to the county auditor as provided in section 13439 G. C., since you state that the fee of thirty cents was allowed the constable. Inasmuch as section 11222, above quoted, has application, it is my view that payment of the additional seventy cents can be only in those cases certified during the last six years.

Answering your questions specifically it is my opinion that the constable referred to is entitled to the payment of the additional seventy cents from the county for serving the warrants only in those instances in which the following facts may be established:

1. Such services must have been rendered in a case falling within the provisions of section 13423 G. C.
2. The services rendered must have been rendered on or subsequent to June 7, 1911, and the cost bill must have been certified by the trial magistrate to the county auditor within the last six years.
3. The defendant must have been acquitted or discharged from custody by nolle or otherwise or convicted and committed in default of paying the fine and costs.

If proper certification is made by the trial magistrate, or his successor, in such instances to the county auditor, I think that such county auditor may then properly issue his warrant upon the county treasurer.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

1028.

COSTS—STATE NOT LIABLE FOR SAME WHEN BOY OVER SIXTEEN YEARS OF AGE IS COMMITTED TO STATE REFORMATORY BY JUVENILE COURT UNDER SECTION 1652 G. C.—HOW SUCH COSTS PAID.

A boy over sixteen years of age is committed to the Ohio state reformatory by the juvenile court by virtue of section 1652 *of the General Code. The state is not liable for the costs in the case. Such costs must be paid from the county treasury upon the certificate of the juvenile judge, as provided in section* 1682 *G. C.*

COLUMBUS, OHIO, February 25, 1918.

HON. HENRY W. CHERRINGTON, *Prosecuting Attorney, Gallipolis, Ohio.*

DEAR SIR:—I have your letter of February 12, 1918, as follows:

"Under the provisions of section 1652 G. C. a boy over sixteen years of age, but under eighteen, was sentenced by the juvenile court of this

county to the Ohio state reformatory. Sentence was made on a plea of guilty to a charge of burglary and grand larceny. Costs were certified by the juvenile court in the usual manner, but the state of Ohio refuses to pay the costs. Is the state responsible for the costs in this case? If not, how shall they be paid?"

You ask whether the state is responsible for the costs in the case referred to. I presume this question arises in your mind because of the fact that the boy was committed to the Ohio state reformatory.

It has always been held that costs and transportation, where prisoners are sentenced to the Ohio state reformatory for felonies, should be paid the same as when prisoners are sentenced to the Ohio penitentiary. This conclusion has been passed upon the fact that the original act, providing for payment of costs in criminal cases by the state, provided for such payment in all cases of conviction of any person for any crime, punishment whereof is imprisonment in the penitentiary.

In opinion No. 427 of this department, rendered under date of July 5, 1917, it was said:

"It will be noted here that the object of the statute was to pay the costs of conviction of any person convicted of any crime the punishment whereof is imprisonment in the penitentiary, and as to the provision for the payment of costs, the legislature had uppermost in mind the crime of which the person was convicted rather than the institution to which such person was being sent."

In other words, the aim of the statutes seems to be to have the state pay the costs in all felony cases, and when it was afterward provided that some persons convicted of felony could be sent to the Ohio state reformatory and some sent to the Ohio reformatory for women, it still held that the costs of conviction and transportation should be paid by the state, since the persons committed to such institution had been convicted of felonies. In the case you submit the youth was not convicted of any crime, but simply found to be a delinquent. You state that the boy was sentenced to the reformatory under the provisions of section 1652 of the General Code. That section provides in part:

"Where it appears at the hearing of a male delinquent child that he is 16 years of age, or over, and has committed a felony, the juvenile court may commit such child to the Ohio state reformatory."

In such cases there is no trial, no plea of guilty and the child is not charged with the commission of any specific crime. The court simply upon hearing found the child to be delinquent and committed him to the proper institution. In such a case as this the statutes, providing for the payment of costs to the state in felony cases, do not apply.

Section 1682 of the General Code provides:

"Fees and costs in all such cases with such sums as are necessary for the incidental expenses of the court and its officers, and the costs of transportation of children to places to which they have been committed, shall be paid from the county treasury upon itemized vouchers certified to by the judge of the court."

This section was originally part of the juvenile court act and it has been several times held by this department that the fees and costs in juvenile cases and cost of transportation of children to places to which they have been committed should be paid according to the provisions of this section.

In direct answer to your inquiry, therefore, I am of the opinion that the state is not responsible for the costs in the case submitted, but that the same should be paid from the county treasury upon the certificate of the juvenile judge.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1029.

THE ACT CREATING THE MUNICIPAL COURT OF ZANESVILLE, LIMITING THE JURISDICTION OF JUSTICES OF THE PEACE OUTSIDE OF SAID CITY, IS CONSTITUTIONAL—JURISDICTION OF SAID JUSTICES TO ISSUE ORDERS OF ATTACHMENT UPON RESIDENTS OF THE CITY OF ZANESVILLE.

1. *Under the authority of the case In re Hesse, 93 O. S., 230, section 37 of the Zanesville municipal court act (section 1579-366 G. C., 107 O. L., 731)—limiting the jurisdiction of justices in townships outside the city of Zanesville, so as to prevent the issuance of an order of attachment or garnishment upon a citizen or resident of Zanesville, unless such service be actually made by personal service within the township in which the proceeding may have been instituted—is constitutional.*

2. *Such justice of the peace is without jurisdiction to issue an order of attachment or garnishment upon a citizen or resident of Zanesville, unless service be actually made by personal service within the township in which the proceeding may have been instituted.*

COLUMBUS, OHIO, February 25, 1918.

HON. W. D. FULTON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I am in receipt of communication from H. N. Kendall, justice of the peace in and for Falls township, Muskingum county, Ohio. He calls attention to the act creating the Zanesville municipal court found in 107 O. L. 722, particularly to section 37 of said act. The justice desired an opinion as to whether or not the municipal court act in any manner abridged the jurisdiction of the justices in Falls townships under the attachment laws. I am addressing this opinion to you and a copy of same will be forwarded to Mr. Kendall.

Section 37 of the Zanesville municipal court act (section 1579-366 G. C., 107 O. L. 731) reads:

> "No justice of the peace in any township in Muskingum county outside the city of Zanesville, or mayor of any village, in any proceeding, whether civil or criminal, in which any warrant, order of arrest, summons, order of attachment or garnishment or other process, except subpoena for witnesses, shall have been served upon a citizen or resident of Zanesville or a corporation having its principal office in Zanesville, shall have jurisdiction, unless such service be actually made by personal service within the township or village in which said proceeding may have been instituted, or

in a criminal matter, unless the offense charged in any warrant or order of arrest shall be alleged to have been committed within said township or village."

The communication in question states that Falls township is a township adjacent to the township in which the city of Zanesville is situated. The question arising in the mind of the justice is whether or not the provision of section 37 of the municipal court act would limit the jurisdiction theretofore possessed by a justice in an outside township in attachment suits against citizens and residents of the city of Zanesville. The section in question expressly provides that justices and mayors outside of the city of Zanesville are without jurisdiction in any proceeding in which an order of attachment, or garnishment, or other process, except subpoena for witnesses, shall have been served upon a citizen or resident of Zanesville or a corporation having its principal office in Zanesville, unless such service be actually made by personal service within the township or village in which said proceeding may have been instituted.

The legislative act creating the Columbus municipal court has a similar provision to section 37 of the Zanesville municipal court act, and the common pleas court in an unreported case some two years ago held that the provision was not unconstitutional and that it was effective in limiting the jurisdiction as therein provided.

About the same time that the Franklin decision was rendered, the supreme court of Ohio passed upon a similar question in a case found in 93 O. S. 230, under the title In re Hesse. Section 41 of the Cincinnati municipal court act (103 O. L. 279, section 1558-41 G. C.) in part provides that no justice of the peace in any township in Hamilton county, other than in Cincinnati township, or the mayor of any village or city, shall have any jurisdiction in any criminal proceeding in which a warrant, order of arrest or other process, except subpoena for witnesses, shall have been served upon a citizen or resident of Cincinnati, unless such service be actually made by personal service within the township, village or city in which said proceedings may have been instituted, or jurisdiction in a criminal matter unless the offense charged in the warrant or order of arrest shall have been committed within said township, village or city.

The provisions of the Zanesville and Cincinnati acts, as to both civil and criminal proceedings, are practically the same.

Newman, J., in the opinion of the case in the supreme court, above referred to, calls attention to the fact that the office of justice of the peace ceased to be a constitutional office on January 1, 1913, and that the offices of justices are now statutory offices under the act establishing the offices of justice of the peace, found in 103 O. L. 214. He holds that the provisions of the Cincinnati municipal court act, limiting the jurisdiction of justices outside the city of Cincinnati, as to persons residing therein, are constitutional, calling attention to the fact that under section 1, article IV of the Ohio constitution, authorizing the establishment of inferior courts, by reason of being a special grant of legislative power upon a particular subject, the general assembly is vested with full power to determine what other courts it will establish, local, if deemed proper, and to define their jurisdiction and power.

The abridgment and limitation of the jurisdiction is of a statutory court only. In that case it was held that a justice of the peace who was a justice in a township outside of Cincinnati had no jurisdiction to issue a warrant for the arrest of Hesse, who was a citizen and resident of Cincinnati township.

Under the authority of this case it is my opinion that section 37 of the Zanesville act—limiting the jurisdiction of justices in townships outside the city of Zanes-

ville, so as to prevent the issuance of an order of attachment or garnishment upon a citizen or resident of Zanesville, unless such service be actually made by personal service within the township in which the proceeding may have been instituted—is constitutional.

It therefore follows that the justice of the peace in question is without jursidiction to issue an order of attachment or garnishment upon a citizen or resident of Zanesville, unless service be actually made by personal service within the township in which the proceeding may have been instituted.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1030.

TOWNSHIP TRUSTEES MAY NOT APPOINT MORE THAN ONE TOWNSHIP HIGHWAY SUPERINTENDENT.

The provision of section 3370 of the General Code, to the effect that the township trustees may appoint some competent person, not a member of the board of trustees, to have charge of the maintenance and repair of the roads within the township, which person shall be known as the township highway superintendent, does not authorize the appointment of more than one such person in any township.

COLUMBUS, OHIO, February 25, 1918.

HON. O. W. KENNEDY, *Prosecuting Attorney, Bucyrus, Ohio.*

DEAR SIR:—I have your letter of January 31, 1918, as follows:

> "I desire your construction of section 3370 G. C., as amended in 107 O. L., 93. You will note in this section that there are three ways in which the township trustees may provide for the maintenance and repair of the roads:
>
> (1) They may designate one of their number to have charge of all the roads of the township.
>
> (2) They may divide the township into three districts and assign a district to each trustee.
>
> (3) They may appoint some competent person, other than a member of the board, to have charge of the maintenance and repair of the roads of the township.
>
> The first and second divisions are clear to me, but the third one is not in this, as to whether or not under this provision there can only be one person appointed or whether there may be more than one person appointed; that is, may the township be divided into one or more districts and a superintendent be appointed over each district? True, under a literal construction of this provision it would appear that it is limited to one person, but having in mind the evident intention of the legislature was to make provision for the proper maintenance and repair of the roads, it would seem that if it were necessary in the judgment of the trustees to divide their township into districts in order to have the roads properly maintained and repaired the trustees would have that right.
>
> We have in our county townships that could not be properly handled by one superintendent, and if this provision means that the township trus-

tees are limited to the appointment of one person, then the roads cannot be properly maintained and repaired as contemplated by the statutes. I fail to see any harm to come of a division of the township into districts and the appointment of superintendents accordingly. To be sure the trustees should not be permitted to abuse this right by dividing the township into an unnecessary number of districts."

Sections 3370 and 3371 of the General Code read:

"Sec. 3370. The township trustees shall have control of the township roads of their township and shall keep the same in good repair. The township trustees may, with the approval of the county commissioners or state highway commissioner, as the case may be, maintain or repair a county road or intercounty highway or main market road within the limits of their township. In the maintenance and repair of roads the township trustees may proceed in any one of the following methods as they may deem for the best interest of the public, to wit:

1. They may designate one of their number to have charge of the maintenance and repair of roads within the township, or

2. They may divide the township into three road districts, in which event each trustee shall have charge of the maintenance and repair of roads within one of such districts, or

3. They may appoint some competent person, not a member of the board of trustees, to have charge of the maintenance and repair of roads within the township which person shall be known as a township highway superintendent, and shall serve at the pleasure of the township trustees. The method to be followed in each township shall be determined by the township trustees by resolution duly entered on their records."

"Sec. 3371. When the trustees of any township determine to proceed in the third method hereinbefore provided and appoint a township highway superintendent such superintendent shall before entering upon the discharge of his duty give bond to the state of Ohio for the use of the township in the sum of two hundred dollars, conditioned upon the faithful performance of his duty. Such bond shall be approved by the trustees of the township and filed with the clerk thereof. The township trustees shall fix the compensation of the township highway superintendent for time actually employed in the discharge of his duties, which compensation shall be paid from the township road fund. The compensation and all proper and necessary expenses, when approved by the trustees, shall be paid by the township treasurer upon warrant of the township clerk."

It will be noted from these sections that the legislature saw fit, when the township trustees personally assumed charge of the maintenance and repair of the roads, to allow them to either designate one of their number to have charge of the maintenance and repair of all the roads of the township or to divide the township into three road districts and designate one trustee to be in charge of each of such districts. However, when they made provision for the township trustee to direct the maintenance and repair of roads in the township to persons other than themselves, the legislature did not see fit to carry out the district plan, but simply provided that the board of trustees might appoint some competent person, not a member of the board of trustees, to have charge of the maintenance and repair of roads within the township, which person shall be known as the township highway superintendent.

Section 3371 G. C. provides that the township superintendent shall, before entering upon the discharge of his duties, give bond to the state for the use of the township in the sum of two hundred dollars, conditioned upon the faithful performance of his duty. Such section also provides that such trustee shall fix his compensation. Through a great many of the following sections concerning the improvement of township highways reference is made to the township highway superintendent, his powers and duties are defined in much detail and no where in the legislation can be found a single word or phrase upon which can be based any theory that the legislative mind was contemplating a possibility or probability of there being in any township more than one township highway superintendent.

I am not unmindful of the situation which confronts you in your county, nor of the fact that similar situations probably exist in many counties of the state. Nevertheless, from a consideration of the sections quoted I am compelled to conclude that provision is made for but one township highway superintendent in any one township and that the arrangement suggested by your communication, while undoubtedly such a one as might operate to better provide for the maintenance and repair of roads, is, nevertheless, not authorized by law.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1031.

SECTIONS 1150 AND 1154 G. C. DO NOT APPLY TO SALES OF FERTILIZER MADE BY THE UNITED STATES DEPARTMENT OF AGRICULTURE.

Sections 1150 *and* 1154 *G. C. do not apply to sales of fertilizer made by the department of agriculture of the United States government for use for agricultural purposes.*

COLUMBUS, OHIO, February 25, 1918.

The Department of Agriculture, Bureau of Feeds and Fertilizers, Columbus, Ohio.

GENTLEMEN:—You have made the following request for my opinion:

> "We are in receipt of a telegram from R. J. Brand, chief of the U. S. bureau of markets, which reads, in part, as follows:
>
> 'This department now receiving, Atlantic ports, nitrate of soda which it will sell at cost under food control act to farmers in addition to other actual expenses. Farmers must bear state fertilizer inspection fees if any required. Please wire government rate collect in detail what if any requirements your state will make as to tags, labels, reports, inspection fees, etc., in connection with sale and distribution nitrate by federal government and exact procedure to be followed.'
>
> We understand that the U. S. government purchased 100,000 tons of nitrate of soda to be distributed among farmers of the United States, through the various agricultural county agents. This fertilizer is sold at cost price of $7.50 per ton, plus freight, and farmers are required to deposit in bank funds covering their orders and to furnish affidavit that the nitrate of soda will be used for agricultural purposes.
>
> Ohio's fertilizer law (section 1154 O. L.) requires a person, firm or corporation selling fertilizer to pay a license fee of $30.00 per brand. Section 1150 provides for labeling, etc.

We respectfully request an opinion by your department as to whether the board of agriculture of Ohio should collect a license fee for this brand of fertilizer and if so from whom."

Section 1150 G. C. provides:

"Each person, firm or corporation who manufactures, sells or offers for sale in the state a commercial fertilizer which means any substance for fertilizing or manurial purposes, except barnyard manure, marl, lime and plaster, shall affix to each package in a conspicuous place on the outside thereof, a plainly printed certificate which shall state the number of net pounds contained therein, the name, brand or trade mark, under which it is sold, or offered for sale, the name of the manufacturer, with his or its postoffice address, such certificate shall contain also a chemical analysis which shall state the minimum percentages guaranteed of ammonia, of potash soluble in water, of phosphoric acid in available form, comprising the soluble and reverted, and of insoluble phosphoric acid, the sources of ammonia and the sources of insoluble phosphoric acid. In bone, tankage and basic slag unmixed with other material the phosphoric acid shall be claimed only as total phosphoric acid. In untreated phosphoric rock and other mineral phosphoric materials, the phosphoric acid shall be claimed only as insoluble phosphoric acid. When any commercial fertilizer, sold or offered for sale in this state, contains muck, peat, pulverized leather, hair, ground horn or wool waste or other materials in such form that the ammonia is largely unavailable, such certificate shall state explicitly such fact."

Section 1154 G. C. (107 O. L. 474) provides:

"Before selling or offering for sale within this state a commercial fertilizer, a person, firm or corporation shall pay each year a license fee to the secretary of agriculture for the sale of each brand thereof thirty dollars. Upon the application and payment of such fee, the secretary shall issue a license for the current year. All licenses shall expire on the 31st day of December of each year. The payment of such license fee by a person, firm or corporation, shall exempt an agent thereof from the requirements of this section."

I understand from your inquiry that the sale and distribution of this nitrate is by the federal government. This being true, in my opinion, section 1150 and other provisions of the Ohio law as to the inspection of fertilizers do not apply, for the federal government is not a person, firm or corporation; and it is so obvious as to require no argument whatever that the Ohio law was not intended to apply to a transaction of this character.

As a general proposition the proper exercise of any of the legitimate functions of the federal government cannot be hampered or impeded by legislation enacted by the states under the police power; nor would any officers or agents of the government be subject to the restrictions of such legislations in so far as their acts were necessary in carrying out their duties to the federal government. At the present time it seems to me entirely unnecessary to go into this question as to whether the distribution of this nitrate by the federal government, or an agency of the federal government, comes properly within the provisions of governmental activities which are not subject to restriction by the states. The imperative need

of agricultural products in this entire country at this time is so well known, and the relation that fertilizer of this character bears to agricultural production is also so well known, that it does not seem to me either your department or mine in this particular case should be deeply concerned in constitutional limitations or restrictions, but should so far as we are able construe our laws as intended to expedite and not hamper the government in doing everything possible to win the war.

I feel quite certain that this also is your view of the matter. My opinion, in brief, therefore, is that the Ohio law does not and was not intended to apply to a transaction of this character. Of course, if any of the persons who purchase this fertilizer afterward attempted to dispose of the same in this state the law would apply to any such transactions.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1032.

COURT OF DOMESTIC RELATIONS, MAHONING COUNTY, HOW JUDICIAL BALLOT PRINTED.

In Mahoning county the judge who is to be elected under an act of March 20, 1917, (section 1532-4) should have the name printed on the ticket as a candidate for "judge of the court of common pleas, division of domestic relations."

COLUMBUS, OHIO, February 27, 1918.

HON. JARED P. HUXLEY, *Prosecuting Attorney, Youngstown, Ohio.*

DEAR SIR:—On January 17, 1918, you addressed to this department the following request for opinion:

> "As you are aware, a year or two ago the legislature created what is known as a domestic relation judge in our county.
>
> The supreme court rendered a decision, which is found in the Law Reporter of December 24, 1917, in which they held, as I understand, that the law is unconstitutional so far as the provision in it giving the domestic relation judge the trial of certain cases; that they could not pass a law by which it would take away the right of the other judges to try that class of cases.
>
> Now, what we want to know is whether or not on next fall the judge who is a candidate for domestic relations must be designated on the ticket as a candidate for domestic relations, or does it simply go on the ticket as a common pleas judge. The statute itself provides that he shall be known as a domestic relations judge.
>
> Will you kindly let us know at the earliest opportunity and greatly oblige us."

Your question seems to be and is expressly, affirmatively and distinctly answered by the language of the statute itself. Your doubt, however, concerning the same arises from the decision of the supreme court in the recent case of D'Alton v. The Judges. An examination of the syllabus and opinion in this case will disclose that it has no effect whatever upon the manner of the election of the judge in question in Mahoning county. The statute creating the office of this judge is an amend-

ment of section 1532-4, found in 107 O. L., 721. The portion of said section alluded to above as containing the necessary answer to your question is as follows, after the provision for the election of the additional judge and providing for filling a vacancy, etc.,

> "He and his successors shall, however, be elected and designated as a judge of the court of common pleas, division of domestic relations."

Opinion No. 390 of this department addressed to you on June 18, 1917, contains a discussion of this statute and of the nature of the office created by it, holding in brief, as the statute enacts, that the judge provided for is merely an additional judge of the court of common pleas and assigning to him by legislation certain duties that had theretofore and in other jurisdictions been assigned by arrangement among the judges themselves, and substantially the same matter is discussed in reference to similar courts in other counties in opinion No. 963, addressed to Governor Cox under date of January 23, 1918, and opinion No. 1004, under date of February 11, 1918, addressed to the board of state charities, the latter two opinions having been rendered since the decision of the supreme court in the Toledo case. The statute in the Toledo case, unlike the previous ones for other counties, created a distinctly new court instead of providing for the election of an additional judge of the court of common pleas to whom should be assigned the duties and jurisdiction involved. The supreme court in this case held this statute constitutional but at the same time held that it is unconstitutional in so far as it attempts to give exclusive jurisdiction to this new court of certain subjects of which by general law jurisdiction is granted to other courts.

As has already been pointed out in the other opinions above mentioned, if the legislature had power to create an absolutely new and independent court and their action in doing so is not unconstitutional, *a fortiori* it is not unconstitutional to provide an additional judge of an existing court and assign to him the duties in question. Of course, in so far as these statutes violate the principle of that case and attempt to exclude the jurisdiction of other courts which they have in other counties under general laws, such acts are inoperative. It is to be apprehended, however, that no practical difficulty will arise from this condition and that, unless in some exceptional cases, the jurisdiction given these courts by statute will be by common sufferance assigned to them, they having undoubted concurrent jurisdiction therein.

Your inquiry is therefore answered that the candidate should go on the ticket as a candidate for "judge of the court of common pleas, division of domestic relations."

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1033.

APPROVAL—DEED FROM CHARLOTTE AND JOHN BURNARD TO BOARD OF AGRICULTURE.

COLUMBUS, OHIO, February 27, 1918.

HON. *A.* C. BAXTER, *Acting Chief Warden, Bureau of Fish & Game, Columbus, Ohio.*

DEAR SIR:—You have recently submitted to me a general warranty deed from Charlotte Burnard and John Burnard, her husband, to the state of Ohio, in con-

sideration of $11,000.00, for the following described premises, situated in the village of Chagrin Falls, Cuyahoga county, Ohio:

In township seven north, range nine west, and known as being part of original Russell Township Lot No. 17, in Champion Tract No. 3, bounded and described as follows, to wit: Beginning at a point in the northeasterly line of Cleveland street where the most southerly line of the land conveyed by this grantor, Charlotte Burnard, to the state of Ohio, by deed of warranty dated Oct. 23rd, 1889, and recorded in volume 460, page 253 of Cuyahoga County Records, intersects with the said northeasterly line of Cleveland street; thence south 86 deg. 21′ E. along the southerly line of land so conveyed to the state of Ohio, three hundred and seventy-two (372) feet to a stake; thence in a southwesterly direction, in a straight line, to a point in the northeast line of Cleveland street, distant one hundred and nineteen (119) feet southeasterly, measured along the northeasterly line of said Cleveland street, from the place of beginning; thence north 26 deg. W. along the northeasterly line of Cleveland street one hundred and nineteen (119) feet to the place of beginning.

PARCEL NO. TWO.

Situated in said village, county and state and known as being a part of original Russell Township Lot No. 17 in Champion Tract No. 3, bounded and described as follows, to wit: Beginning at a stone monument in the most southeasterly point of land conveyed by Charlotte Burnard and husband to the state of Ohio, by deed dated October 23rd, 1889, and recorded in Vol. 460, page 253, of Cuyahoga County Records of Deeds; thence north 9 deg. 33′ E. along the easterly line of said land so conveyed to the state of Ohio, two chains and ninety-six links to land conveyed by Charlotte Burnard and husband to John Forsythe by deed dated Nov. 2nd, 1893, and recorded in Volume 565, page 197 of Cuyahoga County Records of Deeds; thence southeasterly along the southwesterly line of said land so conveyed to John Forsythe to the westerly line of a parcel of land conveyed by William H. Barber and wife to John Forsythe by deed dated June 3rd, 1878, and recorded in Vol. 298, page 6 of Cuyahoga County Records of Deeds; thence S. 89 deg. 50′ E. along the southerly line of land so conveyed to John Forsythe by Wm. G. Barber and wife 1 chain 90 links to the westerly line of a parcel of land conveyed by Wm. G. Barber and wife to Henry Sencabaugh by deed dated Sept. 22nd, 1882, and recorded in Vol. 341, page 262 of Cuyahoga County Records of Deeds; thence southerly 3 deg. 25′ E. along said westerly line 1 chain and 88 links to a stake and stones; thence southerly 81 deg. 45′ E. along the southerly line of land so conveyed to Henry Sencabaugh 3 chains and 71 links to the westerly line of a parcel land conveyed by Oliver S. Granger and wife to Olney N. Overton by deed dated April 20th, 1885, and recorded in Vol. 382, page 68 of Cuyahoga County Records of Deeds; thence southerly along said westerly line, 3 deg. 16′ E. 4 chains and 17 links to that point in said westerly line where same is intersected by the northerly line of a parcel of land conveyed by Charlotte Burnard and husband to W. H. Leach and Addie Leach, by deed dated January 8th, 1894, and recorded in Vol. 566, page 286, of Cuyahoga County Records of Deeds; thence northwesterly along the said northerly line of land conveyed to W. H. Leach and Addie Leach, sixty-five feet, to the northwest corner of said parcel; thence

northwesterly, in a straight line, to the point of beginning, be the same more or less but subject to all legal highways.

In lieu of an abstract of title you have submitted to me a certificate of title issued by The Land Title Abstract and Trust Co., which finds that the title to said premises is good in Charlotte Burnard and free from incumbrances, except taxes for the year 1917 and special taxes, if any. From the correspondence had with the attorney for Charlotte Burnard it appears that there are no special taxes.

You advise me that the premises so to be purchased are to be used for a game preserve. In view of the provisions of section 1423 (107 O. L., 488) which authorizes the expenditure of the appropriation made therein "for establishing and purchasing or otherwise acquiring title to lands for game preserves," I have this day approved the title to said lands and herewith return to you the deed and certificate of title transmitted.

Before the land is purchased a certificate should be obtained from the auditor of state to the effect that there is an appropriation available for such purpose, and after the deed is recorded in the proper county it should be deposited with the auditor of state under the provisions of section 367 General Code.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1034.

COUNTY SURVEYOR—OFFICE EXPENSES.

A claim of a county surveyor for expenses of his office, consisting of telephone tolls and other expenses of a similar character is payable on the allowance of the county commissioners under the provisions of sections 2786 and 2460 G. C.

COLUMBUS, OHIO, February 27, 1918.

HON. C. A. WILMOT, *Prosecuting Attorney, Chardon, Ohio.*

DEAR SIR:—In your communication of recent date, requesting my opinion, you say your county surveyor has presented a bill for expenses of his office consisting of telephone tolls and other expenses of a similar character, and that your county auditor desires to know if these bills should be presented to the commissioners for approval before being paid. You suggest that section 7181 G. C., as found in 106 O. L. 612, provided in part as follows:

> "* * In addition thereto, the county highway superintendent and his assistants, when on official business, shall be paid out of the county treasury, their actual, necessary traveling expenses, including livery, board and lodging. * *."

You further state that this section was repealed in 107 O. L. 110 and re-enacted, but that in its re-enacted form the provision above quoted is missing, and that you have not been able to find any other section of the code providing for the payment of the expenses of the county surveyor.

As stated by you, there was a provision in section 7181 G. C. (106 O. L. 612), expressly giving to the county highway superintendent certain expenses, and this was evidently done so there would be no question as to such county highway super-

intendent receiving reimbursement for said expenses, even though the section made the county surveyor the county highway superintendent.

When the legislature in the last highway act (107 O. L. 69 et seq.) abolished the title of "county highway superintendent" and, as found at section 6956-4 (p. 142 of 107 O. L.), provided:

> "The words 'county highway superintendent' found in any section of the General Code of Ohio not herein amended or repealed shall after the taking effect of this act be read 'county surveyor' ",

it was then unnecessary to make specific provision for any expenses for the county highway superintendent.

Section 2786 G. C., which provides among other things for the office furnishings and equipment of a county surveyor's office, contains this express provision:

> "* * * The county surveyor and each assistant and deputy shall be allowed his reasonable and necessary expenses incurred in the performance of his official duties."

It is my conclusion, therefore, that the statute expressly provides for the payment of such expenses of your county surveyor as are inquired about, and that such claims can only be paid upon the allowance of the county commissioners as provided in section 2460 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1035.

PEST HOUSE—TWO CITIES MAY NOT PURCHASE LAND AND MAINTAIN SAME JOINTLY.

Two cities cannot purchase lands jointly and jointly construct and maintain a pest house or quarantine hospital. Powers of charter cities not passed upon.

COLUMBUS, OHIO, February 27, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Your letter of February 14, 1918, is received in which you inquire:

> "Sections 4452 et seq. G. C. authorize municipalities to purchase property and construct a quarantine hospital or pest house.
>
> *Question*: Can two neighboring non-charter cities purchase land jointly, lying between the said cities, and jointly construct a quarantine hospital or pest house to be used by persons afflicted with contagious disease and taken there from both cities?"

Section 4452 General Code provides:

> "The council of a municipality may purchase land within or without its boundaries and erect thereon suitable hospital buildings for the isolation, care or treatment of persons suffering from dangerous contagious disease, and provide for the maintenance thereof. The plans and specifications for such buildings shall be approved by the board of health."

Section 4456 General Code reads, in part:

> "A municipality may establish a quarantine hospital within or without its limits. * * *"

The authority herein granted is to a municipality, not to two municipalities acting jointly. I find no authority of statute which will permit two municipalities to join in the purchase of land and the erection thereon of a pest house or quarantine hospital and the joint maintenance thereof.

In an opinion by Hon. Edward C. Turner, at page 1293 of the opinions of the attorney-general for 1916, he had under consideration the authority of a city and a township to unite in the erection of a city hall and township house. His conclusion is:

> "A city as well as a township has only limited power and each must act within the limits of its powers as prescribed by statute. I find no provision of the statute authorizing a city and township to join in the erection of a city hall and township house, and I am of the opinion therefore that your question must be answered in the negative."

The rule is well established in Ohio that municipal corporations have only such powers as are expressly granted, and such as may be implied to carry out the powers expressly granted.

Ravenna v. Pennsylvania Co., 45 O. S. 118.

There is no express provision of statute granting authority to two cities to jointly erect and maintain a pest house or quarantine hospital, and such authority is not implied from the grant to one municipality to erect and maintain such pest house or hospital.

Two cities cannot, therefore, purchase lands jointly and jointly construct and maintain a pest house or quarantine hospital.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

1036.

SCHOOL DEPOSITORY—MEMBER OF BOARD OF EDUCATION ALSO STOCKHOLDER IN ONE OF BANKS OFFERING HIGHEST BID FOR SCHOOL FUNDS—HOW FUND SHOULD BE APPORTIONED—AWARD TO SUCH BANK NOT INVALID—CONTRACT BETWEEN BOARD OF EDUCATION AND BANK FOR LOAN DOES NOT BECOME VOID BY REASON OF DIRECTOR BECOMING MEMBER OF BOARD OF EDUCATION.

Where a member of the board of education is also a director and stockholder of a bank, which bank, with two other banks, has bid the same and highest rate of interest for the deposit of the funds of such board of education, such funds should be apportioned between the three banks offering such highest rate of interest. Such award would not be invalid because of the interest of the member of the board of education under section 4757 General Code.

Where a board of education enters into a contract for the loan of money from a bank and thereafter a director of such bank becomes a member of the board of education, such contract does not become void under the provisions of section 4757 General Code.

COLUMBUS, OHIO, February 27, 1918.

HON. CLARE CALDWELL, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR:—Under date of January 16, 1918, you submit the following inquiries to this department:

> "I have before me the opinion of Hon. Timothy S. Hogan, rendered April 5, 1912, at page 1246, wherein he holds that it is mandatory upon a board of education to place its deposits in the bank offering the highest rate of interest, and that while a member of the board may also be a stockholder and officer of the bank, there is no violation of section 4757 General Code.
>
> I desire an opinion where a member of the board is also a director and stockholder of a bank which is one of the three highest bidders. In your opinion, would the ruling of your predecessor's opinion apply, and should the contract for deposits be made with all three banks?
>
> I wish another opinion as to this question: Where a board of education has contracted with a bank for certain loans at a certain rate of interest, and subsequent thereto, a director and stockholder becomes a member of the board of education, does the contract become void by virtue of section 4757?"

In your letter of February 4, 1918, you supplement the above inquiry by stating that you mean by the words "which is one of the three highest bids" that there are three banks all bidding the same amount of interest, and that in one of these banks a prospective member of the board of education is a stockholder and an officer.

Section 4757 General Code, reads:

> "* * * No member of the board shall have directly or indirectly any pecuniary interest in any contract of the board or be employed in any manner for compensation by the board of which he is a member except as clerk or treasurer. * * *"

The board above referred to is the board of education.
Section 12932 General Code, provides in part:

> "* * * Whoever, being a local director or member of a board of education, votes for or participates * * *, or acts in a matter in which he or she is pecuniarily interested, shall be fined," etc.

In the opinion of Hon. Timothy S. Hogan, referred to by you, the syllabus reads:

> "Inasmuch as it is mandatory upon the board of education to place the deposits in the bank offering the highest rate of interest for the same, members of the board who are stockholders in or officers of the bank making the best bid, are not criminally liable for making such bank the depository."

In the conclusion of the opinion it is held:

> "That the awarding of the deposits by the board to the bank, being the highest bidder is a valid contract."

This opinion is based upon the mandatory provisions of the statutes covering the deposit of funds by the board of education.

In section 7604 General Code it is provided:

> "* * * The board of education of any school district by resolution shall provide for the deposit of any or all moneys coming into the hands of the treasurer. * * *"

In section 7605 General Code, it is provided:

> "In school districts containing two or more banks such deposit shall be made in the bank or banks, situated therein, that at competitive bidding offer the highest rate of interest which must be at least two per cent for the full time funds or any part thereof are on deposit. * * *"

Under the above provisions it is mandatory to provide for a depository and the funds must be awarded to the bank offering the highest rate of interest.

In the case presented in the opinion of Hon. Timothy S. Hogan, supra, there was but one bank which bid the highest rate of interest. In the case now presented there are three banks which bid the same rate of interest and this was the highest offer. The statutes pertaining to the deposit of funds by a board of education does not provide what shall be done with the funds where more than one bank offers the same rate of interest and this is the highest offer.

Section 2719 General Code provides for such a situation as to county funds. This section reads:

> "If two or more banks offer the same highest rate of interest with proper sureties, securities, or both, the use of the money shall be awarded to either of them, or the commissioners may award a portion of such money to each of such banks or trust companies."

This section does not apply to deposits made by a board of education.

In an opinion of Hon. Timothy S. Hogan, attorney-general, under date of January 26, 1912, page 1119 of the opinions of the attorney-general for 1912, it is held:

> "When township trustees in pursuance of sections 3320 and 3321 General Code, providing for the establishment of a depository receive bids from three banks, two of which were highest and each bidding equally, the trustees should apportion the funds."

Section 2719 supra is referred to in this opinion, but as there was no provision of statute covering such a situation as to deposits by township trustees, it was held that such funds should be apportioned between the two banks offering the same and highest rate of interest.

After consideration, I concur in the above rulings of my predecessor. It follows, therefore, that the bank which has one of its directors and stockholders a member of the board of education, was qualified to bid for the deposit of the school funds. If its bid had been the highest, and no other bank had bid the same, it would have been entitled to the funds. The fact that its bid was equal to that of two other banks, would not deprive such bank of its right to participate in the deposit of such funds.

Therefore, where a member of the board of education is also a director and stockholder of a bank, which bank, with two other banks, has bid the same and highest rate of interest for the deposit of the funds of such board of education, such funds should be apportioned between the three banks offering such highest rate of interest. Such award would not be invalid because of the interest of the member of the board of education.

In your second question you speak of making a loan. I assume from that that the board of education has borrowed money from the bank, but from your supplementary letter it appears that you have reference to the bank offering the highest rate of interest for the deposit of the funds. If the latter is the situation, your second question is answered by the answer to the first question.

Your question will also be answered on the theory that the board of education has borrowed money from the bank.

It appears from your statement that the contract had been entered into and that thereafter and during the continuance of such contract a director and stockholder of the bank became a member of the board of education making the loan.

The director of the bank was not a member of the board of education at the time the contract was entered into. It was legal, therefore, to enter into such a contract at that time. Such contract would not be invalidated because of the fact that thereafter a director of the bank became a member of the board of education. The contract had been executed and the money loaned. All that remained was the repayment of the money, with interest. The terms of the contract could not be changed by the new board.

Hon. Timothy S. Hogan, attorney-general, in an opinion at page 1550 of the annual report of the attorney-general for 1913, held:

> "Where a board of education contracts for the construction of a school building, and a member of this board of education is also a member of a corporation that is furnishing supplies to the contractor for the construction of this building, the action is legal provided at the time the contract was entered into it was not understood that this particular corporation was to get the contract for supplies."

That is not the situation now presented. But the same principle will apply. A contract entered into while the director of the bank was a member of the board of education would present an entirely different question.

Under the circumstances submitted, the contract would not become void.

Yours very truly,

JOSEPH MCGHEE,
Attorney-General.

1037.

SHERIFF NOT ENTITLED TO FEES FOR CONVEYING GIRLS TO GIRLS' INDUSTRIAL SCHOOL—PROBATION OFFICER PROPER OFFICIAL TO RENDER SUCH SERVICE—HOW EXPENSE OF TRANSPORTATION PAID.

The sheriff is not the proper officer to convey girls to the Girls' Industrial School, and if he performs such service he may not collect any fee therefor. The proper officer to render such service is the probation officer, and there must be at least one probation officer in every county. The expenses of such transportation are payable out of the county treasury on the certificate of the juvenile judge, as provided in section 1682.

COLUMBUS, OHIO, February 28, 1918.

HON. C. G. ROETZEL, *Prosecuting Attorney, Akron, Ohio.*

DEAR SIR:—I have your letter of recent date as follows:

"The sheriff of Summit county has placed before this office a question respecting the fees to be charged by him, which question is placed before you for consideration.

The question arises in cases of girls sentenced to the Girls' Industrial Home, and arises because of the repeal of section 2109 of the General Code. Before its repeal section 2109 read:

'The fees of the probate judge, sheriff and other costs incurred in proceedings shall be the same as are paid in similar cases and be paid by the proper county in the same manner.'

Acting under this authorization the sheriff was accustomed to charge fees such as were charged in like cases of boys sentenced to the Boys' Industrial School.

By reason of the repeal of the above section the sheriff is uncertain as to what charge he may properly make and therefore requests a ruling upon:

a.—The amount which shall be charged by him in making service of warrant to convey to the correctional institution, and,

b.—The amount which shall be charged by him as mileage.

The further question is as to whether the amount charged as mileage shall be charged on the return of warrant to convey, or whether it shall be included in the general transportation account of the sheriff."

Section 1653-1 provides in part:

"* * * * Nor shall any child under ten years or over eighteen years of age be committed to such schools (the Boys' Industrial School and the Girls' Industrial School) except as provided in section 2111 of the General Code."

Section 2111 G. C., referred to, provides for the transfer of girls from the county jail, penitentiary or other penal institution to the Girls' Industrial School by the Ohio board of administration.

Section 1659 G. C. reads:

"When a minor under the age of eighteen years is arrested, such child, instead of being taken before a justice of the peace or police judge, shall be tak-

en directly before such juvenile judge; or, if the child is taken before a justice of the peace or a judge of the police court, it shall be the duty of such justice of the peace or such judge of the police court, to transfer the case to the judge exercising the jurisdiction herein provided. The officers having such child in charge shall take it before such judge, who shall proceed to hear and dispose of the case in the same manner as if the child had been brought before the judge in the first instance."

Section 2115 G. C. reads:

"When a girl between nine and eighteen years of age is brought before a court of criminal jurisdiction, charged with an offense, punishable by a fine or imprisonment other than imprisonment for life and who, if found guilty,, would be a proper subject for commitment to the school, the court, by a warrant or order, shall cause her forthwith to be taken before the judge of the juvenile court of the proper county, and shall transmit to him the complaint, indictment, or warrant, by virtue of which she was arrested. Such judge of the juvenile court shall proceed in the same manner as if she had been brought before him upon original complaint."

Section 2148-5 G. C. provides in part:

"* * * * All female persons convicted of felony, except murder in the first degree, without the benefit of recommendation of mercy, shall be sentenced to the Ohio reformatory for women in the same manner as male persons now sentenced to the Ohio state reformatory."

From these sections it is clear that the only court committing girls to the Girls' Industrial School is the juvenile court.

Prior to the enactment of 103 O. L., sections 2108 and 2109, found in the chapter governing the Girls' Industrial Home, read:

"*Sec.* 2108: At the time named in the order, the probate judge shall hear the testimony presented before him in the case. If it appears to his satisfaction that the girl is a suitable subject for the industrial home, he shall commit her thereto, and issue his warrant to some suitable woman to be appointed by him, commanding her to take charge of the girl and deliver her without delay to the superintendent of the home. If the judge deems it advisable so to do, he may designate the sheriff or other male person to accompany such girl and her custodian. This section shall be construed to apply to all courts having authority to commit to the Girls' Industrial Home."

"*Sec.* 2109: The fees of the probate judge, sheriff and other costs incurred in the proceedings shall be the same as are paid in simliar cases, and be paid by the proper county in the same manner."

A great many sections of the juvenile court law were amended in 103 O. L., in an act found at page 864. In that act sections 2108 and 2109 were expressly repealed (page 913), and section 1662 of the General Code was amended to read:

"*Sec.* 1662: The judge designated to exercise jurisdiction may appoint one or more discreet persons of good moral character, one or more of

whom may be women, to serve as probation officers, during the pleasure of the judge. One of such officers shall be known as chief probation officer, and there may be first, second and third assistants. Such chief probation officer and the first, second and third assistants, shall receive such compensation as the judge appointing them may designate at the time of the appointment, but the compensation of the chief probation officer shall not exceed twenty-five hundred dollars per annum, that of the first assistant shall not exceed twelve hundred dollars per annum, and of the second and third shall not exceed one thousand dollars per annum, each payable monthly. The judge may appoint other probation officers, with or without compensation, but the entire compensation of all probation officers in any county shall not exceed the sum of forty dollars for each full thousand inhabitants of the county at the last preceding federal census. The compensation of the probation officers shall be paid by the county treasurer from the county treasury upon the warrant of the county auditor, which shall be issued upon itemized vouchers sworn to by the probation officers and certified to by the judge of the juvenile court. The county auditor shall issue his warrant upon the treasury and the treasurer shall honor and pay the same, for all salaries, compensation and expenses provided for in this act, in the order in which proper vouchers therefor are presented to him."

Section 1663 G. C., originally enacted in 99 O. L., then read and now reads as follows:

"When a complaint is made or filed against a minor, the probation officer shall inquire into and make examination and investigation into the facts and circumstances surrounding the alleged delinquency, neglect, or dependency, the parentage and surroundings of such minor, his exact age, habits, school record, and every fact that will tend to throw light upon life and character. He shall be present in court to represent the interests of the child when the case is heard, furnish to the judge such information and assistance as he may require, and take charge of any child before and after the trial as the judge may direct. He shall serve the warrants and other process of the court within or without the county, and in that respect is hereby clothed with the powers and authority of sheriffs. He may make arrests without warrant upon reasonable information or upon view of the violation of any of the provisions of this chapter, detain the person so arrrested pending the issuance of a warrant, and perform such other duties, incident to their offices, as the judge directs. All sheriffs, deputy sheriffs, constables, marshals and police officers shall render assistance to probation officers, in the performance of their duties, when requested so to do."

Sections 2108 and 2109, above quoted, were enacted long before the juvenile court law was passed, and since they were repealed after the enactment of the juvenile court law it would seem that, if that law provides that girls should be conveyed to the Girls' Industrial School by some officer other than the sheriff, an express repeal of those sections would most strongly indicate a legislative intention that the sheriff should no longer convey girls to the Delaware institution. It will be noted that section 1662 provides in part:

"The judge designated to exercise jurisdiction may appoint one or more discreet persons of good moral character, one or more of whom may be women, to serve as probation officers during the pleasure of the judge."

It will be also noted that section 1663, defining the duties and powers of probation officers, provides, among other things, that he shall "take charge of any child before and after the trial, as the judge may direct. He shall serve the warrants and other process of the court within and without the county, and in that respect is hereby clothed with powers and authority of sheriffs.

Section 1663 would seem to indicate that the probation officer is the proper officer to convey girls to the Girls' Industrial Home after they have been committed to such institution by the juvenile judge. Such holding may be objected to, however, on the ground that section 1662, providing for the appointment of probation officers, is not mandatory in any respect and that inasmuch as, for that reason, there may be some counties in which no probation officer has been appointed, it surely could not have been the legislative intention to take from the sheriff the duty of conveying girls to the Delaware school. If section 1662 is held mandatory, at least as far as the appointment of one probation officer is concerned, then this objection is overcome. It will be noted from a reading of section 1663 that it is, from the standpoint of the child, the most vital section of the juvenile court law. The purpose of the juvenile law is well stated in the matter of State v. Januszewski, 10 O. L. Rep., page 151. At page 156, Sater, J., says:

> "The purpose of the statute is to save minors under the age of seventeen years from prosecution and conviction on charges of misdemeanors and crimes and to relieve them from the consequent stigma attaching thereto; to guard and protect them against themselves and evil minded persons surrounding them; to protect them and train them physically, mentally and morally."

The investigation by a probation officer, his assistance in the hearing, his being present at the hearing to represent the interests of the child—all provided for in section 1663 G. C.—are certainly provisions extremely important to the child's best interests. It may be argued that this section is to be given application only in counties where probation officers are appointed, but the nature of the duties cast upon the probation officer are such that it seems to me a juvenile court could not be successfully conducted in the spirit evidenced everywhere in the act without the services of such officer.

Section 1663 makes the probation officer the spokesman for and friendly adviser of the child, and I cannot for that reason believe that the legislature, in enacting this juvenile legislation, passed solely in the interest of children, ever intended to dispense in some of the counties of the state with the very provisions of the act that are most vital to the welfare of the delinquent children. It must be admitted that section 1662 provides that the court "may appoint" and not "shall appoint," but after a careful examination of the entire juvenile act I am of the view that "may" in this statute should be read "shall" at least to the extent of the appointment of one probation officer.

For the above reasons I am of the opinion that the sheriff is not the proper officer to convey girls to the Girls' Industrial School, and that he may not be allowed any fee for such service, but that the proper officer to convey girls to the industrial school is the probation officer, and that there must be at least one of such officers in every county. When such officer performs this service, the expense thereof may be met as provided in section 1682 of the General Code, which reads:

> "Fees and costs in all such cases with such sums as are necessary for the incidental expenses of the court and its officers, and the costs of transportation of children to places to which they have been committed, shall be

paid from the county treasury upon itemized vouchers, certified to by the judge of the court."

In this connection I might call your attention to the opinion of former Attorney-General Hogan, found in the Annual Report of the Attorney-General, 1914, Vol. 2, page 1275, in which he held:

"When the probate court commits a girl to the girls' industrial school at Delaware, Ohio, the court may appoint a woman as special probation officer to convey such girl to such institution, and the court may allow such woman so appointed such compensation as it sees fit within the limits provided by section 1662, General Code."

Reference is made to this opinion for the reason that it is advisable to have girls conveyed to the Girls' Industrial Home by women rather than men.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1038.

TOWNSHIP TRUSTEES UPON COMPLAINT MUST AFFORD RELIEF IN PROPER CASES TO PERSONS IN SAID TOWNSHIP REGARDLESS OF LEGAL SETTLEMENT—UPON REFUSAL OF TRUSTEES ANY ONE MAY FURNISH SAME, GIVING PROPER NOTICE AND TOWNSHIP WILL BE LIABLE—HOW TOWNSHIP REIMBURSED.

1. *When complaint is made in a proper case to the township trustees, that a person in the township requires public relief, it is the duty of the township trustees to afford such relief, even if such person has a legal settlement under the poor laws in an adjoining county.*

2. *In such case, upon failure or refusal of the township trustees to afford such relief, any person can afford same, giving the notice required in section 3480 G. C., and such township shall be liable for the expense thereof and must look to the county of the person's legal settlement for reimbursement therefor.*

COLUMBUS, OHIO, February 28, 1918.

HON. BENTON G. HAY, *Prosecuting Attorney, Wooster, Ohio.*

DEAR SIR:—In your communication addressed to this office, asking for an opinion, you state:

"Complaint was made to the township trustees of a township of this county that a person therein required public relief, but who had a legal settlement under the poor laws in an adjoining county.

In a suit against the township trustees of said township in this county could the person who furnished the necessary relief legally recover from the township trustees of said township in this county, the reasonable value of the relief given? Or would the county commissioners of the adjoining county be the only officials legally liable for such relief?

Upon such complaint being made to the township trustees in this county, are such trustees legally bound to furnish such pauper with relief

or pay for the same if furnished by some one else, notice having been given them, but said trustees not having authorized or ordered such relief?"

The provisions of the General Code pertaining to the poor laws applicable to your question are found in sections 3476 et seq. G. C. Under section 3476 G. C. the trustees of the township in question have a duty imposed upon them under certain conditions to afford public support to persons therein who are in condition requiring it. I take it from the inquiry that complaint was duly made under section 3480 G. C. and that the real question in your case arises from the fact that the person requiring the relief had a legal settlement under the poor laws in the adjoining county.

The supreme court in Trustees v. White, 48 O. S. 577, was called upon to construe section 1491 R. S. and the succeeding sections of the poor laws, which are now found in the General Code as sections 3476 et seq. The sections read practically the same then as they do now.

Spear, J., at p. 583, speaking of section 1494 R. S., now section 3480 G. C., as amended in 1878, which, while changed in some respects, remains now practically the same as it was at that time, says:

"The conclusion upon the reason of the statute, therefore, would seem to follow that the discretion by the trustees applies to all services rendered and all relief afforded for which the township is made liable. There may be doubt as to the true construction of this feature of the statute, but we are of opinion that, under it, when notice is immediately given, the township is liable for all relief and for services rendered, but if notice is not given within three days, the township is liable for only such relief and services as may be afforded after notice is given, and that in either case the township is liable only for such amount of money as the trustees determine to be just and reasonable. In the performance of the duty enjoined, the trustees must pass upon all claims for relief afforded or services rendered, coming within the terms of the law. Claims for services or relief prior to notice, where notice is not given within three days, they have no jurisdiction to consider, the provision of the statute in that respect being mandatory upon them, as it would have been upon a court had a like claim been prosecuted under the former statute."

The court at p. 580 calls attention to the case of Trustees v. Ogden, 5 Ohio, 23, where it was held under a statute which provided that where the trustees should receive notice from the overseers of the poor that any person, not having a legal settlement in the township, was in condition requiring temporary assistance, such trustees should, if in their opinion such person was in suffering condition, and requiring assistance from the township, direct the overseers to provide such relief.

Continuing, Judge Spear said (p. 580):

"The opinion of the trustees was not final, and any individual who, after notice to the overseers, should furnish necessary relief to such person, could have an action to recover the value of the same against the township. There was no direct provision in the statute authorizing payment of such claim, but the court held that a promise might be implied. The decision turned upon the duty to carry into effect the object of the

law, there being no language in the act clearly showing that the opinion of the trustees as to the necessity for public aid should be treated as conclusive."

The statute imposes a plain and express duty upon the township officers, and where complaint has been made in a proper case, it is mandatory upon them to afford relief.

In the event that the trustees fail or refuse to afford relief in a proper case, after complaint, any person may afford such relief, notifying the trustees within three days after such relief is afforded, and the township then shall be liable for such relief, although, as provided in section 3480 G. C., the trustees or one of them may at any time order the discontinuance of such relief and escape liability for relief rendered thereafter.

As the duty of affording relief is imposed upon the trustees of the township in which the pauper is found, it is my opinion that the right of action accruing to a person who in a proper case affords relief after the refusal or failure of the trustees so to do, is against the trustees of the township in which the pauper is found. If the pauper has a legal settlement in an adjoining county, the trustees of the township in which the person is found and where the relief was afforded would have a claim against and be entitled to reimbursement from the county in which the pauper had such legal settlement.

So answering your questions specifically, it is my opinion:

1. That in a proper case the township trustees of the township in which the relief was afforded to the pauper would be the proper persons against whom to bring the action for the expense of rendering such relief.

2. That upon complaint in a proper case it is the duty of the township trustees to furnish a pauper found within the township with relief.

3. That in a proper case, and after complaint, where the township trustees have failed or refused to furnish a pauper with relief and due notice under the statute has been given to said trustees, any person can furnish such relief without any order of the trustees, and such township trustees are liable for the expense of such relief so afforded.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1039.

APPROVAL OF BOND ISSUE, BARBERTON CITY SCHOOL DISTRICT—$30,000.00.

COLUMBUS, OHIO, February 28, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of Barberton city school district, in the sum of $30,000.00, for the construction and equipment of a school building in said school district.

I am just recently in receipt of a corrected transcript of the proceedings of the board of education of Barberton city school district relating to the above bond

issue. I have carefully examined said transcript and as a result of such examination, I find that the proceedings relating to said bond issue are in conformity to the provisions of the General Code of Ohio relative to the issue and sale of bonds of this kind.

I am therefore of the opinion that bonds covering this issue will, when prepared according to bond form submitted and properly executed and delivered, constitute valid and subsisting obligations of Barberton city school district.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1040.

COUNTY COMMISSIONERS—DITCH IMPROVEMENT—JURISDICTION.

The county commissioners acquire jurisdiction in a county ditch case or the improvement of a living stream, when they find in favor of said improvement, in accordance with section 6454 G. C., and such jurisdiction so acquired cannot thereafter be lost.

COLUMBUS, OHIO, February 28, 1918.

HON. CALVIN D. SPITLER, *Prosecuting Attorney, Tiffin, Ohio.*

DEAR SIR:—On January 19, 1918, you addressed to this department the following request for opinion:

> "In the month of January, 1916, a petition was filed with the county auditor of Seneca county, Ohio, by approximately fifty land owners of the city of Tiffin, and by one party who owned land up stream and outside of the municipality, and by the city of Tiffin, by Walter K. Keppel, mayor, authorized to sign by action of city council on January 15, 1916; also a bond signed by five residents of the city of Tiffin for the purpose of improving Rock Creek, by straightening, widening, altering, deepening, locating and constructing the channel of a creek or run known as Rock Creek, commencing at the Sandusky River in the city of Tiffin, and extending in a southeasterly direction to the corporation line of said city, and thence a short distance beyond said corporation line.
>
> This petition was filed under section 6447 of the General Code, and the signature of the city of Tiffin was affixed thereto by virtue of the authority given in section 6494 of the General Code.
>
> The county commissioners granted the petition and apportioned the assessments among the land owners living in the city of Tiffin, and also among a large number of land owners living beyond the corporation limits of said city, and upstream whose lands would be benefited by the proposed improvement. A large number of the land owners living beyond the corporation limits of the city and upstream filed an injunction suit in the court of common pleas on the ground that they would not be benefited in any way by the proposed improvement. The courts sustained the injunction. This will so reduce the assessments that it will be necessary for the county commissioners very materially to shorten the line of the improvement. In fact, they cannot go further upstream now than the Circular street bridge within the city of Tiffin. The question arises whether the county commissioners, after having acquired jurisdiction by reason of the

improvement extending beyond the corporation of the city of Tiffin will lose that jurisdiction if the upstream terminus is so changed as to cause the entire improvement to be made within the corporation limits of the city of Tiffin, to be paid for only by residents of the city whose property will be benefited and by the city of Tiffin as a municipality.

After looking at the statute carefully I have come to the conclusion that the county commissioners will lose jurisdiction in this matter by making such change, but before giving my opinion to the board of commissioners, I would like to have your advice in the matter."

You assume in the above inquiry that by reason of the loss of a substantial part of the assessments, the collection of which had been enjoined, the commissioners are thereby authorized to change the beginning or terminus of the improvement to bring the cost within the amount remaining available, and that as to the assessments so enjoined, being those of the land owners benefited by the upper portion of the improvement, that portion may for that reason be abandoned.

A distinction has been made between ditch improvements and river improvements, as to the power of the commissioners to change the termini, in two cases hereinafter cited. Your improvement is stated to be that of the channel of a creek known as Rock Creek, from which I take it to be the improvement of a living stream, although you provide for locating and constructing it.

There is no provision in any statute in Ohio for locating and constructing a stream. Let it be assumed that the words "locating and constructing" are superfluous; that Rock Creek is a living stream and that your proceeding is one under the statute for improving its channel, which is no doubt the fact.

Two questions will arise; one as to whether the language of the statute permitting the change of the termini of a ditch applies at all to the improvement of the channel of a stream; the other—if it does so—can the change be made at the time and in the manner suggested in your inquiry?

The first of the cases above alluded to, holding that it cannot be done, is by the court of common pleas of Hardin county:

Abel v. Commissioners, 6 N. P., 349.

The syllabus is:

"The board of county commissioners in a proceeding under the ditch laws for the improvement of a river, have no authority to change the termini designated in the petition for such improvement."

Dow, J., holds that the commissioners have not the power because in section 4448 R. S. (now 6443 G. C.), in which both ditch improvements and river improvements are included, the express language of the statute only permits the change of termini in the case of a ditch.

The next case, which was subsequent to that, is from the Franklin county common pleas court, decided in 1904—

Gease v. Carlisle, 15 O. D., 435.

The syllabus reads:

"County commissioners are authorized by R. S. 4448 to change the termini of ditches, drains and *artificial* water courses, if the object of the

improvement will be better accomplished thereby; but as to the termini of rivers, creeks, runs and natural water courses, they have no such power."

Dillon, J., says on page 438:

"There was an evident purpose in providing that the commissioners could change the termini of any ditch, drain or water course, and expressly omitting that power with reference to a river, creek or run. That purpose evidently is based upon two considerations: First, that a river, creek or natural run has its termini already fixed by nature and it would be absurd to say that the commissioners might change the termini thereof. A second consideration is that as to a ditch or other artificial body to be established it may be apparent to the commissioners that the judgment of the petitioner is not at all conclusive as to the manner in which the land should be drained, and that upon a hearing the commissioners might find that the purpose would be more fully accomplished by a change of proposed termini. I am of opinion, therefore, that the commissioners have only power to change the termini of a ditch, a drain or *artificial* water course, that as to any river, creek, run or natural water course they have no such power."

This department has already expressed its opinion contrary to that announced in the above two decisions in Opinion No. 97 rendered March 10, 1917, to Hon. Thomas F. Hudson, prosecuting attorney of Clark county. The reason for such conclusion will be here re-stated.

It is a question of the construction of section 6443 G. C., which section is as follows:

"The board of county commissioners, at a regular or called session, when necessary to drain any lots, lands, public or corporate road or railroad, and it will be conducive to public health, convenience or welfare, in the manner provided in this chapter, may cause to be located and constructed, straightened, widened, altered, deepened, boxed or tiled, a ditch, drain or water course, or box or tile part thereof, or cause the channel of a river, creek or run, or part thereof, within such county, to be improved by straightening, widening, deepening, or changing it, or by removing from adjacent lands timber, brush, trees or other substance liable to obstruct it. The commissioners may change either terminus of a ditch before its final location, if the object of the improvement will be better accomplished thereby."

If this section were the original enactment I should agree with the construction placed upon it above as necessarily following from the language used. It is, however, a part of a re-enactment and re-arrangement of former sections with no apparent intention of changing the effect of the language originally used in them. The whole of the matter contained in this section was originally enacted in 1871.

68 O. L., p. 60.

It is entitled, "An act relating to ditches," and consists of twenty-seven sections. Section 2 contains the following:

"That before the commissioners shall establish any ditch, there shall be filed with the auditor of such county, a petition signed by one or more of

the land owners whose lands will be assessed for the expense of the same, setting forth the necessity thereof, with a general description of the proposed starting point, route, terminus, * * *"

Section 25 contains the following:

"This act shall be construed to extend to, and include the straightening of streams and water courses to which the same may be applicable."

Now from this it is perfectly apparent that if it be practicable to change the termini of the improvement of a stream the same as that of a ditch, the commissioners were authorized to make the change.

Reverting to the reasoning of Judge Dillon, quoted above, that it is not so practicable, he says: First, it is because the stream already has termini fixed by nature, and it would be absurd to say the commissioners might change the same. However, it is the termini of the improvement of a part of the channel that they propose to change and not at all the termini of the creek, so that this criticism falls. The termini means the two ends, where they start and where they stop, and these are not at all intended necessarily to be coincident with the source and the mouth of the stream. Of course, in the case of a ditch where they originally make it, it is different. There is nothing there except as they create it and the termini are where they start and where they stop.

His second reason is that it may be apparent to the commissioners that the judgment of the petitioner is not conclusive as to the manner in which the land should be drained and that upon a hearing the commissioners might find that the purpose would be more fully accomplished by a change of the proposed termini. Just why that would not be equally true as to a river improvement when we consider as above that it is the improvement that we are considering, not the stream, no body can make apparent.

This statute remained in that form without change for twelve years, during all of which time a river improvement in that respect was a ditch, or the same as a ditch. The river improvement had all the incidents of a ditch improvement, undoubtedly including the right of the commissioners to change the termini. It was next re-enacted April 11, 1883.

80 O. L., page 109.

At this time it took substantially its present form so far as this question is concerned. Although the provisions above referred to of the act of 1871 were incorporated in section 4447 R. S., which provided, as 6443 G. C. now does, that the commissioners "in the manner provided in this chapter, etc., may cause to be located and constructed * * any ditch * * or cause the channel of a river, creek or run, or part thereof, to be improved by straightening, etc.", the words "in the manner provided in this chapter" are significant. They undoubtedly apply to both kinds of improvements. That is, you could construct a ditch in the manner provided in this chapter and you could improve the channel in the manner provided in this chapter and undoubtedly the legislature intended and the people of the state understood that these words, so far as the channel improvement was concerned, would take the place of the provision that the act should be construed to include the improvement of streams as in the original act. The word "ditch" has been kept in the statutes with reference to the change of termini because it was originally there, and the legislature has not seen fit to change it in any of the amendments or re-enactments. It originally applied to streams, and there is no evidence of any intention ever to take

streams out of its application. Besides, in several sections in the chapter, in its present form, "ditch" must be held to include stream, for instance, the provisions in reference to appeal. It, therefore, still does apply to streams.

It being established that the commissioners have the power to change the terminus of a stream improvement, we come to the consideration of the other question, whether they may do it under the circumstances and at the time and for the purpose suggested in your inquiry.

The first significant thing that strikes the attention is the expression in the statute itself granting the authority to make the change. It is to be "before its final location." This is immediately followed by the reason for which the change may be made, which is "if the object of the improvement will be better accomplished thereby."

In your case you must have passed the time that the statute permits the change to be made. I do not assume to pass upon your actual case without the record before me, but as you state the assessments have been enjoined, it follows that they must have been made. The assessments cannot be made until after the final location of the improvement. This finding for the improvement is provided for by section 6454 G. C., which in the case of such finding requires the county commissioners to cause to be entered on their journal an order directing the county surveyor to go upon the line described in the petition and survey and level it, etc., and section 6455 G. C. provides that they shall further direct him to make and return a schedule of the lots and lands, and public or corporate roads that will be benefited, with an apportionment of the cost of location and labor of constructing the improvement, in money, according to the benefits which will result to each. Section 6457 G. C. provides for a review of this apportionment by the surveyor to be made by the commissioners.

All this is after the finding by the commissioners in favor of the improvement and must precede the bringing of injunction proceedings to restrain the assessment. Therefore, you must have passed the time when the commissioners can change the terminus. You do not propose to make the change because the object of the improvement will be better accomplished, but for other reasons, because by this injunction you are prevented from having the funds to make the improvement.

This practically answers your question. The commissioners have no power to change the termini of this improvement. The form of your question, however, is as to whether they have lost jurisdiction. The answer to the question in this form is the statement of a well established legal principle. Jurisdiction once lawfully and properly acquired is not lost by the occurrence of subsequent events, but continues until it has been exercised. So that the categorical answer to your question is in the negative.

As to the course the commissioners are required to take in this situation, I am not asked and do not volunteer a solution. Very truly yours,

JOSEPH MCGHEE,
Attorney-General.

1041.

COUNCIL MAY MAKE APPLICATION FOR TRANSFER OF SURPLUS FUND ARISING FROM OPERATION OF GAS PLANT TO ANY OTHER FUND—ALSO HAS AUTHORITY TO PROVIDE FOR THE INVESTMENT OF SUCH SURPLUS IN PROPER SECURITIES.

Under authority of section 2296 et seq. General Code, the council of a municipality may make application to the court of common pleas of the county to transfer

the surplus arising from the operation of a gas plant by such municipality to any other fund, or to a new fund, of the municipality, and such funds can then be used for the purposes of the fund to which they are transferred.

The council of a municipal corporation has authority to provide for the investment of the surplus moneys arising from the operation of a municipal gas plant, in proper securities. What are proper securities is not determined.

COLUMBUS, OHIO, February 28, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Your letter of January 18, 1918, is received, in which you submit the following statement of facts and inquiries:

> "The city of Lancaster maintains a gas department. While they are the owners of a couple of moderate sized wells, the great volume of their gas is purchased from another company and sold by the department to the consumers. The department has no bonded indebtedness for gas improvements or purposes and has been operating at a profit and the director of service in charge of the department has accumulated a surplus of approximately $90,000.00, which has been invested in interest bearing bonds, which bonds are in the custody of the city treasurer.
>
> *Question* 1. Is there any legal authority for the purchase of such investments?
>
> *Question* 2. Can the surplus of the gas department be used by the municipality for other purposes?"

Your second question will be considered first.

Section 3799, General Code, authorizes council by three-fourths vote, to transfer funds raised by taxation. The funds now in question are not raised from taxation and, therefore, this section does not apply. This section provides:

> "By the votes of three-fourths of all the members elected thereto, and the approval of the mayor, the council may at any time transfer all or a portion of one fund, or a balance remaining therein, except the proceeds of a special levy, bond issue or loan, to the credit of one or more funds, but there shall be no such transfer except among funds raised by taxation * * *."

Section 5654, General Code, provides:

> "When there is in the treasury of any city, village, county, township or school district, a surplus of the proceeds of a special tax, or of the proceeds of a loan for a special purpose, which is not needed for the purpose for which the tax was levied, or the loan made, it may be transferred to the general fund by an order of the proper authorities entered on their minutes."

The fund now in question was not raised by a special tax or by a loan for a special purpose. This section does not, therefore, apply.

Section 2296, G. C., provides:

> "The county commissioners, township trustees, the board of education of a school district, or the council, or other board having the legislative

power of a municipality, may transfer public funds, except the proceeds or balances of special levies, loans or bond issues, under their supervision, from one fund to another, or to a new fund created under their respective supervision, in the manner hereafter provided, which shall be in addition to all other procedure now provided by law."

Section 2297, General Code, provides:

"A resolution of such officers or board shall be duly passed by a majority of all the members thereof, declaring the necessity therefor, and such officers or board shall file a petition in the court of common pleas of the county in which the funds are held. * * *"

Here follows provision as to the petition and the following sections provide for notice, the hearing and the finding of the court.

A transfer of the funds in question may be made under the above sections and then used by the city for other purposes.

Section 3618-1, General Code, authorizes a municipal corporation to own and operate a gas plant and to furnish the product to the municipality and its inhabitants. This section reads in part:

"That any municipal corporation owning a municipal gas plant or system of gas distribution shall have the power to purchase gas, natural or artificial, and to furnish the same to said municipality and the inhabitants thereof for the purpose of light, power and heat. * * *"

The above section does not provide for the disposition of surplus funds. Section 3959, General Code, provides what shall be done with the surplus of the waterworks. There is no such provision as to gas plants.

Therefore, under authority of sections 2296 et seq., General Code, the council of a municipality may make application to the court of common pleas of the county to transfer the surplus arising from the operation of a gas plant by such municipality to any other fund, or to a new fund, of the municipality and such funds then can be used for the purposes of the fund to which they are transferred.

Your second question is as to the right of the municipality to invest the surplus in interest-paying bonds.

The only specific authority of statute for a municipality to make investment of its funds is granted to the trustees of the sinking fund by section 4514 General Code.

This section provides:

"The trustees of the sinking fund shall invest all moneys received by them in bonds of the United States, the state of Ohio, or of any municipal corporation, school, township or county bonds, in such state, and hold in reserve only such sums as may be needed for effecting the terms of this title. All interest received by them shall be reinvested in like manner."

It appears from your letter that the investment was made through the city treasurer and not by the sinking fund trustees.

Section 4294, General Code, provides:

> "Upon giving bond as required by council, the treasurer may, by and with the consent of his bondsmen, deposit all funds and public moneys of which he has charge in such bank or banks, situated within the county, which may seem best for the protection of such funds. * * *"

Section 4295, General Code, provides for the deposit of funds by the municipality, and section 4515, General Code, covers the deposit by the trustees of the sinking fund. These do not cover investments.

At section 2163 of McQuillin on "Municipal Corporations," it is stated:

> "Seldom have municipal corporations surplus moneys for loan or investment. But where such a condition of affairs presents itself, the municipality has power to loan or invest in proper securities, unless it should be forbidden by statute. However, where a statute provided that towns could appropriate certain public moneys to public objects of expenditure and to no other purpose, it was held to be a violation of the statute for a town to distribute such moneys among its inhabitants, receiving therefor their individual notes. So while a municipal corporation may loan its accumulated sinking fund, it is not empowered to loan funds raised for special purposes."

At page 1562 of volume 28 of Cyc., it is said:

> "Surplus money in a municipal treasury, not appropriated for immediate payment, may be loaned or invested by the municipality, until needed for municipal use, at any lawful rate of interest which may be agreed upon, and a borrower will not be heard to set up the want of corporate power to make his loan."

It appears from the above authorities that municipalities may loan their funds in proper securities, unless it should be forbidden by statute.

There is no specific provision in the statutes of Ohio which would prohibit the investment of funds. The only express provision for such power is that found in section 4514 General Code.

Section 4240, General Code, provides:

> "The council shall have the management and control of the finances and property of the corporation, except as may be otherwise provided, and have such other powers and perform such other duties as may be conferred by law."

The above section gives council the control and management of the finances of the municipality. Under the above authority council could authorize the investment of funds in proper securities. What would be proper securities should be determined as to each particular security or investment. A proper security would be such as are enumerated in section 4514 General Code.

Investment in securities of a private corporation would raise a constitutional question. This need not now be considered.

It is my opinion that council would have authority to make an investment of the funds in proper securities.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1042.

COUNTY COMMISSIONERS HAVE NO AUTHORITY TO HIRE SHERIFF'S MACHINE FOR HIS OWN USE IN PERFORMANCE OF HIS DUTIES —MAY REIMBURSE HIM—SCHOOL BOARD—WHEN ONE OF TWO NEWLY ELECTED MEMBERS DOES NOT QUALIFY A VACANCY EXISTS—HOW SUCH VACANCY FILLED.

The county commissioners have no authority to hire the sheriff's machine for the use of the sheriff in the performance of his official business, but that the commissioners, under authority of section 2997, may make allowance to the sheriff to reimburse him for the expense of using his own machine for public business.

Two new members were to be elected, at a November election, to the township school board. One of the retiring members ran for re-election but was defeated. The other retiring member did not run for re-election. Two new members were elected. One of the two new members moved away and did not qualify.

HELD, that a vacancy exists and such vacancy should be filled by the board of education as provided by section 4748 G. C.

COLUMBUS, OHIO, February 28, 1918.

HON. ROGER D. HAY, *Prosecuting Attorney, Defiance, Ohio.*

DEAR SIR:—I have your letter of February 7, 1918, submitting two questions. The first question submitted reads:

> "The county commissioners, acting on an opinion received from the attorney-general's office December 9, 1911, passed a resolution to allow the sheriff fifteen cents per mile for every mile traveled in carrying out the duties imposed upon him by law, said sheriff to file bills and the same allowed and paid as provided by law. The sheriff is using his own automobile and in order not to violate the law asks for an opinion. The county commissioners purchased an automobile under an act passed by the last legislature but owing to the volume of business could not use the same in conjunction with the sheriff. Therefore, they thought it advisable and for the best interests of the county to allow the sheriff to use his own car and charge a rate within reason for the upkeep of said machine.
>
> Please advise us if his proceeding is regular and in conformity to the laws of the state of Ohio and opinions rendered by the attorney-general."

Your first question was fully discussed in an opinion of this department, No. 876, rendered December 19, 1917, to Hon. Chester Pendleton, prosecuting attorney, Findlay, Ohio, copy of which opinion is hereto attached. It will be noted that in this opinion it was held that:

> "The county commissioners have no authority to hire the sheriff's machine for the use of the sheriff in the performance of his official business, but that the commissioners, under authority of section 2997, may make allowance to the sheriff to reimburse him for the expense of using his own machine for public business."

Your second question reads:

> "At the November election last, the Delaware township school board elected two new members, three old members holding over. One old

member did not run for re-election, another old member ran for re-election and was defeated and two new members were elected.

One of the two new members moved away and did not qualify. This leaves the three who are holding over and one of the newly elected members composing said force. Has the board the power to appoint the fifth member or which one of the old board retains his seat, the member who ran for re-election and was defeated or the old member whose time expired and did not make the race?"

In this case it is impossible to determine whether the newly elected member, who failed to qualify, was elected to succeed the old member who did not run for re-election, or the old member who ran for re-election and was defeated. It has been frequently held by this department that in such cases a vacancy exists.

Section 4748 of the General Code reads:

"A vacancy in any board of education may be caused by death, nonresidence, resignation, removal from office, failure of a person elected or appointed to qualify within ten days after the organization of the board or of his appointment, removal from the district or absence from meetings of the board for a period of ninety days, if such absence is caused by reasons declared insufficient by a two-thirds vote of the remaining members of the board, which vote must be taken and entered upon the records of the board not less than thirty days after such absence. Any such vacancy shall be filled by the board at its next regular or special meeting, or as soon thereafter as possible, by election for the unexpired term. A majority vote of all the remaining members of the board may fill any such vacancy."

It will be noted from the above section that where a vacancy is caused by the "failure of a person elected or appointed to qualify within ten days after the organization of the board," such vacancy shall be filled by the board by election for the unexpired term and a majority vote of all the remaining members of the board is necessary. A vacancy existing in the case you submit is one caused by failure to qualify and therefore the manner of filling such vacancy, as outlined in section 4748, has application here. This unexpired term would be the remainder of the full four-year term.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1043.

TOWNSHIP TRUSTEES—BY WHAT JUSTICE OF THE PEACE VACANCY IN SAID OFFICE FILLED—"OLDEST COMMISSION" AS USED IN SECTION 3262 DEFINED.

1. *The phrase "oldest commission," as used in section 3262 G. C., means the existing commission of earliest date.*

2. *When the commission of two or more justices of the peace bear the same*

date, the justice oldest in years is the proper official to appoint a suitable person to fill a vacancy in a board of township trustees.

COLUMBUS, OHIO, February 28, 1918.

HON. HENRY W. CHERRINGTON, *Prosecuting Attorney, Gallipolis, Ohio.*

DEAR SIR:—Under date of February 22 you wrote me as follows:

> "In Huntington township, Gallia county, Ohio, there is a vacancy in the board of township trustees. One justice of the peace of the township has been the holder of a commission as such for eighteen years continuously. Another justice of the peace has been the holder of a commission as such for a number of years less than eighteen. The dates of the commissions under which these two justices of the peace are now holding office are the same. The justice of the peace who has held the office for the lesser number of years is the older man of the two. A construction of section 3262 G. C. is involved. Which justice of the peace has the power to appoint a suitable person to fill the vacancy in the board?"

Section 3262 G. C. provides:

> "When for any cause a township is without a board of trustees or there is a vacancy in such board, the justice of the peace of such township holding the oldest commission, or in case the commission of two or more of such justices bear even date, the justice oldest in years, shall appoint a suitable person or persons, having the qualifications of electors in the township to fill such vacancy or vacancies for the unexpired term."

This department has a number of times construed what the term "oldest commission means in this section, and in an opinion rendered by my predecessor, Hon. Edward C. Turner, on April 8, 1915, to Hon. Harold W. Houston, and found in Vol. I of the opinions of the attorney-general for 1915, p. 411, the following language is used:

> "The word 'commission' as here used has reference to a live commission, that is to say, after the term of a commission has expired, it ceases to be a commission within the meaning of the terms of this statute. This view is strengthened by the provision of the above quoted section of the statute in case two commissions are of even date and is in accord with the former holding of my predecessor, Hon. U. G. Denman, under date of February 1, 1910, as follows:
>
> 'I beg to advise that under date of August 8, 1906, this department rendered an opinion to the secretary of state in which it was held that section 1452, which provides that the justice of the peace "holding the oldest commission," in case of vacancy in the office of township trustees, shall fill the same by appointment, does not refer to a commission earlier than the one under which the justice is now holding office, and it is entirely immaterial as to what terms were served or commissions held by either justice prior to the current year.'"

So in the case of vacancy in the board of trustees, on the question of which justice of the peace is the holder of the oldest commission, an examination is to be made of the date of the existing commissions of the justices of the peace, and

the mere fact that a justice has held the office of justice of the peace for a great number of years has no bearing upon the case.

In your communication you state that the dates of the commissions, under which the two justices of the peace are now holding office, are the same. This situation is taken care of by the express language of section 3262, supra, wherein provision is made that:

> "* * * in case the commission of two or more of such justices bear even date, the justice oldest in years, shall appoint a suitable person or persons * * *."

So in the case of Huntington township the justice of the peace who is the older man, notwithstanding that he has held office a lesser number of years than the other justice, is the proper justice to make the appointment for the vacancy that exists in the board of township trustees.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

1044.

BOARD OF STATE CHARITIES IS NOT REQUIRED TO PROSECUTE INSTITUTIONS FOR VIOLATION OF SECTION 1352-1 RELATING TO SOLICITING MONEY, ETC., WITHOUT CERTIFICATE OF BOARD.

There is no statutory duty imposed upon the board of state charities to prosecute violation of section 1352-1 *G. C. for receiving children or soliciting money on behalf of an institution not having the certificate of the board, enabling it to assume the care of children, but in the nature of the case it is appropriate for the department to enforce the observance of this law and inaugurate prosecution for its violation.*

COLUMBUS, OHIO, March 4, 1918.

Board of State Charities, Columbus, Ohio.

GENTLEMEN:—On February 13, 1918, you addressed to this department the following communication and inquiry:

> "I call your attention to the attached copy of a report made by Miss Eaton, assistant director of the children's welfare department of this board, relative to the Kinder Freund Gesellshaft. This is another case where lack of certification, as prescribed by section 1352-1 G. C., fails to secure obedience to the law by the parties concerned. It appears that Rev. George Eyler is the principal offender.
>
> We are referring this matter to you for counsel as to whether we should, under the circumstances, undertake prosecution for failure to observe the restrictions imposed by said section of the General Code.
>
> A number of institutions and agencies in Cleveland, as well as elsewhere, have abided by our recommendations and now they feel that the state should possess power to suppress the activities of uncertified agencies in their midst, inasmuch as the state has vested authority in one of its departments to issue a form of license under the title of certification.

Our investigators are beginning to feel that much of their work is in vain, so long as there is an open violation of the action of the board relative to such institutions and agencies.

We understand that, as a state department, we cannot employ any legal counsel except that assigned by you, in case prosecution should be attempted by us. We therefore hope that you may see your way clear to afford such assistance as will protect the findings of our board.

Perhaps this communication had better be put in the form of a query, as follows:

Is it the duty of the board of state charities to prosecute the executive officers of non-certified agencies who continue to disregard the findings of the board of state charities? If not, who should?"

Upon a full reading of the above communication and the attached report, it would seem that you might desire rather more than a mere categorical answer to the question in which you epitomize your inquiry.

Only one section of the General Code seems necessary to be considered in view of the fact that other opinions addressed to you treat rather fully upon the subject of the jurisdiction of the juvenile court.

Section 1352-1. This section provides that your board shall pass upon the fitness of all institutions involved, and make an annual report showing the condition, management and competency, adequately to care for children, the system of visitation employed for children placed in private homes, and such other facts as the board requires, and then provides for your issuing a certificate upon being satisfied in reference to the fitness of the applicant. It then proceeds with a provision that no child shall be committed by the juvenile court to an association not having such certificate. The section closes with a penalty for its violation, which is as follows:

"Any person who receives children, or receives or solicits money on behalf of such an institution, corporation or association, not so certified, or whose certificate has been revoked, shall be guilty of a misdemeanor, and fined not less than $5.00 nor more than $500.00."

It has been heretofore noted that section 1683-1 G. C. provides for jurisdiction in the juvenile court for offenses against minors below a certain age, so that if the offense above defined be an offense in any given case against such minor, the juvenile court would have at least concurrent jurisdiction in its prosecution. This offense, however, seems not to be an offense against any particular infant committed to such institution, but rather an offense against the state. The commitment of a given child to a given institution might be the best possible thing for its welfare, and might open the door and point the way to fame and fortune for such infant, and yet the act would be none the less an offense against the state, because an infraction of its law. The object of the law is to afford every security for the welfare of unfortunate children in general, and like all laws, is intended to command universal obedience.

It is therefore submitted that the offense above defined, not being an infraction of any of the statutes enumerated in section 1683-1, and not being an offense against minors, should be prosecuted in the criminal courts than the juvenile court.

Referring to the specific inquiry made by you as to your duty, no statute is found requiring you to institute such prosecution, so far as the affirmative statutory requirements are concerned. This is simply a criminal offense to be punished as

other such offenses. However, the law does not execute itself; it must be set in motion either by public officials, or private individuals. Any individual who took enough interest to do so could inaugurate a prosecution for violation of this statute by making a charge in the form of an affidavit against the offender, and causing his arrest, or it might be done by the prosecuting attorney of any county in which it occurs, by bringing witnesses before the grand jury and causing an indictment.

The trust reposed in your department, the authority given you by the statute, and the general nature of your functions and duties are such as make it proper for you to interest yourself in the enforcement of this law, which you could do either by making affidavit and instituting prosecution before a magistrate in the proper county, or by furnishing names of witnesses to the prosecuting attorney and requesting him to bring the matter before the grand jury.

This department stands ready to co-operate with you in the enforcement of the law, and to assist in the iniation and conduct of prosecutions whenever necessary.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

1045.

APPROVAL OF RESOLUTIONS FOR ROAD IMPROVEMENT IN JEFFERSON, ASHLAND, HARRISON AND FAIRFIELD COUNTIES.

COLUMBUS, OHIO, March 5, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I am in receipt of communication from you, transmitting for examination final resolutions relating to the following inter-county highway improvements:

Jefferson County—Ohio River road, Sec. J, I. C. H. No. 7, Pet. No. 2539.

Ashland County—Ashland-Norwalk road, Sec. A, I. C. H. No. 142, Pet. No. 2035.

Ashland County—Savannah-Vermilion road, Sec. G, I. C. H. No. 149, Pet. No. 2040.

Harrison County—Dennison-Cadiz road, Sec. D, I. C. H. No. 370, Pet. No. 2454.

Ashland County—Ashland-Wooster road, Sec. A, I. C. H. No. 141, Pet. No. 2030.

Fairfield County—Logan-Lancaster road, Sec. E, I. C. H. 360, Pet. No. 2321.

I find said resolutions to be in regular form and am therefore returning same with my approval endorsed thereon, in accordance with the provisions of section 1218 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1046.

HOW FINES AND COSTS ASSESSED BY MAYOR FOR VIOLATION OF MUNICIPAL ORDINANCES, AND IN STATE CASES, MAY BE COLLECTED WHEN MAYOR DOES NOT ACT.

A mayor is without authority to allow fines and costs in cases to go unpaid and if he does so, such fines and costs may be recovered as follows:

In cases of violations of municipal ordinances, recovery can be had in the name of the corporation, as provided in sections 4561 *and* 4562 *of the General Code, but these suits must be commenced within one year after the violation of the ordinance.*

In the case of a violation of an ordinance, where resort cannot be had to these sections, and in state cases, mandamus will lie against the mayor, at the instance of the interested party, to compel him to issue execution on the judgment for fines. At the instance of the officers to whom costs in these cases are due, mandamus will also lie against such mayor to compel the issuance of the execution to collect the costs in these cases.

COLUMBUS, OHIO, March 5, 1918.

The Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I have your letter as follows:

"The mayor of a municipality of this state has in a number of cases imposed a sentence, consisting of fines and costs, and without any notation of suspending the sentence or other notation, allows the person thus sentenced to walk out without payment of such fines and costs, which still remain unpaid.

Question 1. Is there any authority of law which would grant a mayor power to allow such non-payment?

Question 2. If the persons thus sentenced can be reached, can collection still be legally made?"

Sections 13717, 13718 and 13719 of the General Code read:

"Sec. 13717. When a fine is the whole or a part of a sentence, the court or magistrate may order that the person sentenced remain imprisoned in jail until such fine and costs are paid, or secured to be paid, or he is otherwise legally discharged, provided that the person so imprisoned shall receive credit upon such fine and costs at the rate of sixty cents per day for each day's imprisonment."

"Sec. 13718. When a magistrate or court renders judgment for a fine, an execution may issue for such judgment and the costs of prosecution, to be levied on the property, or, in default thereof, upon the body of the defendant. The officer holding such writ may arrest such defendant in any county and commit him to the jail of the county in which such writ issued, until such fine and costs are paid, or secured to be paid, or he is otherwise legally discharged."

"Sec. 13719. An execution, as provided in the next preceding section, may issue to the sheriff of any county in which the defendant resides, is found or has property, and the sheriff shall execute the writ. If the defendant is taken, the sheriff shall commit him to the jail of the county in which the writ issued, and deliver a certified copy of the writ to the

sheriff of such county, who shall detain the offender until he is discharged as provided in such section."

Section 4270 of the General Code reads:

"All fines and forfeitures collected by the mayor, or which in any manner comes into his hands, and all moneys received by him in his official capacity, other than his fees of office, shall be by him paid into the treasury of the corporation weekly. At the first regular meeting of the council in each and every month, he shall submit a full statement of all such moneys received, from whom and for what purpose received, and when paid over. All fines, penalties and forfeitures collected by him in state cases shall be by him paid over to the county treasury monthly."

Section 12378 of the General Code reads:

"Unless otherwise required by law, an officer who collects a fine, shall pay it into the treasury of the county in which such fine was assessed, to the credit of the county general fund within twenty days after the receipt thereof, take the treasurer's duplicate receipts therefor and forthwith deposit one of them with the county auditor."

From these sections it is clear that when the mayor has found a defendant guilty and assessed the fine, it is his duty to collect the same, and if such fine is for the violation of an ordinance, pay it into the city treasury; if for the violation of a state law, into the county treasury. The city, therefore, has an interest in collecting the fine for the violation of ordinances and the county is an interested party in the collection of fines for the violation of state laws before the mayor.

There is no authority in law for a mayor refusing to collect these fines and costs. If he does so refuse, collection can be made in one of two different ways. First, mandamus will lie at the instance of the county, city or officer claiming fees, depending upon whether an effort is being made to collect state fines, municipal fines or costs.

In Bailey on Habeas Corpus, in the discussion of the subject of mandamus, I find the following:

"Sec. 209. The general rule has been stated that mandamus will not lie where the party has another adequate remedy, but this rule has no application where the purpose of the writ is to set inferior courts in motion. In such cases mandamus will be allowed irrespective of the question whether the party has or has not another remedy. * * *"

"Sec. 212. * * * And where a court, whose duty it is to issue executions upon judgments (instead of clerk of a court), refuses after an ineffectual appeal from its judgment to issue an execution thereon, mandamus will lie to compel it to do so."

"Sec. 223. The same general rules apply to proceedings in justices' as in inferior courts. Such courts may be compelled to mandamus to proceed to the performance of their duties, and determine matters which are brought before them and which are within their jurisdiction. * * * Also to issue an execution upon a judgment; and generally to do and perform all acts that are ministerial in their nature."

In cases where the fines have been assessed for violations of ordinances, recovery may also be had as provided in section 4561 and section 4562 of the General Code, as follows:

"Sec. 4561. Fines, penalties and forfeitures may, in all cases, and in addition to any other mode provided, be recovered by suit or action before any justice of the peace, or other court of competent jurisdiction, in the name of the proper municipal corporation, and for its use. In any suit or action where pleading is necessary, it shall be sufficient if the petition sets forth generally the amount claimed to be due in respect of the violation of the by-law or ordinance, referring to its title, and the date of its adoption or passage, and showing, as near as may be practicable, the true time of the alleged violation."

"Sec. 4562. Suits or prosecutions for the recovery of fines, penalties, or forfeitures, or for the commission of any offense made punishable by any by-law or ordinance of any municipal corporation, shall be commenced within one year after the violation of the ordinance, or commission of the offense, and not afterward."

From a consideration of these sections and authorities it is my opinion that the mayor you refer to is without authority to allow the fines and costs in these cases to go unpaid. In the case of violations of municipal ordinances, recovery can be had in the name of the corporation, as provided in sections 4561 and 4562 of the General Code, but these suits must be commenced within one year after the violation of the ordinance. In the case of a violation of an ordinance, where resort cannot be had to these sections, and in state cases, mandamus will lie against the mayor, at the instance of the interested party, to compel him to issue execution on the judgment for fines. At the instance of the officers to whom costs in these cases are due, mandamus will also lie against such mayor to compel the issuance of the execution to collect the costs in these cases.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1047.

COUNCIL MAY FIX COMPENSATION OF CITY ENGINEER UPON BASIS OF PERCENTAGE OF THE COST OF AN IMPROVEMENT—WHEN COMPENSATION FIXED UPON PER DIEM BASIS IT CANNOT BE CHANGED TO PERCENTAGE BASIS AFTER IMPROVEMENT STARTED—WHEN SALARY PAID BY MONTH OR YEAR MAY NOT BE CHARGED AGAINST FUND RAISED BY BOND ISSUE.

Council of a municipality is authorized to fix the compensation of the city engineer and his assistants upon the basis of a certain per cent of the cost of an improvement.

Where council has provided by ordinance that the engineer shall be paid upon a per diem basis, and thereafter this is changed to a per cent of the entire cost of an improvement, and provision is made that for all other services said engineer shall be paid on a per diem basis, such engineer should be paid upon a per diem basis where work has been started prior to the second ordinance becoming effective but not completed until after such time.

Where the compensation of an engineer is fixed upon a salary basis by the month or the year, no part of such compensation can be charged against the funds raised by an issue of bonds for a specific purpose, even though such improvement is not to be paid for by means of a special assessment.

COLUMBUS, OHIO, March 5, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Under recent date you submit the following statement of facts and inquiries to this department:

"STATEMENT OF FACTS"

On December 24, 1915, the council passed an ordinance providing that the compensation of the city engineer should be the sum of fifty cents per hour for all service performed by him, and that in all public improvements wherein a part of the costs was to be assessed against property holders the amount paid the engineer should be charged against the special improvement funds.

On July 24, 1916, the council passed an ordinance repealing the ordinance of December 24, 1915, and providing that the engineer, for all work in connection with the improvement of streets, including the preliminary surveys, plans, specifications, profiles and estimates and other surveys, and all supervision work done and performed by him and assistants and inspectors, should receive out of the street improvement fund 2¾ per cent of the total cost of the labor and materials; one-third when the ordinance determining to proceed is passed; one-third during construction of the work, and the remaining one-third when the work is completed.

The ordinance of July 24, 1916, did not become effective until August 24, 1916. During the spring of 1916, plans and specifications were prepared for five street improvements involving a cost of over $50,000.00. The contracts were awarded in June, 1916, and by the time the ordinance became effective, August 24, 1916, a greater portion of the improvement work was completed on several of the streets. At said time all the preliminary surveys, plans and estimates had been made and there was left only the supervision, and the preparing of the final estimates, on a portion of each of the street improvements. The engineer was paid under the ordinance of December 25, 1915, at the rate of fifty cents per hour up to August 24, 1916, and after said date he was paid under the ordinance of July 24, 1916, the amount paid him being estimated only.

Question 1. Can the compensation of an engineer which is fixed by the hour be changed when certain work is under way to compensation based on a percentage basis of such work?

Question 2. Can the compensation of an engineer which is fixed by the month or the year, be charged against improvements from bond funds when such improvements are not under special assessment?"

The first question to be considered is the right of council to fix the compensation of the engineer and his assistants upon the basis of a certain percentage upon the costs of the improvement.

Section 4214 General Code authorizes council to fix compensation for municipal officers and employes. This section reads as follows:

"Except as otherwise provided in this title, council, by ordinance or resolution, shall determine the number of officers, clerks and employes in each department of the city government, and shall fix by ordinance or resolution their respective salaries and compensation, and the amount of bond to be given for each officer, clerk or employe in each department of the government, if any be required. Such bond shall be made by such officer, clerk or employe, with surety subject to the approval of the mayor."

The method of paying such compensation is not limited by statute. In such case the rule is stated at page 460, Vol. 28 of Cyc., as follows:

"When the common council is authorized to fix the compensation of a municipal officer, the entire compensation may be fixed in the form of a salary, or fees, or salary and fees, or in a lump sum for salary, assistants, and office expenses."

It appears, therefore, that council may fix the compensation of a municipal officer or employe upon a salary basis, upon a per diem, or fees, or salary and fees.

In the first ordinance submitted by you, the compensation of the engineer was fixed upon a per diem. The amendment provided a percentage of the costs and this would be upon a fee basis.

Council therefore was authorized in fixing the compensation of the engineer and his assistants, upon the basis of a certain percentage of the cost of the improvement.

The first question which you submit is as to the right to change the basis of compensation of the engineer after an improvement has been started and before its completion.

Section 4213 General Code limits the right to change compensation of an officer or employe who has a fixed term. This section reads as follows:

"The salary of any officer, clerk or employe shall not be increased or diminished during the term for which he was elected or appointed, and, except as otherwise provided in this title, all fees pertaining to any office shall be paid into the city treasury."

The engineer of a city is the head of a subdepartment under the director of public service. He is appointed by virtue of section 4250 General Code, which section reads as follows:

"The mayor shall be the chief conservator of peace within the corporation. He shall appoint, and have the power to remove, the director of public service, the director of public safety, and the heads of the subdepartments of the departments of public service and public safety, and shall have such other powers and perform such other duties as are conferred and required by law. In cities having a population of less than twenty thousand, the council may by a majority vote merge the office of director of public safety with that of public service, one director to be appointed for the merged department."

This section does not prescribe a fixed term of office for the engineer.

In an opinion to Hon. Thomas C. Davis, city solicitor, under date of March 26, 1912, page 1643 of the annual report of the attorney-general for 1912, Hon. Timothy S. Hogan, attorney-general, held as follows:

"Section 4250, General Code, providing for the powers of appointment and removal of a director of public service, by the mayor, and section 3252, presenting the idea of a term of office, and section 3259, requiring appointments to be made in a definite time, present a patent ambiguity.

Inasmuch as sections 4251 and 4252 are carried down from the statutes relating to the old 'board plan,' which was succeeded by the 'federal plan,' of which section 4250 is an essential provision, the latter statute should be allowed to control. Therefore the director of public service has no 'term of office' within the comprehension of section 4213 General Code, and the council is therefore not prohibited from increasing or diminishing his salary during his incumbency."

The conclusion above reached will also apply to the position of engineer. The engineer of a city therefore has no fixed term of office, and council can therefore change his compensation at any time it sees fit.

The question presented by you, however, is as to the right to pay the engineer upon a per diem basis for a part of the improvement and upon a percentage basis for the remainder of the same improvement.

On January 30, 1918, you submitted copies of the ordinances in question. The first ordinance fixes the compensation of the city engineer at fifty cents per hour for all services. The second ordinance fixes the compensation for the improvement of streets, at two and three-fourths per cent of the "total cost of the labor and material." Provision is made therein to pay the engineer fifty cents per hour where the ordinance to proceed fails to pass.

There is a further provision as follows:

"For all other services he shall receive the sum of fifty cents per hour, payable out of the proper fund, in accordance with the appropriations of the council."

Under this ordinance the percentage basis of payment is upon the *total* cost, which is to include all services performed thereon. There is no provision for payment upon percentage basis for a *part* of the services or upon a *part* of the cost of a particular street improvement.

The situation presented is met by the provision above quoted. Where work on a street improvement had been started prior to, but not completed until after the second ordinance became effective, the city engineer should be paid at the rate of fifty cents per hour for all services performed on such improvment.

This, I believe, answers your first question.

Your second question is as to the right of charging the compensation of an engineer against funds raised by the issue of bonds for specific improvements, where the compensation of the engineer is fixed upon a salary basis.

This question is covered and answered by the second branch of the syllabus in the case of Longworth v. City of Cincinnati, 34 Ohio State, 101. This branch of the syllabus reads:

"Where the surveying and engineering of such improvement were performed by the chief engineer of the city and his assistants, who were officers appointed for a definite period, at a fixed salary, which the law required to be paid out of the general fund of the city, the reasonable cost to the city, of such surveying and engineering, cannot be ascertained and assessed upon the abutting property, as a necessary expenditure for the improvement."

The above case was as to improvements the cost of which was to be assessed upon the abutting property. The same principle, however, will apply to the question now submitted by you.

Where bonds are issued for a specific purpose, expenditures cannot be made therefrom for any other purpose. Where an engineer is paid upon a salary basis, which includes his compensation for the general duties of his office, it cannot be determined with reasonable certainty what part of such compensation is paid on account of any particular improvement.

It is my opinion, therefore, that where the compensation of an engineer is fixed upon a salary basis by the month or the year, no part of such compensation can be charged against the funds raised by bond issues for a particular improvement, even though the cost of such improvement is not to be levied against property owners as a special assessment.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1048.

COUNTY AUDITOR MUST ACCEPT REGISTRATION OF UNREGISTERED DOG ANY TIME DURING YEAR—FEES.

It is the duty of the county auditor to accept registration during the year of unregistered dogs which were subject to registration prior to the first day of January for the following year and which have not been seized and impounded. In registering such dogs, the auditor is authorized to receive only the proper fees provided for in section 5652 *G. C.*

COLUMBUS, OHIO, March 5, 1918.

HON. G. B. FINDLEY, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—As previously acknowledged, I have at hand your letter of February 8, 1918, in which you ask my opinion on questions stated by you as follows:

> "With reference to the so-called dog law found in 107 Ohio Laws 534, this question has arisen:
>
> Should the county auditor accept the application fee and assign numbers after the county commissioners have performed their duties under section 5652-8 General Code? It is claimed on the one hand that after the county commissioners have acted as above then the county auditor no longer has the right to issue a license except to those who become the owners of dogs after January 1st, or with reference to dogs that have become three months of age after January 1. That section 5652 requires the license to be secured before the first day of January and that the county auditor has no authority after that date to issue one except in the two specific cases above mentioned. It is further suggested that if he does issue a license in either case he should collect the penalty provided in section 5652-10."

I am not certain that I fully appreciate the application of your reference to the duties to be performed by the county commissioners under section 5652-8 G. C. (107 O. L. 535), so far as the question made by you are concerned. The duties required of the county commissioners under this section are of a general nature and extend to the matter of providing for the employment of deputy sheriffs necessary to enforce the provisions of the act and providing suitable devices for taking up dogs.

Further, other than in counties where there is an incorporated humane society furnishing the same, the county commissioners are required to provide a suitable place for a dog pound and suitable devices for destroying dogs.

Your questions suggest a consideration of the matter of registering dogs more than three months of age which have been seized and impounded by the sheriff or deputy, and the matter of registering, during the year, dogs subject to registration prior to the first day of January for the following year, which have not been seized and impounded. Under the provisions of this act a dog so seized and impounded must be either sold, redeemed or destroyed. If a dog be destroyed, that is of course an end of the matter, so far as any question with respect to the registration of the dog is concerned, and there only remains a claim in favor of the county against the owner, keeper or harborer of the dog, for the cost of seizing, keeping and destroying the same, which has been assessed against the dog under section 5652-10 G. C. (107 O. L. 536).

If the dog so seized and impounded be sold, it must be sold for enough to pay the cost assessed against the dog for seizing, keeping and selling the same. Though the provisions of section 5652-9 G. C. (p. 536 of 107 O. L.) are not specific on this point, I am inclined to the view that the statute contemplates the payment of such costs by the purchaser to the keeper of the pound, who in turn is required to deposit same in the county treasury to the credit of the general county fund.

In addition to paying the costs assessed against such dog, the purchaser is required to have same registered under the provisions of section 5652-2 G. C. (p. 534 of 107 O. L.), which states that every person, immediately upon becoming the owner, keeper or harborer of any dog more than three months of age, during any year, shall file like application as required by section 5652 G. C. (107 O. L. 534) for registration for the year beginning January first prior to the date such person became the owner, keeper or harborer of such dog.

If the dog so seized and impounded is redeemed by the owner, keeper or harborer thereof, such person is required to pay to the keeper of the pound the cost assessed against the animal, and in addition is required to provide the dog so redeemed with a valid registration tag for the year beginning on the first day of January prior to the date of registration, by application therefor and payment of fee as required by sections 5652 and 5652-2, supra.

I do not understand from the provisions of this act that the county auditor is required in any case to collect costs assessed against any dog seized and impounded by the sheriff, whether such dog be sold, redeemed or destroyed.

With reference to unregistered dogs subject to registration prior to the first day of January for the following year, and which have not been seized and impounded, it is sufficient to observe, with respect to your question, that the duty of the owner, keeper or harborer of a dog subject to registration, to procure registration of the same, is continuing, and it is the duty of such person during the year to procure the registration of such dog by payment of the registration fee provided in section 5652 G. C., such registration to be for the year beginning January first prior to the date of such registration. In procuring such registration, such person is only required to pay the registration fee provided in section 5652 G. C. This conclusion requires the question made by you to be answered in the affirmative.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

1049.

APPROVAL OF BONDS OF MAINTENANCE ENGINEERS IN STATE HIGHWAY DEPARTMENT.

COLUMBUS, OHIO, March 11, 1918.

HON. CLINTON D. COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—Under date of March 6th you enclose bonds of Harry J. Kirk and Don O. Stone for approval as to form.

It appears that the above named parties have been appointed maintenance engineers in your department, have given bond in the sum of three thousand dollars with the Fidelity and Deposit Company of Maryland as surety, and that you have approved each of said bonds as to amount and sureties under the provisions of section 1183 G. C., 106 O. L., 624.

I have examined the said bonds and finding the same to be in accordance with law have this day approved the same as to form and herewith return the same to you to be filed in the office of the secretary of state as required by said section.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1050.

WHERE ASSESSOR ELECTED FOR TOWNSHIP AND SUBSEQUENTLY AN INCORPORATED VILLAGE FORMED THEREIN, SAID ASSESSOR MAY NOT ACT FOR VILLAGE, AS VILLAGE IS A NEW DISTRICT, MAY NOT ACT IN TOWNSHIP BECAUSE OF RESIDENCE IN VILLAGE—VACANCY—MAY NOT ELECT VILLAGE ASSESSOR AT SPECIAL ELECTION FOR VILLAGE OFFICERS.

Where an assessor was elected in November, 1917, *for a township which at the time did not include a municipality, and subsequently a newly incorporated village was formed in said township, in which village the assessor, so as aforesaid elected, resided;*

HELD:

1. *That the creation of the newly incorporated village created a new taxing district composed of the territory comprised in the village.*

2. *That the assessor elected for the township taxing district in November,* 1917, *cannot act for the village taxing district, since he was not elected as assessor for the village taxing district and cannot act for the township district outside the village because he resides in the village district and possesses the qualifications of an elector of such village.*

3. *That since no assessors have been elected for the newly created village district and there is no qualified, elected assessor in the township outside the village, there are such vacancies as should be filled under the provisions of section* 3353-1 *G. C.*

4. *That it would not be proper to elect an assessor for the newly created village taxing district at the special election to be held for the election of village officers, as such assessor is not a village officer.*

COLUMBUS, OHIO, March 11, 1918.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—You ask an opinion upon the following:

> "A newly incorporated village is created out of part of the territory of a township. In November, 1917, an assessor was elected for the township, which at that time did not include an incorporated village, the assessor, however, being a resident of the territory afterward included in the incorporated village.
>
> What is the status of this elected assessor? Is his office abolished or does he continue in office? If he continues in office, for what territory does he act—the village in which he resides, the township outside of the village or the whole township, including the village?
>
> If a special election is held for the election of village officers, should an assessor be elected at that time for the newly created village? If an assessor is not elected prior to the beginning of the assessment of the personal property for the year 1918, should the auditor appoint an assessor for the village?
>
> If the old assessor, being a resident of the newly incorporated village, cannot act as assessor for the territory outside of the incorporated village, should the county auditor appoint an assessor for that territory?"

The provisions of law for the election of assessors, the establishment of assessment districts and prescribing the qualifications, terms, powers and duties of assessors are found in section 3349 G. C.

While the supreme court in the case of State v. O'Brien, 95 O. S. 166, held that part of section 17 of the Parrett-Whittemore law, which became section 3349 G. C., was unconstitutional, the part so held did not affect the part of said section in relation to the election, qualification and term of the assessors, nor the provisions creating the asssessment districts.

Section 3349 G. C., as far as is necessary in the consideration of your question, provides:

> "At the regular election to be held in November, 1915, and biennially thereafter, assessors shall be elected in the manner provided by law for the election of * * * village and township officers as follows: * * *; in villages one assessor shall be elected; * * * One assessor shall, at the time specified in this section, be elected in each assessment district so created; * * *; in townships composed in part of a municipal corporation, one assessor shall be elected in the territory outside such municipal corporation. An assessor shall be a citizen possessing the qualifications of an elector of such * * * village or township. Such assessor shall take and hold his office for the term of two years from and after the first day of January following his election. * * *"

From a consideration of the above section of the General Code, it is apparent that each village constitutes an assessment district, as also does the territory in a township outside a municipal corporation, in the event that a township is composed in part of a municipal corporation.

It further appears that section 3349 G. C. provides the qualifications that must be possessed by the assessor, to wit, that such assessor shall be a citizen possessing the qualifications of an elector of the village or township constituting the assessment district.

In the case submitted by you, the assessor was elected for the entire township, at a time when the township did not have a municipal corporation within its confines. The entire township at that time constituted the assessment district.

Under section 5366-1 G. C. (107 O. L. 30), the time when the property shall be listed for taxation is fixed between the second Monday of April and the first Monday of June, annually.

Under the provisions of section 5367 G. C. (107 O. L. 30), the assessors are required to meet annually with the county auditor on the first Monday of May.

So it appears that the assessor elected in November, 1917, for the township which at that time did not include an incorporated village, had no opportunity to perform any of the duties of his office prior to the time when the newly created village was carved out of the township.

Section 5366 G. C. (107 O. L. 37) provides among other things that persons required to list property for taxation must make the returns to the county auditor on the second Monday in April or within fifteen days thereafter, and also that the lists of persons and property returned for taxation shall be delivered to the assessors of the respective subdivisions at the time of their meeting for instructions as provided in section 5367 G. C.

So it is evident that the assessor heretofore elected at the time mentioned in your inquiry has not been called upon to enter upon the discharge of his duties. It is my opinion that the qualification that the assessor must be an elector of his taxing district is a continuing qualification, and that the assessor for the newly created taxing district, viz., the village district, must be an elector of such taxing district. That is to say, the assessor of the village taxing district should be an elector of the village, and the mere fact that he was also an elector of the township as a whole, as well, would not permit him to be the assessor of that part of the township which was situated outside the municipality.

The assessor for the taxing district composed of the township outside the municipality would have to be an elector voting in that taxing district; that is, voting in that portion of the township which is outside the municipality.

In volume III of opinions of the attorney-general for 1915, p. 2203, is an opinion rendered by my predecessor, Hon. Edward C. Turner, addressed to Hon. D. F. Mills, under date of November 12, 1915, in which he held:

> "An elector of a municipal corporation located within a township is not an elector of said township as contemplated by the following provision of section 3349 G. C., 106 O. L. 250, viz.:
>
> 'An assessor shall be a citizen possessing the qualifications of an elector of such ward, district, city, village or township' and may not qualify as an assessor of said township."

So the assessor residing in the village not having been elected for the village taxing district, such taxing district is without an assessor and there is a vacancy in that office; and inasmuch as the assessor, so as aforesaid elected, resides in the village, he would not possess the necessary qualification to act as an assessor for that part of the township outside of the village. In consequence whereof, there are vacancies both in the village taxing district and in the taxing district composed of the township outside the village. These vacancies should be filled

by appointment of the county auditor under the provisions of section 3353-1 G. C. (106 O. L. 252), which reads as follows:

> "Sec. 3353-1. If there shall be a failure to elect an assessor in any ward, district, city, village or township, or if a person elected assessor fails to give bond and take the oath of office within thirty days after his election, or if after his appointment or election an assessor shall remove from the ward, district, city, village or township for which he was appointed or elected, the office shall be deemed vacant. Should there be at any time a vacancy in such office for any of the causes aforesaid, or from any other cause, the county auditor shall fill such vacancy by appointing any competent and suitable elector of such ward, district, city, village or township, who will accept and perform the duties of such office."

Referring to your further inquiry, to wit, if a special election is held for the election of village officers should an assessor be elected at that time for the newly created village, it is my view that the officers to be elected under section 3536 G. C. are strictly municipal officers and do not include assessors.

In State ex rel. v. Capeller, County Auditor, 3 W. L. B. 853, Avery J. (Hamilton Co. Dist. Ct.), at p. 854 said:

> "Although assessors for wards are elected within the precincts of a city, it by no means follows that they are city officers. * * *
>
> The power of imposing taxes might be left to the officers of a city but not the power of returning the valuation upon which the levies for the county and state are to be laid. * * * It matters not that the election is by ward or town or part of township and that the voters within that subdivision cast their votes for an officer who, deriving his office only from them, exercises its duties only within the territory over which they are conveyed. (*sic.*) The duties are appropriate in the township as forming part of the state organization and the officer is in that sense an officer of the township."

Upon the questions submitted, then, it is my opinion:

1. That the creation of the newly incorporated village created a new taxing district composed of the territory comprised in the village.
2. That the assessor elected for the township taxing district in November, 1917, cannot act for the village taxing district, since he was not elected as assessor for the village district and cannot act for the township district outside of the village because he resides in the village district and possesses the qualifications of an elector of such village.
3. That since no assessors have been elected for the newly created village district and there is no qualified, elected assessor in the township outside the village, there are such vacancies as should be filled under the provisions of section 3353-1 G. C.
4. That it would not be proper to elect an assessor for the newly created village taxing district at the special election to be held for the election of village officers, as such assessor is not a village officer.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1051.

MARRIAGE—JUDGE OF MUNICIPAL COURT OF ALLIANCE HAS NO AUTHORITY TO SOLEMNIZE.

The judge of the Municipal Court of Alliance has no authority to solemnize marriages.

COLUMBUS, OHIO, March 11, 1918.

HON. MILTON C. MOORE, *Judge of Municipal Court, Alliance, Ohio.*

DEAR SIR:—On February 25, 1918, you addressed the following inquiry to this office:

> "Section 10224 of the General Code of Ohio in prescribing the jurisdiction of a justice of the peace grants therein to justices of the peace jurisdiction to solemnize marriages. Under an act of the last legislature found in 107 Ohio Laws, page 660, the Municipal Court of Alliance, Ohio, was established; and section 3 of said act defines the jurisdiction of this court. The legislative act above referred to abolished the offices of justices of the peace in Lexington and Washington townships, Stark county; and I believe your office in a recent ruling held that this feature of the law was valid and constitutional. The question now arises whether or not the judge of the municipal court has the authority under the legislative act as aforesaid, to solemnize marriages."

The above question presents no difficulty, as in Ohio the authority to perform a marriage ceremony is entirely statutory, and inasmuch as no statute is found extending this authority to you, it would necessarily follow that you do not have it. That such is the case is rendered more apparent by other considerations. The municipal court is a statutory court, and its powers, jurisdiction and duties are limited to the permissive language of the statute creating it.

Section 3 of the act you mention begins as follows:

> "Said municipal court herein established shall have the same jurisdiction in criminal matters and prosecutions for misdemeanors, for violations of ordinances as mayors of cities and any justice of the peace, and in addition thereto shall have ordinary civil jurisdiction within the limits of said city of Alliance and townships of Lexington and Washington, in the county of Stark and state of Ohio, in the following cases:"

It is very evident that this subject would have nothing to do with the criminal jurisdiction. The civil jurisdiction is expressly limited to the cases following set out in paragraphs numbered from 1 to 8. This civil jurisdiction in this section, however, applies to certain townships in Stark county, while section 4 extends it in three paragraphs to the whole of Stark county and certain parts of Columbiana and Mahoning counties. Section 5 extends the civil jurisdiction to certain ancillary matters. Succeeding sections carry out details as to jurisdiction, and also as to procedure.

The perusal of the statute shows not only that it is a court of limited and express statutory jurisdiction and power, but that it is peculiarly and exclusively a court. Every paragraph of it has to do with actions and judicial proceedings.

No authority in any way is given it in reference to purely administrative matters, such a variety of which are possessed by the probate court and probate judge.

Marriage is not a judicial proceeding. A justice of the peace is only partially a judicial officer. He is a conservator of the peace, and he does and performs many acts in reference to public and private matters. In performing a marriage ceremony he is in no respect acting judicially. It does not take a judge to solemnize a marriage; as a matter of fact, it is usually done by preachers.

All these considerations render it certain that the judge of the municipal court has no power in reference to this subject.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

1052.

COUNTY COMMISSIONERS NOT ENTITLED TO CHARGE THREE DOLLARS PER DAY AS PART OF THE COSTS OF A PROCEEDING FOR THE CONSTRUCTION OF SEWAGE DISPOSAL PLANT.

In a proceeding for the construction of sewage disposal plant under the provisions of the act found in 107 *O. L., page* 440, *the county commissioners are not entitled to charge* $3.00 *per day as part of the costs of said proceeding.*

COLUMBUS, OHIO, March 11, 1918.

HON. THOMAS F. HUDSON, *Prosecuting Attorney, Springfield, Ohio.*

DEAR SIR:—On March 7, 1918, you made the following request for an opinion from this office:

> "A sewage disposal plant is being constructed outside of the city, as provided by the Laws of Ohio, Vol. 107, page 440.
>
> Are the county commissioners entitled to compensation of $3.00 per day, as provided in the general ditch laws, when holding meetings in regard to the sewage disposal plant?"

Referring to the statutes cited by you, I find section 7 (Sec. 6602-7 G. C.) to be as follows:

> "The cost of any improvement herein provided for and the cost of the maintenance and operation thereof, shall include, in addition to the cost of construction, the cost of engineering, necessary publications, inspection, interest on certificates of indebtedness or on bonds, and all other items of cost incident to such improvement. The county may pay any part of the cost of the improvement in this act provided for and of the maintenance and operation thereof if the board of county commissioners may deem such payment just."

This is the only section referring to the subject of costs, and the per diem of

the county commissioners is not provided for unless it be included in the phrase "and all other items of cost incident to such improvement."

In determining whether this per diem is costs incident to the improvement, it is necessary to refer to the General Code to determine whether this statute fits into the drainage statutes in such manner as to make it part of the county ditch law, so that costs there provided for as incident to such improvement would have the same application to this improvement. The act referred to by you is given sectional numbers 6602-1 to 6602-18, and is really an amendment of or substitute for similar statutes existing prior to its passage, so that the sectional numbers by the terms of the enactment itself are correct. Looking to the General Code, therefore, to get the connection, we find that this act takes place of chapter headed "SEWER DISTRICTS," and is designated as chapter 4a of title 3, which title is headed "DRAINAGE" of part second of the General Code.

There is nothing in this particular chapter of the General Code allowing per diem to the county commissioners; neither is there in chapter 4 which is entitled "COUNTY SEWERS." Referring back to the single county ditch law, the provision is found, which is section 6523, and is as follows:

> "For services actually rendered under the provisions of this chapter, the county commissioners, each, shall receive three dollars per day. All other officers and persons shall receive compensation for such services as provided in this subdivision of this chapter."

This provision by its express terms is confined to services performed under chapter 1. It is, however, by general reference carried into the provision for joint county ditches and some other purely ditch proceedings. But there is nothing in either chapter 4 or chapter 4a upon the subject of county sewers or sewer districts carrying the provision for costs into those chapters. The legislature recognized this situation in passing said section 7 of the act in question. It was necessary to make provision for costs, as there was no general provision carrying the costs provided in the county ditch law into this proceeding. They saw fit to expressly provide for the engineer, and made other express provisions. It is not necessary to determine whether the phrase quoted above as to other incidental items of cost adds anything to the section, or includes any of the costs not specifically provided for or not. It is enough to say that it cannot be construed to include per diem for the commissioners, because the cost is not incident to the improvement unless some statute makes it so.

The county commissioners receive a salary, and if they did not, they could not draw this fee because they are only entitled to compensation expressly given by statute, and this is not given. It is not incident to the cost of the improvement any more than any other possible expense connected with it might be; such for instance, as some part of the salary of the prosecuting attorney for services in determining this question, or any other outlay that might possibly be directly or indirectly connected with the improvement. It cannot be incidental to the cost of the improvement unless it have some existence, as a charge in some cases. It cannot have such existence unless it gets it from the statute. It is not created by the statute, and it is therefore demonstrated that it cannot be charged and collected.

Very truly yours,

JOSEPH MCGHEE,
Attorney-General.

1053.

DEPOSITORY INTEREST ON MONEYS PAID INTO THE STATE TREASURY SINCE JULY 1, 1917, ON ACCOUNT OF SALES OF SCHOOL AND MINISTERIAL LANDS AND LEFT UNINVESTED, TO WHAT FUNDS SAME SHOULD BE CREDITED—RATE OF INTEREST—AUTHORITY OF THE COMMISSIONERS OF THE SINKING FUND OVER SUCH MONEYS.

Depository interest on moneys paid into the state treasury since July 1, 1917, on account of sales of school and ministerial lands, and left therein uninvested by the commissioners of the sinking fund but, together with other moneys, deposited in the state depositories, should be credited to the interest accounts in the common school fund and the ministerial trust fund, respectively.

Where no separate account has been kept of specific moneys placed in depositories the average rate obtained by the state on inactive deposits should be so credited.

It is erroneous to credit depository interest earned by the deposit of such funds to the general revenue fund.

The commissioners of the sinking fund have no authority respecting the control and deposit of moneys in the hands of the treasurer of state and belonging to the ministerial trust and common school funds. They may withdraw such funds for investment in specified securities but may not control the powers and duties of the treasurer of state with respect to the deposit of general balances.

COLUMBUS, OHIO, March 11, 1918.

HON. CHESTER E. BRYAN, *Treasurer of State of Ohio, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of January 22d supplementing and explaining a previous inquiry from you under date of January 3d and requesting my opinion as follows:

> "Commencing on July 1, 1917, the auditor of state transmitted to this department various sums of money pursuant to the act of March 20, 1917, 107 O. L. 357. This money was placed in what is known as the common school fund and ministerial trust fund respectively. These funds were from time to time invested by us under the depository act along with moneys belonging to the general and other funds of the state, but no separate depository account was kept of these trust fund moneys so placed at depository interest.
>
> It appears that at its meeting on July 1, 1917, the commissioners of the sinking fund adopted a resolution as follows:
>
> 'that in view of the unsettled conditions now existing it would make no attempt at present to invest the trust funds now in the hands of the treasurer of state, but directed the treasurer of state to credit to the account of the school and ministerial trust the sum of the average rate of inactive depository interest received by the treasurer of state upon such funds until the further order of this board.'
>
> No notice was given to this department of the aforesaid action of the commissioners of the sinking fund, hence the depository interest earned upon these moneys was credited by this department as it credited depository interest upon the general and other funds of the state.

In December, 1917, the auditor of state formally notified us of the action of the commissioners of the sinking fund on July 1st. We desire to be advised:

1. Can the Treasurer of State credit to these trust funds the amount of depository interest earned by them under the depository law?

2. Inasmuch as the interest earned upon these funds has already been placed to the credit of the general fund of the state, will it be permissible, in distributing the depository interest payment made to this department on February the 1st, to credit to the aforesaid trust funds the whole sum of depository interest earned since July 1, 1917?

3. If such a distribution of the February 1st depository interest can be made, then what authority shall the treasurer of state require to make the same; i. e., will a certified copy of the journal of the commissioners of the sinking fund of July 1, 1917, be sufficient?"

The pertinent sections of the General Code as amended and enacted in the act referred to (107 O. L. 357) are as follows:

Section 42, designated as section 3203-19 General Code:

"* * * such proceeds (of sales) shall, if the lands are for the support of schools, be placed in the 'common school fund' as provided by law, and if the lands are for the purpose of religion, shall be placed in the 'ministerial fund' as provided by law."

"Sec. 3239. The money paid into the state treasury on account of sales of lands granted by congress for the purposes of religion, known as section twenty-nine, and on account of the sale of minerals thereon, shall constitute the 'ministerial trust fund' of the state, of which the auditor of state shall be the superintendent, and the income therefrom shall be used exclusively for religious purposes, in the manner designated by law."

"Sec. 7579. The money which has been and may be paid into the state treasury on account of sales of land granted by congress for the support of public schools in any original surveyed township or other district of country, and on account of the sales of minerals thereon, shall constitute the 'common school fund' of which the auditor of state shall be superintendent, and the income of which must be applied exclusively to the support of public schools in the manner designated by law."

"Sec. 7580. The auditor of state shall keep an account of the capital sum now belonging to the 'common school fund,' and the 'ministerial trust fund.' Interest thereon shall be computed by him annually for the calendar year. The auditor of state shall keep an account with and for each township or districts of country in the state, showing the capital sum in such common school fund and ministerial trust fund belonging to each such township or district of country, the interest accruing on the same and the disbursement of such interest."

"Sec. 7580-1. The auditor of state shall give notice in writing at least once in every two months to the commissioners of the sinking fund of the amount of the capital sum belonging to the common school fund and ministerial trust fund that may have been paid into the state treasury subsequent to his last preceding notice arising from the sale of lands or minerals thereon granted by congress for the use of schools or the purposes of religion, with the sum of such capital so paid belonging to each township or other district of country in the state."

"Sec. 7580-2. It shall be the duty of the commissioners of the sinking fund from time to time to draw an order for the balance of such capital sum in the common school fund and ministerial trust fund that may have been reported by the auditor of state, such order shall be presented to the auditor of state who shall issue his warrant upon the treasurer of state for the sum thereof."

"Sec. 7580-3. The auditor of state shall open proper accounts in which he shall charge the commissioners of the sinking fund with all such orders and warrants, and credit said commissioners, with all sums of interest earned and disbursed by them for and on account of said capital sums so withdrawn by said commissioners from the state treasury."

"Sec. 7580-4. It shall be the duty of the commissioners of the sinking fund from time to time to invest the moneys so withdrawn by them from the state treasury, either in bonds or other interest bearing obligations of the United States, or those for which the faith of the United States is pledged, including bonds of the District of Columbia, or in bonds or other interest bearing obligations of this or any other state of the United States, or the legally issued bonds or interest bearing obligations of any county, city, village, township, school district or other political subdivision or district of this state."

"Sec. 7580-5. The commissioners of the sinking fund shall keep an account of all such investments and interest accrued or received on account thereof, which account shall show the amount of each such investment belonging to each township or other district of country, and the interest earned or paid thereon."

"Sec. 7580-6. At least once in every two months the commissioners of the sinking fund shall report to the auditor of state the amount of such investments made subsequent to the last preceding report made pursuant to this section, showing the sum thereof belonging to each township or other district of country, together with the interest accrued and interest received by them on account of each such township or other district of country."

"Sec. 7580-7. The interest so accrued and received on account of the portion of the whole investment that belongs to each township or district of country together with interest at the rate of six per cent. per annum upon the sum of the debt owing by the state to the common school fund and the ministerial trust fund, shall, if the capital sum was derived from the sale of school lands or minerals thereon, be appropriated and used for the support of schools as provided by the act of congress of February 1, 1826, or, if the capital sum was derived from the sale of ministerial lands or minerals thereon, be appropriated and used for the purpose of religion, in each township and district of country entitled thereto, as provided by the act of congress of February 20, 1833."

"Sec. 7580-8. Before making the February settlement with county auditor the state auditor shall draw his order upon the commissioners of the sinking fund for the sum of the interest so accrued and received at the time of so drawing such order, and the commissioners of the sinking fund shall thereupon, upon the draft of the auditor of state, pay into the state treasury to the credit of the interest account of the common school fund and the ministerial trust fund the sum of such order, and the auditor of state shall thereupon credit the account of said commissioners with the sum so paid to the treasurer of state."

For purposes of a comparison which I shall hereinafter make I beg leave to include also in the catalogue of sections to be considered the corresponding provisions of the statutes as they existed prior to the legislation of 1917.

"Sec. 3239. The money paid into the state treasury on account of sales of lands granted by congress for religious purposes, known as section twenty-nine, shall constitute the 'ministerial fund,' of which the auditor of state shall be the superintendent, and the income therefrom shall be used excluively for religious purposes."

"Sec. 3240. The ministerial fund shall constitute an irreducible debt of the state, on which the state shall pay interest annually, to be computed for the calendar year, and the first computation on any payment of principal, hereafter made, shall be from the time of payment to and including the thirty-first day of December next succeeding. The auditor of state shall keep an account of the fund and of the interest which accrues thereon, in a book or books to be provided for that purpose, with each original surveyed township or other district to which any part of the fund belongs, crediting each with its share of the fund, and showing the amount of interest thereon which accrues and the amount which is disbursed annually to each."

(Section 3240 was repealed by the act of 1917.)

"Sec. 7579. The money which has been and may be paid into the state treasury on account of sales of lands granted by congress for the support of public schools in any original surveyed township, or other district of country, shall constitute the 'common school fund,' of which the auditor of state shall be superintendent, and the income of which must be applied exclusively to the support of common schools, in the manner designated in this chapter."

"Sec. 7580. The common school fund shall constitute an irreducible debt of the state, on which it shall pay interest annually, at the rate of six per cent. per annum, to be computed for the calendar year, the first computation on any payment of principal hereafter made to be from the time of payment to and including the thirty-first day of December next succeeding. The auditor of state shall keep an account of the fund, and of the interest which accrues thereon, in a book or books to be provided for the purpose, with each original surveyed township and other district of country to which any part of the fund belongs, crediting each with its share of the fund, and showing the amount of interest thereon which accrues and the amount which is disbursed annually to each."

I should also quote section 7575 of the General Code, which is still in force, as amended 105 O. L., 5:

"Sec. 7575. For the purpose of affording the advantages of a free education to all the youth of the state, there shall be levied * * * and for the payment of interest on the irreducible or trust fund debt for school purposes, twenty-five ten thousandths of one mill, such fund to be styled 'the sinking fund.'"

Looking first at what may be called the old sections, the situation of the two "trust funds" about which you inquire prior to the going into effect of the act of 1917 was as follows:

The proceeds of sales of ministerial and school lands were required to be paid into the state treasury and there were given the appellation of "funds;" but by the succeeding sections it is clear that they did not in any real sense constitute funds in the state treasury; for it was provided that the amounts of such payments should constitute irreducible debts of the state upon which the state should pay interest at the rate of six per cent., and a general tax levy was made for the purpose of paying this interest. In effect, therefore, the state borrowed, and it is presumed expended, the moneys paid in from the sales of lands and constituting the "trust funds" for the two specified purposes and paid interest on what it had borrowed at the rate of six per cent.

Though both of the sections constituting the moneys paid in the past an irreducible debt of the state and providing for the payment of interest thereon at the rate of six per cent. were repealed by the act of 1917, yet these borrowed sums still represent an irreducible debt of the state and are no part of any fund in the state treasury as such. This is made apparent by the provisions of section 7580-7, which now contains the provision for the payment of "interest at the rate of six per cent. per annum upon the sum of the debt owing by the state to the common school fund and the ministerial trust fund"—which, it may be observed, is a very felicitous expression in that it describes with perfect accuracy the exact situation with respect to what sections 3239 and 7579 in their former condition, and in point of fact in their present condition, in so far as they mention past payments—refer to as the "ministerial trust fund" and the "common school fund," respectively. In other words, payments made into these funds prior to the going into effect of the legislation of 1917 were immediately and automatically borrowed under existing legislation and applied to the current needs of the state government. There is nothing in the act of 1917, nor in other acts passed by the same legislature, which has the effect of repaying the sums so borrowed, and they still constitute debts of the state and, as the phrase above quoted has it, "moneys owing by the state to the common school fund and the ministerial trust fund;" or, with even more perfect accuracy, moneys owing by the state in its general governmental capacity to its own common school fund and ministerial fund or to itself as trustees.

The general effect of the legislation of 1917 upon future revenues arising from these two sources—sales of ministerial lands and of school lands, respectively—is the exact opposite of that just outlined. Sections 3239 and 7579, though re-enacted without substantial change in phraseology, now have something definite upon which to operate so far as subsequent payments are concerned; that is to say, there is now a *real* ministerial trust fund and a *real* common school fund in the state treasury. This results simply from the fact that the state no longer borrows for general revenue purposes the capital sums so paid into its treasury. Such capital is paid into the treasury to the credit of these two funds and is not at once transferred again by construction as it formerly was. Hence it remains in the treasury, subject to proper withdrawal of course, but does not belong in the general revenue fund. Sections 7580-1 to 7580-6, inclusive, above quoted, provide for the investment of these sums. These sections authorize and require the commissioners of the sinking fund periodically to invest the capital sums in the common school fund and the ministerial trust fund in certain specified securities. This is all that the commissioners of the sinking fund have to do. They are not authorized to make any other investments, nor are they authorized to direct the treasurer of state to treat moneys in his hands belonging to the common school fund and the ministerial trust fund, respectively, in any particular way save to pay them out on their warrant for the purpose of investment. I might therefore answer your third question, and in part all of your questions, by saying that the order of the commissioners of the sinking fund is entirely nugatory and in nowise binding upon you as treasurer

of state, for the reason that leaving these funds on deposit for the purpose of securing depository interest on them is not such an "investment" of the funds as the commissioners of the sinking fund are authorized to make.

But this short statement does not answer your questions, nor if it did would it present an accurate view of the legal situation, for though the commissioners of the sinking fund had no authority to order you to do anything with respect to the crediting of depository interest, yet, in my opinion, the order which the commissioners attempted to make was in effect a perfectly accurate statement of your official duty in the premises. In other words, depository interest belongs, not to the general revenue fund, as you seem to suppose, but to the several funds in the state treasury pro rata. This proposition is true, I think, as a matter of general law. The state depository law, sections 321 to 330-11, inclusive, makes no disposition of depository interest. If such interest were to be considered as "moneys paid into the state treasury" for the purpose of section 270 of the General Code, then it might be argued that it should be credited by the auditor of state to the general revenue fund as moneys "the disposition of which is not otherwise provided for by law." I think, however, that the disposition of depository interest is otherwise provided for by law in the sense that the general principle of law is that all increments or earnings of trust funds belong to the funds themselves.

I do not wish, however, to express a comprehensive opinion upon this point as its effect would be very far-reaching. It is not necessary to do so in this particular case because of the explicit provisions of sections 3239 and 7579 of the General Code above quoted, both of which provide that the income from the funds to which they respectively relate shall be used exclusively for the purpose to which the capital of the fund is devoted; so that whatever may be the case wth respect to funds like the agricultural fund, for example, or the state common school fund, which are, or at least should be, separately set up and maintained as funds by the auditor and treasurer of state, and whether these funds are entitled to share pro rata in depository interest obtained from the deposit of the commingled funds of the state in banks, it is at least clear that this is true with respect to the ministerial trust fund and the common school fund and, to be accurate, especially with regard to the moneys that really are in those funds, viz: those which have accrued to them since July 1, 1917.

I am therefore of opinion that depository interest on account of the common school fund and the ministerial trust fund belongs to those funds, respectively. The same should be credited to them on the books of your office and those of the auditor of state.

I shall not consider in this opinion the question as to just how these funds should be deposited and as to whether the depository law authorizes any separation of moneys and depository accounts according to funds. It is apparent that heretofore no such separation has been made and all moneys in the treasury have been treated for the purpose of deposit as if they were in one fund. Under these circumstances it is my opinion that it is the duty of the treasurer of state and the auditor of state to credit to the account of the common school and ministerial trust funds a pro rata share of the interest on all inactive deposits. That is to say, these moneys have been on deposit and will not be disturbed at least until the February settlement. Therefore, they would be entitled to the rate of interest obtained by the state on its inactive deposits. I presume that to credit these with the average rate obtained by competitive bidding on such deposits as suggested by the attempted "order" of the commissioners of the sinking fund would produce results sufficiently accurate for all purposes.

In view of the foregoing discussion I answer your several specific questions as follows:

(1) The treasurer of state not only may but must credit to the ministerial trust fund and the common school fund, respectively, the amount of depository interest earned by each of them under the depository law so long as there are in the treasury and on deposit moneys belonging to these funds.

(2) It was erroneous to place the interest earned upon the funds referred to to the credit of the general revenue fund of the state. Such error should now be corrected and proper credits given.

(3) The treasurer of state needs no other authority than the statutes and the general principles of law to which I have referred to make such disposition of the interest earned by the funds referred to as I have described; he need pay no attention to the order of the commissioners of the sinking fund, as it is in and of itself of no effect whatsoever.

I should state that the interest inquired about should be credited to the interest account in each of the funds respectively. The effect of the sections which have been discussed, and especially section 7580-8 General Code as above quoted, is to set up within the common school fund and the ministerial trust fund perpetual or standing accounts which may be designated as the "capital account" and the "interest account." These accounts are really subdivisions of funds and are not to be confused with appropriation accounts. Therefore they belong on the books of the treasurer of state as well as on those of the auditor of state. As stated, the depository interest should be credited to the interest account.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1054.

APPROVAL—SURETY BOND OF WILLIAM F. DUFFY.

COLUMBUS, OHIO, March 11, 1918.

HON. A. W. FREEMAN, *Commissioner of Health, Columbus, Ohio.*

DEAR SIR:—You have submitted to this department bond of William Francis Duffy in the sum of five thousand dollars, payable to the state of Ohio, with the Chicago Bonding and Insurance Company of Chicago, Ill., as surety.

I have examined the said bond and finding the same to be in compliance with law have this day endorsed my approval thereon and herewith return the same to you. Said bond, under the provisions of section 1261-7 G. C. (103 O. L. 522) is to be deposited with the secretary of state. Very truly yours,

JOSEPH MCGHEE,
Attorney-General.

1055.

APPROVAL OF BOND ISSUE OF MAHONING COUNTY—$11,000.00.

COLUMBUS, OHIO, March 12, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of Mahoning county, Ohio, in the sum of $11,000.00, for the purpose of creating a fund for the payment of compensation, damages, cost and expense of the improvement of section U-1 of the Akron-

Canfield road, I. C. H. No. 87, in Canfield township, under the provisions of section 1223 General Code.

I have carefully examined the corrected transcript of the proceedings of the board of county commissioners of Mahoning county, Ohio, relating to the above bond issue and find said proceedings to be in conformity with the provisions of the General Code of Ohio relative to bond issues of this kind.

I am therefore of the opinion that properly prepared bonds will, when the same are signed by the proper officers and delivered, constitute valid and binding obligations of said county.

No bond form covering said issue was submitted with the transcript and I am therefore retaining said transcript until said bond form is submitted and approved by this department.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1056.

APPROVAL OF BOND ISSUE OF WASHINGTON TOWNSHIP RURAL SCHOOL DISTRICT, FRANKLIN TOWNSHIP—$25,000.00.

COLUMBUS, OHIO, March 12, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of Washington township rural school district, Franklin county, Ohio, in the sum of $25,000.00, for the purpose of providing additional funds for completing the construction of high and elementary grade school buildings in said school district and furnishing and equipping same.

I have carefully examined the transcript of the proceedings of the board of education and other officers of Washington township rural school district, Franklin county, Ohio, relating to the above bond issue, and find said proceedings to be in conformity with the provisions of the General Code of Ohio relative to bond issues of this kind.

I am therefore of the opinion that bonds properly prepared according to the bond form submitted will, when signed by the proper officers and delivered, constitute valid and binding obligations of said school district.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1057.

APPROVAL OF BOND ISSUE OF AKRON CITY SCHOOL DISTRICT—$250,000.00.

COLUMBUS, OHIO, March 12, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of Akron city school district, Summit county, Ohio, in the sum of $250,000.00, for the purpose of improving public school prop-

erty by erecting school buildings—one on North Martha avenue to be known as the East High building, and one at the corner of Currie avenue and Hammel street to be known as the N. L. Glover building, both in the city of Akron, Ohio, and in anticipation of income from taxes for such purpose to be levied.

I have carefully examined the corrected transcript of the proceedings of the board of education and other officers of Akron city school district, Summit county, Ohio, relating to the above bond issue, and find said proceedings to be in conformity with the provisions of the General Code of Ohio relative to bond issues of this kind.

I am therefore of the opinion that bonds properly prepared according to the bond form submitted will, when signed by the proper officers and delivered, constitute valid and binding obligations of said school district.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1058.

APPROVAL OF BOND ISSUE OF MAHONING COUNTY—$10,000.00.

COLUMBUS, OHIO, March 12, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of Mahoning county, Ohio, in the sum of $10,000.00, for the purpose of creating a fund for the payment of compensation, damages, cost and expense of the improvement of the Akron-Youngstown road, I. C. H. No. 18, section R-1, in Jackson township, under the provisions of section 1223 General Code.

I have carefully examined the corrected transcript of the proceedings of the board of county commissioners of Mahoning county, Ohio, relating to the above bond issue and find said proceedings to be in conformity with the provisions of the General Code of Ohio relative to bond issues of this kind.

I am therefore of the opinion that properly prepared bonds will, when the same are signed by the proper officers and delivered, constitute valid and binding obligations of said county.

No bond form covering said issue was submitted with the transcript and I am therefore retaining said transcript until said bond form is submitted and approved by this department.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1059.

APPROVAL OF BOND ISSUE OF MAHONING COUNTY—$10,000.00.

COLUMBUS, OHIO, March 12, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of Mahoning county, Ohio, in the sum of $10,000.00, for the purpose of creating a fund for the payment of compensation, damages, costs and expense of the improvement of the Hitchcock road, No. 133, in Boardman township, under the provisions of section 6929 of the General Code.

I have carefully examined the corrected transcript of the proceedings of the board of county commissioners of Mahoning county, Ohio, relating to the above bond issue and find said proceedings to be in conformity with the provisions of the General Code of Ohio relative to bond issues of this kind.

I am therefore of the opinion that properly prepared bonds will, when the same are signed by the proper officers and delivered, constitute valid and binding obligations of said county.

No bond form covering said issue was submitted with the transcript and I am therefore retaining said transcript until said bond form is submitted and approved by this department.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1060.

APPROVAL OF BOND ISSUE OF MAHONING COUNTY—$11,500.00.

COLUMBUS, OHIO, March 12, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of Mahoning county, Ohio, in the sum of $11,500.00, for the purpose of creating a fund for the payment of compensation, damages, cost and expense of the improvement of section A-1 of the Canfield-Niles road, I. C. H. No. 328, in Canfield township, under the provisions of section 1223 of the General Code.

I have carefully examined the corrected transcript of the proceedings of the board of county commissioners of Mahoning county, Ohio, relating to the above bond issue and find said proceedings to be in conformity with the provisions of the General Code of Ohio relative to bond issues of this kind.

I am therefore of the opinion that properly prepared bonds will, when the same are signed by the proper officers and delivered, constitute valid and binding obligations of said county.

No bond form covering said issue was submitted with the transcript and I am therefore retaining said transcript until said bond form is submitted and approved by this department.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1061.

APPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN HOLMES, SUMMIT AND GEAUGA COUNTIES.

COLUMBUS, OHIO, March 12, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your communication of March 8, 1918, in which you enclose for my approval final resolutions on the following improvements:

Holmes County—Columbus-Millersburg road, I. C. H. No. 23, section "I."

Holmes County—Columbus-Millersburg road, I. C. H. No. 23, section "J."

Summit County—Akron-Canton road, I. C. H. No. 66, section "Q."

Geauga County—Cleveland-Meadville road, I. C. H. No. 15, section "K-1."

I have carefully examined said final resolutions, find the same correct in form and legal, and am therefore returning them to you with my approval endorsed thereon, in accordance with the provisions of section 1218 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1062.

APPROVAL—FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN GUERNSEY, MADISON, MONROE AND ROSS COUNTIES.

COLUMBUS, OHIO, March 12, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your communications of February 26 and 28, in which you enclose for my approval final resolutions on the following improvements:

McConnelsville-Cambridge road—I. C. H. No. 484, section "A," Guernsey county.

Columbus-Cincinnati road—I. C. H. No. 6, Main Market IV, section "A-1," type A, B, C and D, Madison county.

Malaga-Alledonia road—I. C. H. No. 108, section "H," Monroe county.

Findlay-Delphos road—I. C. H. No. 133, section "A," Putnam county.

Portsmouth-Columbus road—I. C. H. No. 5, section "O," Ross county.

I have carefully examined said final resolutions, find them correct in form and legal and am therefore returning the same to you with my approval endorsed thereon, under section 1218 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1063.

COUNTY COMMISSIONERS MUST HIRE AND FIX SALARY OF POUNDKEEPER.

The employment of a poundkeeper for dogs seized and impounded under provisions of act found in 107 O. L., pages 534 et seq., is a duty devolving upon the county commissioners and not upon the sheriff.

The compensation of such poundkeeper is to be fixed by the county commissioners and paid out of the general county fund.

COLUMBUS, OHIO, March 12, 1918.

HON. D. FINLEY MILLS, *Prosecuting Attorney, Sidney, Ohio.*

DEAR SIR:—I have your favor under date of February 16, 1918, in which you ask my opinion as follows:

> "I would be very much pleased to have your opinion as to the proper construction to be placed upon sections 5652-7 to 5652-12 inclusive of the General Code, as amended in Vol. 107, page 535-537 of Ohio Laws, relative to the providing for and compensation to be paid to the poundkeeper. Is it the duty of the sheriff or his deputies to act as poundkeeper and feed and care for the dogs that have been impounded? Or are the commissioners authorized to employ some other person as a poundkeeper and fix a certain compensation to be paid him for performing his duties as provided therein? If the commissioners are authorized to employ a poundkeeper and fix his compensation, from what fund shall his compensation or salary be paid?
>
> Also in the event that the county commissioners should provide for the employment of deputy sheriffs, as provided therein, who fixes their compensation, and from what fund is it to be paid?"

Section 5652-7 General Code, the same being a part of the act referred to in your communication, provides generally for the seizure and impounding by the sheriff of unregistered dogs subject to registration under the provisions of said act.

Section 5652-9 General Code provides generally for the disposition of dogs so seized and impounded.

Section 5652-8 General Code provides as follows:

> "County commissioners shall provide for the employment of deputy sheriffs necessary to enforce the provisions of this act, shall provide nets and other suitable devices for taking dogs in a humane manner, and, except as hereinafter provided, shall also provide a suitable place for impounding dogs, and make proper provision for feeding and caring for the same, and shall also provide humane devices and methods for destroying dogs. Provided, however, that in any county in which there is a society for the prevention of cruelty to children and animals, incorporated and organized as provided by law, and having one or more agents appointed in pursuance of law, and maintaining an animal shelter suitable for a dog pound and devices for humanely destroying dogs, county commissioners shall not be required to furnish a dog pound, but the sheriff shall deliver all dogs seized by him to such society for the prevention of

cruelty to animals and children at its animal shelter, there to be dealt with in accordance with law, and the county commissioners shall provide for the payment of reasonable compensation to such society for its services so performed out of the county general fund."

Without any extended discussion of the provisions of this section it will be noted that, except in counties where there is an incorporated humane society having suitable facilities for a dog pound, it is the duty of the county commissioners to provide a suitable place for impounding dogs seized under the provisions of the act and to make proper provision for feeding and caring for the same.

It seems obvious that dogs seized and impounded cannot be fed or cared for unless some person is designated or employed to perform this duty, and that the county commissioners are authorized and required to appoint such person to act as poundkeeper and to feed and care for such dogs. Though it is the duty of the sheriff, by himself or deputy, to place dogs that have been seized in such pound, I do not see that it is any part of his duty to provide for feeding and caring for such dogs nor to provide a poundkeeper for such purpose. This conclusion reached by me answers your first question.

As to your second question I am of the opinion that the compensation of the person employed as poundkeeper for the purpose of feeding and caring for dogs seized and impounded is to be paid by the county commissioners out of the general county fund.

Your last question is answered by opinions Nos. 861 and 973 addressed, respectively, to Hon. Perry Smith, prosecuting attorney, Zanesville, Ohio, and Hon. John V. Campbell, prosecuting attorney, Cincinnati, Ohio, under dates of December 15, 1917, and January 29, 1918, copies of which are enclosed herewith.

Very truly yours,

JOSEPH MCGHEE,
Attorney-General.

1064.

HUMANE SOCIETY FOR PREVENTION OF CRUELTY TO ANIMALS MUST ALSO BE FORMED FOR PREVENTION OF CRUELTY TO CHILDREN—CERTIFICATE OF BOARD OF STATE CHARITIES—RESULT OF TAKING TEMPORARY POSSESSION OF MISTREATED CHILD—CRIMINAL JURISDICTION OF JUVENILE COURT—SECTION 10083 MODIFIED BY JUVENILE COURT LAW.

There is no such thing as a society for the prevention of cruelty to animals which is not also a society for the prevention of cruelty to children, as all such societies are required to be formed for both of said objects. Such societies do not require the certificate of the board of state charities in order to render their incorporation lawful.

The act of taking temporary possession of a mistreated child under section 10081 *G. C. does not make such society subject to annual certification by the board of state charities.*

The criminal jurisdiction of the juvenile court is partly exclusive and partly concurrent with that of other criminal courts. In all cases in which the judgment acts directly upon the infant himself it is exclusive, and in all cases in which it is necessary to establish the delinquency of a child as a substantive part of the offense such jurisdiction is also exclusive. In cases of offenses against infants under stat-

utes in existence prior to the creation of the juvenile court the jurisdiction is concurrent, and as to statutes creating offenses since the establishment of the juvenile court the jurisdiction is either exclusive or concurrent, depending upon the considerations in the first two paragraphs above set forth and also the terms of the act itself under consideration.

The provision of the juvenile court law so modifies section 10083 *G. C. that it is no longer necessary to comply with that provision thereof requiring a child to be placed under the care of a humane society or its agent.*

COLUMBUS, OHIO, March 12, 1918.

Board of State Charities, Columbus, Ohio.

GENTLEMEN:—On January 23, 1918, you addressed to this department the following request for an opinion:

"In attempting to apply the provisions of section 1352-1, we are confronted with a number of conditions, obtaining in so-called humane societies of the state, whose activities may be placed in three groups:

I. Societies which seem to maintain work only relating to protection of animals and prosecutions for abuses thereof.

II. Societies which, in addition to the animal protection, also prosecute parents for non-support and other cases of neglect of children, but do not attempt to assume any legal responsibility for the children after prosecutions, or to perform any other form of personal guardianship over them.

III. Societies which, in addition to the above activities, do, by court action, acquire guardianship of children and exercise full legal authority and care for and over them.

Section 10067 authorizes societies to be organized, some of which are styled as humane societies and some as societies for the prevention of cruelty to animals.

Section 10063 states that the objects of such societies, among other things, shall be for the prevention of cruelty especially to *children* and *animals.*

Section 10070 provides for the appointment of agents to prosecute persons guilty of acts of cruelty to *persons* and *animals.*

Section 10081 provides that an officer or agent of such a society may remove a child from parents or persons having charge thereof, by taking *possession* summarily.

Section 10082 provides for a method of notice to be served on parents and concludes with this sentence, 'When said period of two weeks from the time of publication shall have elapsed, said court shall have full jurisdiction, to deal with the child as provided by this chapter.'

Section 10083 states that the probate court *shall,* under certain conditions, make an order conferring on the general agent the powers of guardian over a child.

Section 5653 provides that, under certain conditions, balances in the sheep fund may be paid to the society for the prevention of cruelty to *children* and *animals.*

Section 13440 provides a schedule of fees to be paid from county funds to an attorney of a humane society or its agent.

Section 1683-1 provides that juvenile court judges shall have jurisdiction of all misdemeanors against minors.

Having the above sections in mind, we submit to your consideration the following questions:

(1) Does the fact that such societies have a legal authority to do many things for the protection of children require those in group one to be certified by the board of state charities?

(2) Are societies coming under the scope of group two subject to annual certification?

(3) Does the refusal of certification of a humane society, or similar organization, have any effect upon the legal right of such society to continue as a prosecuting agency, either of animals or children, or both, with or without the public financial assistance provided in sections 10072, 10076, 5653 and 13440?

(4) Does the act of taking possession of a mistreated child, as provided in section 10081, make a society which the agent represents subject to annual certification?

(5) Does the general juvenile court law amend by implication the requirements in the humane society law about bringing cases before the probate judge; that is, should such cases be brought before the juvenile court instead?

(6) Does the juvenile court law remove the compulsory provision in section 10083 concerning the placing of the child under the care of a humane society or its agent?

(7) Does section 1683-1 warrant an interpretation to the effect that *all* cases of non-support, including abuses and other offenses against the welfare of children, as defined in sections 1645, 1646, 1654, 1655, 12970 and probably others, *must* be brought before the juvenile court?"

The questions asked by you were partially answered in a former opinion rendered to your board under date of December 15, 1917. The answer at that time was made against my own opinion as to its correctness because I deferred to the decision of the circuit court of Cuyahoga county, which had theretofore determined that societies for the prevention of cruelty to animals under the statute must secure the approval of your department before being entitled to file articles of incorporation.

I have delayed answering your present inquiry because shortly before receiving it I was informed that the same question was again raised in an action brought in the court of appeals of Cuyahoga county, being State ex rel. Cleveland Animal Protective League v. County Commissioners and County Auditor of Cuyahoga County. That cause has now been determined and I have a transcript of the record before me, as well as the briefs of counsel. It is held that these societies do not require your approval.

The requirement of section 1352-2 General Code is as follows:

"No association whose object may embrace the care of dependent, neglected or delinquent children or the placing of such children in private homes shall hereafter be incorporated unless the proposed articles of incorporation shall have been submitted first to the board of state charities. The secretary of state shall not issue a certificate of incorporation unless there shall first be filed in his office the certificate of the board of state charities that it has examined the articles of incorporation, and that in its judgment the incorporators are reputable and respectable persons," etc.

It is to be noted that this section applies to and includes societies the object of which is the care of dependent, neglected or delinquent children or the placing of such children in private homes.

Societies for the prevention of cruelty to animals organized under sections 10066 and 10067 General Code are required to have as their object the inculcation of humane principles and the enforcement of laws for the prevention of cruelty, especially to children and animals; so that no matter under whch section the society is organized its objects are the same. There is no such thing as a society for the prevention of cruelty to animals that is not also a society for the prevention of cruelty to children. What is held by the court, however, is that this casual care that is taken on behalf of children by prosecuting those guilty of acts of cruelty to them does not embrace the "care of dependent, neglected or delinquent children" in the sense in which the term is used in section 1352-2 G. C.; that this latter section is intended to apply to those who in some sense have the continued care or disposition and control of children. The briefs filed in this case show that the court had before them the subjects provided for in sections 10081 and 10082 G. C.

Section 10081 provides that in a certain contingency the officer of the society for the prevention of cruelty to animals may take possession of a child summarily.

Section 10082 provides what he shall then do, which in substance is to place the child at the disposition of the probate court, who shall fix a time and place of hearing, which must be at least two weeks after publication is made.

Section 10083 provides that the probate judge may at the hearing take possession and control of the child from the parent, and make an order conferring upon the general agent of the society the powers of a guardian as to the child. Here indeed at the last is permanent care of a neglected child. It is not, however, in the society but in the general agent of the society, who must receive his appointment from the probate court, which it is presumed in all cases is a sufficient certification and finding of his fitness. Upon this theory evidently the court of appeals has found that these societies do not require the certificate of character from your department, and this of necessity answers your first, second, third and fourth inquiries.

Answering your fifth inquiry as to the jurisdiction of the juvenile court: this jurisdiction is conferred by section 1642, and is therein defined to be

> "over and with respect to delinquent, neglected and dependent minors, under the age of eighteen years, not inmates of a state institution, or any institution incorporated under the laws of the state for the care and correction of delinquent, neglected and dependent children, and their parents, guardians, or any person, persons, corporation or agent of a corporation, responsible for, or guilty of causing, encouraging, aiding, abetting or contributing toward the delinquency, neglect or dependency of such minor, and such courts shall have jurisdiction to hear and determine any charge or prosecution against any person, persons, corporations, or their agents, for the commission of any misdemeanor involving the care, protection, education or comfort of any such minor under the age of eighteen years."

It will be seen that the jurisdiction here given is not by its express terms made exclusive.

Section 1659, however, enacts as follows:

> "When a minor under the age of eighteen years is arrested, such child, instead of being taken before a justice of the peace or police judge,

shall be taken directly before such juvenile judge; or, if the child is taken before a justice of the peace or a judge of the police court, it shall be the duty of such justice of the peace or such judge of the police court, to transfer the case to the judge exercising the jurisdiction herein provided."

Sections 1644 to 1648 G. C. make provision as to who are such delinquent, neglected and dependent children, and provide the proceedings in reference thereto, which in all cases are before the juvenile court. The combined effect of these different sections evidently does by implication amend the sections to which you refer and require these proceedings to be before the juvenile court rather than the probate judge, as it would necessarily follow that in any case such child in order to be taken under section 10081 by such officer would come under the description of "delinquent, neglected or dependent children."

As to your sixth question, if the child in question be delinquent, dependent or neglected, it is required by section 1670 that it be placed in the "detention home," and by the operation of the statutes above quoted generally the child becomes a ward of the juvenile court. It therefore does affect section 10083 at least to the extent that it is not mandatory that such child be placed under the guardianship of the agent of the society.

As to your seventh question, the jurisdiction given the juvenile court under section 1683-1 is

"of all misdemeanors against minors, and of offenses prescribed in sections 928, 6344, 6345, 6373, 12664, 12666, 12787, 13031, 13035 and 13038."

The language of this section is in form permissive and upon examination it appears that it is not intended to give exclusive jurisdiction to the juvenile court, but only concurrent jurisdiction with other courts in which the offenses referred to were already cognizable. The said offenses may therefore be prosecuted by indictment and otherwise in other courts the same as before the enactment of this section, except where by the express terms of the different sections or by necessary implication the jurisdiction of the juvenile court is exclusive. This exclusive jurisdiction undoubtedly exists in all cases where the judgment of the court acts directly on the infant himself, as for instance in section 1564 it is provided as follows:

"If in his judgment it is for the best interest of a delinquent minor under the age of seventeen years, the judge may impose a fine upon such delinquent not exceeding ten dollars, and he may order such person to stand committed until fine and costs are paid."

The judge here referred to is undoubtedly none but the juvenile judge. The section is in the chapter headed "juvenile court" and the context undoubtedly indicates that it is the judge of that court who is meant.

The same may be said as to all offenses against a delinquent child. There is no court but the juvenile court that has power to declare such delinquency, and it follows that when in a prosecution, for an offense against an infant, it is necessary to establish such delinquency as a substantive part of the offense against a delinquent, only a juvenile court can have cognizance of the case.

Section 1655 G. C. provides as follows:

"Whoever is charged by law with the care, support, maintenance or education of a minor under the age of eighteen years, and is able to sup-

port or contribute toward the support or education of such minor, fails, neglects, or refuses so to do, or who abandons such minor, or who unlawfully beats, injures, or otherwise ill treats such minor, or causes or allows him or her to engage in common begging, upon complaint filed in the juvenile court, as provided in this chapter, shall be fined not less than ten dollars, nor more than five hundred dollars, or imprisoned not less than ten days nor more than one year, or both. Such neglect, non-support, or abandonment shall be deemed to have been committed in the county in which such minor may be at the time of such neglect, non-support, or abandonment. Each day of such failure, neglect, or refusal shall constitute a separate offense, and the judge may order that such person stand committed until such fines and costs are paid."

The reference to "the judge" in the latter part of the section seems to indicate or rather assume that the juvenile judge will always be the one before whom such offender is tried. However, section 12970 G. C. describes almost the identical offense, and there is no doubt but what it may be the subject of indictment and trial in the ordinary criminal courts, because its enactment precedes the delinquent child and juvenile court laws and there is nothing to take away the established jurisdiction of the courts existing at the time of their passage.

Offenses against this last section may also be prosecuted in the juvenile court under section 1683-1 G. C. as being a "misdemeanor against minors."

With these suggestions it can be determined in each case what courts may entertain such jurisdiction and the various statutes will not here be discussed or enumerated.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1065.

WHEN PROCEEDS OF AN INSURANCE POLICY ON A CHURCH ARE INVESTED AND INTEREST USED FOR SUPPORT OF CHURCH, SAME ARE SUBJECT TO TAXATION.

The proceeds of an insurance policy on a church building destroyed by fire, when invested and the interest is used for the support of the church, are subject to taxation.

COLUMBUS, OHIO, March 12, 1918.

HON. FRANK CARPENTER, *Prosecuting Attorney, Norwalk, Ohio.*

DEAR SIR:—On date of February 19, 1918, you requested my opinion as follows:

"Some time ago a church building owned by the Congregational church Greenwich, Ohio, was burned. At the time that this building was destroyed by fire the trustees had caused the same to be insured for the sum of twenty-five hundred ($2500) dollars. After the fire this sum of twenty-five hundred ($2500) dollars was collected by the trustees of this church and they now hold the same as property of the church, which is loaned out in the regular way; the interest arising from the use of this money is applied by the church to the usual church purposes.

The officers in charge of this church make the claim that this fund it not under the laws of Ohio subject to taxation.

I would like to have your opinion in this matter at an early date as they are very anxious to know whether or not this fund is property subject to taxation under the laws of Ohio, or whether it is exempted by the statutes of this state."

The question which you submit is one of statutory construction, as the exemptions authorized in the constitution, article 12, section 2, are not self executing. The pertinent statutes are as follows:

"Sec. 5349. * * houses used exclusively for public worship, the books and furniture therein and the ground attached to such buildings necessary for the proper occupancy, use and enjoyment thereof and not leased or otherwise used with a view to profit, * * shall be exempt from taxation. * *"

"Sec. 5353. * * property belonging to institutions of public charity only, shall be exempt from taxation."

The following propositions have been established by the supreme court of this state under the above sections. A church is not an institution of "purely public charity." Watterson v. Halliday, 77 O. S., 150; Gerke v. Purcell, 25 O. S., 229. It is the use of the property itself which renders it exempt or non-exempt from taxation and not the use of the income which is derived from it. Rose Institute v. Myers, 92 O. S. 252. The case last cited related to real estate.

In Rose Institute v. Myers, 92 O. S. 238, it was held that prior to the constitutional amendments of 1913 at least, an endowment fund invested and used for the support of an institution of purely public charity was exempt from taxation, thus affirming and applying to amended section 5353 the rule laid down in Little v. Seminary, 72 O. S. 417.

The case last cited, however, has no bearing upon the question to be considered in this opinion because of the controlling fact that a church is not an institution of purely public charity; in short, the only extent to which a church, as such, is entitled to exemption under the decision of Watterson v. Halliday, 77 O. S. 150, is that of its buildings used exclusively for public worship and the land attached thereto. This does not prevent a church from being the owner of a separate institution such as a parochial school, which might be one of purely public charity. Gerke v. Purcell, supra; Little v. Seminary, 72 O. S. 417.

These considerations bring the question down to whether or not insurance moneys paid on account of the destruction of a church building are to be regarded for the purpose of exemption from taxation in the same light as the building itself.

Bearing in mind the leading principle that it is the use to which property is put and not its ownership that determines its exemption, together with the correlative proposition as phrased by Nichols, C. J., in Rose Institute v. Myers, supra, to the effect that "the exemption is not a release in personam but a release in rem, and the res to which the release applies must be found and identified by the officer or no exemption can be recognized," I arrive at the conclusion that insurance moneys cannot be regarded as a substitute for a house of public worship itself, and that the fund cannot be exempted on any such ground. If anything more were needed to complete a statement of my reasons, it would be that primarily the exemption statutes must be strictly construed and cannot be extended by implication or analogy. The fund stands in no different situation in my opinion than would an endowment

fund vested in the trustees of the church for the purpose of paying the salary of its priest or minister. For the reason stated in Watterson v. Halliday, supra, such a fund would be subject to taxation.

For these reasons then I am of the opinion that the fund in question is not exempt from taxation.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1066.

DORMITORIES FOR TEACHERS, ETC., IN PAROCHIAL SCHOOL, OR OTHER INSTITUTION OF PURELY PUBLIC CHARITY, ARE NOT SUBJECT TO TAXATION.

Buildings belonging to the proprietor of a parochial school or other institution of purely public charity, and used as dormitories for teachers or other workers in such institutions, are exempt from taxation.

COLUMBUS, OHIO, March 12, 1918.

HON. D. M. CUPP, *Prosecuting Attorney, Delaware, Ohio.*

DEAR SIR:—I have your letter of February 27, in which you request my opinion as follows:

> "I desire to submit to your department for answer this question, 'Is a convent or sisters' home, as such are commonly understood to be, subject to taxation?'
>
> While this specific class of property is not mentioned in the case of Watterson against Halliday, I am informed by Father Wagoner, that at some stage in the above case, this question was specifically passed upon by the common pleas, then circuit court or in the supreme court."

This question was passed upon by Hon. Timothy S. Hogan, attorney-general, in an opinion to Hon. Lewis E. Mallow, assistant prosecuting attorney of Lucas county under date of April 17, 1911, Annual Report of the Attorney-General for that year, volume 2, page 1154. The head note of the opinion states accurately the holding arrived at as follows:

> "Houses used exclusively as places of domicile for the sisters or lay teachers of parochial schools, are 'buildings connected with public colleges and academies' or 'lands connected with public institutions of learning,' within the meaning of section 5349 G. C., and are therefore exempted from taxation."

This opinion was based upon a careful examination of the exact issue involved in Watterson v. Halliday, 77 O. S. 150, referred to by you, and it is true that, as you have been informed, the question in which you are interested was raised in the lower courts in that case and was determined in favor of the exemption that is claimed. This exemption, however, was placed upon the grounds submitted in the syllabus of the opinion, which I have quoted.

I agree with Mr. Hogan's opinion, and advise you therefore that if the buildings to which you refer are used as dormitories for teachers in a parochial school, they are exempt from taxation.

Further, I would be of the opinion that if they are used as dormitories for persons engaged exclusively in public charitable work carried on by an institution of purely public charity of any kind, they are exempt from taxation under section 5353, as interpreted in Rose Institute v. Myers, 92 O. S. 252.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1067.

APPROVAL—SYNOPSIS OF PROPOSED CONSTITUTIONAL AMENDMENT—PROHIBITION AMENDMENT.

COLUMBUS, OHIO, March 12, 1918.

HON. JAMES A. WHITE, *Superintendent Anti-Saloon League, 175 South High Street, Columbus, Ohio.*

DEAR SIR:—I am in receipt of the form of constitutional amendment, together with schedule and suggested synopsis, which you submit to me under the provisions of section 5175-29e G. C. One part of the form submitted for certification is as follows:

"The full text of the proposed amendment to the constitution shall read as follows:

Be it resolved by the people of the State of Ohio:

ARTICLE XV.

Section 9. The sale and manufacture for sale of intoxicating liquors as a beverage are hereby prohibited. The general assembly shall enact laws to make this provision effective. Nothing herein contained shall prevent the manufacture or sale of such liquors for medicinal, industrial, scientific, sacramental or other non-beverage purposes.

SCHEDULE.

If the proposed amendment be adopted, it shall become section 9 of artivle XV of the constitution, and it shall take effect on the 27th day of May of the year following the date of the election at which it is adopted, at which time original sections 9 and 9a of article XV of the constitution and all statutes inconsistent with the foregoing amendment shall be repealed."

The other part of the form is the synopsis of the proposed amendment and reads:

"That a section to be known as section 9, article XV of the constitution shall be adopted so as to prohibit the sale and manufacture for sale of in-

toxicating liquors for beverage purposes, said amendment to take effect on the 27th day of May of the year following the date of the election at which it is adopted."

Pursuant to the provisions of section 5175-29e of the General Code of Ohio, I hereby certify that the synopsis above set out is a truthful statement of the contents and purpose of the proposed amendment to be known as section 9 of article XV of the constitution of Ohio.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

1068.

APPROVAL OF BOND ISSUE OF MAHONING COUNTY—$7,000.00.

COLUMBUS, OHIO, March 12, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of Mahoning county, Ohio, in the sum of $7,000.00, for the purpose of creating a fund for the payment of Austintown township's share of the compensation, damages, cost and expense of improving section 1 of the Canfield-Niles road, I. C. H. No. 328, in Austintown township.

I have carefully examined the corrected transcript of the proceedings of the board of county commissioners of Mahoning county, Ohio, and of other officers relating to the above bond issue, and find said proceedings to be in conformity to the provisions of the General Code of Ohio relative to bond issues of this kind.

I am therefore of the opinion that bonds properly prepared according to the bond form submitted will, when signed by the proper officers and delivered, constitute valid and binding obligations of said county.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

1069.

APPROVAL OF BOND ISSUE OF MAHONING COUNTY—$9,500.00.

COLUMBUS, OHIO, March 12, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of Mahoning county, Ohio, in the sum of $9,500.00, for the purpose of creating a fund for the payment of Boardman township's share of the compensation, damages, cost and expense of improving section 1 of the Canfield-Poland road, I. C. H. No. 486 in Boardman township.

I have carefully examined the corrected transcript of the proceedings of the board of county commissioners of Mahoning county, Ohio, and of other officers

relating to the above bond issue, and find said proceedings to be in conformity to the provisions of the General Code of Ohio relative to bond issues of this kind.

I am therefore of the opinion that bonds properly prepared according to the bond form submitted will, when signed by the proper officers and delivered, constitute valid and binding obligations of said county.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1070.

NOTICE OF APPLICATION TO CONSTRUCT STREET RAILWAY WITHIN A MUNICIPALITY MUST BE PUBLISHED ONCE A WEEK FOR THREE CONSECUTIVE WEEKS BEFORE COUNCIL MAY ACT ON SAME.

Where application has been made under authority of section 3768 of the General Code, to construct a street railroad within a municipal corporation, council has no authority to proceed under such application for any purpose until published notice of such application has been made once a week for three consecutive weeks as provided in section 3769 General Code.

COLUMBUS, OHIO, March 12, 1918.

The Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Under date of March 7, 1918, the Hon. Asa E. Ward, city solicitor of Marietta, Ohio, submits a question which is of general interest and the opinion is therefore addressed to you. A copy of this opinion is also sent to Mr. Ward.

The inquiry is as follows:

"The city of Marietta is about to receive an application for leave to construct a street railway in the city.

I am in doubt as to the proper procedure under section 3769 G. C., as to whether or not it is necessary to give public notice of the application therefor, before the ordinance or resolution establishing route and authorizing advertisement for bids, or to pass the necessary resolution establishing route and authorizing advertising for bids, and then give the proper notice by publication of the said application, as seems to be the procedure laid down by Ellis' Ohio Municipal Code, at page 211."

Section 3768 General Code reads as follows:

"No corporation, individual or individuals shall perform any work in the construction of a street railroad, until application for leave is made to the council in writing, and the council by ordinance has granted permission, prescribed the terms and conditions upon, and the manner in which the road shall be constructed and operated, and the streets and alleys to be used and occupied therefor, but the council may renew any such grant at its expiration upon such conditions as may be considered conducive to the public interest."

Under the terms of this section the first thing required is the making of the written application to council.

Section 3769 of the General Code reads:

> "Nothing mentioned in the preceding section shall be done, no ordinance or resolution to establish or define a street railroad route shall be passed, no action inviting proposals to construct and operate such railroad shall be taken by the council, and no ordinance for the purpose specified in such section shall be passed, until public notice of the application therefor has been given by the clerk of the council once a week, for the period of at least three consecutive weeks in one or more of the daily papers, if there be such, and if not, then in one or more of the weekly papers published in the corporation."

This section specifically provides that none of the things mentioned in section 3768 of the General Code shall be done until public notice of the application shall be given once a week for three consecutive weeks. It further provides that no ordinance or resolution to establish the route shall be passed until notice of such application has been made.

Therefore upon the filing of the application, as provided for in section 3768, General Code, the next step is to give public notice of the filing of such application once a week for three consecutive weeks, as provided in section 3769, General Code. Council has no authority to pass an ordinance or resolution establishing the route and authorizing advertisement for bids until after such notice has been made.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1071.

APPROVAL OF THE FOLLOWING LEASES OF CANAL LANDS: TO LEN C. KOPLIN, AKRON; THE COMMERCIAL PRINTING AND LITHOGRAPHING CO., AKRON; THE MASSILLON ELECTRIC & GAS CO., MASSILLON: WILLIAM A. CARLTON, THORNVILLE; THE BING CLUB OF DAYTON; FRED W. SIMPSON, NEWARK; CHARLES CARROLL, ST. MARYS; ROE SPURGEON, KIRKERSVILLE.

COLUMBUS, OHIO, March 14, 1918.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of February 21, 1918, in which you enclose the following leases of canal property, in triplicate, and ask my approval of said leases:

	Amount.
To Len C. Koplin, of Akron, Ohio, for a portion of the state canal property between the north line of Exchange street and the south line of Buchtel avenue, the appraisement on which is $20,000 for the first three years, and $28,333⅓ for the last twelve years, the average valuation being	$26,666⅔

To the same party, a portion of the state canal land lying between the south line of Exchange street in the city of Akron, and a line drawn parallel thereto and 95 feet southerly therefrom. The appraisement for the first three years is $15,000 and for the last twelve years the appraisement is $20,000, the average appraisement being	19,000 00
To the Commercial Printing and Lithographing Co., of Akron, Ohio, a lease for the portion of the berme embankment between the northerly line of Exchange street and the alley between Exchange street and Buchtel avenue, and abutting the lands of said company. Valuation	3,100 00
To the Massillon Electric and Gas Co., of Massillon, Ohio, lease for the berme embankment and the outer slope of the towing path embankment of the Ohio canal in the city of Massillon, commencing at the north line of Walnut street in said city and extending thence northerly a distance of 645 feet. Valuation	6,666⅔
To the Massillon Electric and Gas Co., lease for railway crossing over the Ohio canal a short distance north of the village of Bolivar in Tuscarawas county, Ohio. Valuation	500 00
To William A. Charlton, Thornville, Ohio, lease for two small islands in Buckeye lake. Valuation	1,666⅔
To the Bing Club of Dayton, Ohio, renewal of a lease of two small islands in Lake St. Marys. Valuation	1,000 00
To Fred W. Simpson, Newark, Ohio, renewal of a lease for a portion of the abandoned Ohio canal in east Newark. Valuation	1,000 00
To Chas. Carroll, renewal of a lease of twenty acres of land adjacent to Lake St. Marys. Valuation	1,000 00
To Roe Spurgeon, Kirkersville, Ohio, small tract of the Kirkersville feeder near Kirkersville, Ohio. Valuation	100 00

I have carefully examined these leases and find them to be correct in form and legal in every respect. I am therefore endorsing my approval thereon and forwarding them to the governor of the state for his consideration.

I desire to make one or two suggestions in reference to these leases. In the lease made to the Massillon Electric & Gas Company of Massillon, Ohio (property valuation, $6,666⅔), the property is leased to a railroad company for switch track purposes. I am assuming that the switch track is not of a greater length than two miles.

Section 13965 G. C. provides that the canal lands of the state "may be leased for any purpose or purposes other than for railroads operated by steam." The section provides further, however, that the canal basin or any portion of canal lands may be leased to a railroad company for the necessary use of such railroads for a distance of not exceeding two miles. On account of the provisions of this section I make the above assumption and base same upon the description set out in the lease.

In the lease made to the same company, the property of which is valued at $500.00, there are a number of stipulations set out. These stipulations are not numbered correctly nor consecutively, but this is a mere matter of form and does not interfere with the validity of the lease.

In the lease to the Bing Club, of Dayton, Ohio (property valuation, $1,000.00) there is no authority given by said club to the one who signed the lease, to sign the same. Undoubtedly it would have been better if such a resolution had been adopted and copy of same attached to the lease. However, from the name of the lessee I assume that it is neither a corporation nor a partnership, but rather a voluntary association, and I have therefore decided to approve the lease.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1072.

BOARD OF EDUCATION NOT LIABLE FOR INTEREST ON SCHOOL FUNDS DEPOSITED WITH COUNTY TREASURER WHEN UNABLE TO SECURE BIDS FOR DEPOSIT—"CONVENIENTLY LOCATED" AS USED IN SECTION 7607 DEFINED—BOARD MAY DETERMINE WHEN BANKS ARE CONVENIENTLY LOCATED.

Where a school district contains two or more banks and the board of education has used its best efforts to secure bids for the deposit of the school funds under section 7605 General Code, and such board finds that there are no other banks "conveniently located" as provided in section 7607 General Code, and such funds are deposited in the county treasury under authority of section 4763 General Code, the members of such board are not liable for interest on the school funds as provided in section 7609 General Code.

It is within the discretion of the board of education to determine when banks are "conveniently located" within the meaning of section 7607 General Code, and the bureau of inspection and supervision of public offices cannot control such discretion, except in case of fraud, collusion, or clear abuse of such discretion.

The phrase "conveniently located" as used in section 7607 General Code cannot be defined so as to apply to all cases. It should be considered in connection with the particular circumstances of each case.

COLUMBUS, OHIO, March 15, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Under date of January 25, 1918, you submit the following statement of facts and inquiries to this department:

> "The board of education of Medina, Ohio, used their best efforts to secure bids covering deposit of funds of the board of education under the provisions of section 7605 General Code. There are three banks in the school district. The board was unable to secure any bids, and was informed that their funds, which were not in great amount, were not cared for by the banks. Upon which the board placed the funds in the custody of the county treasurer under authority of section 4763 General Code.
>
> Question 1. In view of the above statement, can the members of the board be held liable for 2% interest on the funds as set forth in section 7609 General Code.
>
> Question 2. The board contends that other banks of the county are not conveniently located as set forth in section 7607 General Code. Has this department any power of discretion in deciding what a convenient location may be?

Question 3. Can your office advise us construction of the meaning of 'conveniently located?'"

Section 7604 General Code provides in part:

"* * * the board of education of any school district by resolution shall provide for the deposit of any or all moneys coming into the hands of its treasurer. * * *"

Section 7605 General Code provides:

"In school districts containing two or more banks such deposit shall be made in the bank or banks, situated therein, that at competitive bidding offer the highest rate of interest which must be at least two per cent for the full time funds or any part thereof are on deposit. * * *"

It appears from your statement of facts that the board of education used their best efforts to comply with the above provisions and to secure a depository. The banks refused to tender bids.

Section 7607 General Code provides:

"In all school districts containing less than two banks, after the adaption of a resolution providing for the deposit of its funds, the board of education may enter into a contract with one or more banks that are conveniently located and offer the highest rate of interest, which shall not be less than two per cent for the full time the funds or any part thereof are on deposit. * * *"

The district now in question does not come within the letter of the above provision, as it contains three banks. It is provided in said section that the "board of education may enter into a contract with one or more banks that are conveniently located."

The word "may" is used herein, and this makes it discretionary with the board to enter into such contract. The banks must be "conveniently located."

It is the province of the board of education in the first instance to determine whether the banks are conveniently located. Their discretion in this matter cannot be controlled except in case of fraud, collusion, or clear or arbitrary abuse of such discretion.

The rule is stated in the case of Pugh Printing Co. v. Yeatman, 22 Cir. Ct. 584, wherein the second branch of the syllabus reads:

"The courts cannot control public officers in the exercise of their discretion. It is only when the courts find present some of the equitable grounds of fraud or mistake, or find the decision or award to be wrongful, fraudulent, collusive or arbitrary, that they can set aside or restrain their conclusions or determinations."

Your department in its supervisory capacity can only control the discretion of the board of education in accordance with the above rule. It is your duty to call

attention to any abuse of discretionary power. You cannot control the power of discretion granted to the board of education.

You ask as to the liability of the board of education under section 7609 General Code. This section provides:

> "* * * Upon the failure of the board of education of any school district to provide a depository according to law the members of the board of education shall be liable for any loss occasioned by their failure to provide such depository, and in addition shall pay to the treasurer of the school funds two per cent on the average daily balance on the school funds during the time said school district shall be without a depository. Said moneys may be recovered from the members of the board of education for the use and benefit of the school funds of the district upon the suit of any taxpayer of the school district."

It appears in your statement that the board of education did provide for a depository under section 7604 General Code, and asked for bids as required by section 7605 General Code, but no bids were received. The funds were then deposited with the county treasurer under authority of section 4763 General Code, which reads:

> "* * * In all village and rural school districts which do not provide legal depositories as provided in sections 7604 to 7608 inclusive, the county treasurer shall be the treasurer of the school funds of such districts."

Under the circumstances submitted, the members of the board of education cannot be held liable for interest under the provisions of section 7609 General Code.

You ask for a construction of the phrase "conveniently located" as used in section 7607 General Code, supra.

The word "conveniently" is defined at page 817 of volume 9 of Cyc:

> "In a convenient manner, commodiously, without difficulty; by the exercise of reasonable diligence—so used with respect to the performance of services enjoined upon an officer of law."

"Convenient" is also defined at page 815:

> "Adapted; well adapted, or adapted to an end; affording certain facilities or accommodation; appropriate; becoming; beneficial; commodious; conducive to ease or comfort in any kind of performance; easily used; fit; just; promotive of comfort or advantage; proper; rendering some act or movement easy of performance or freeing it from obstruction; serviceable; suitable; conducive to ease or comfort in any kind of performance; suitable for a required purpose; easily used; serviceable."

It would be difficult to define the phrase "conveniently located" so as to meet all cases. It is largely a question of fact, to be determined by the circumstances of each case.

However, in order to be conveniently located under section 7607 General Code, the banks must be adapted to the use of the board of education and must be

reached without unnecessary difficulty. An element of comparison is to be considered. The banks, or some of them at least, coming under the terms of section 7607 supra, must of necessity be located outside the school district. Such banks need not be as convenient as banks located within the districts. This element must be taken into consideration in construing and applying said phrase. A more definite answer cannot be safely given.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1073.

COLLATERAL INHERITANCE TAX—WHEN BEQUEST TO FOREIGN INCORPORATED OR UNINCOPORATED CHARITABLE INSTITUTION NOT SUBJECT TO SAME.

A general bequest to or for the use of a foreign charitable corporation is subject to collateral inheritance tax.

A general bequest to an unincorporated charitable institution is taxable unless the institution substantially confines its operation to Ohio.

A bequest to a foreign public charitable corporation for the use of its work in Ohio, or to an unincorporated public charitable institution, for work in Ohio, is exempt from such tax.

COLUMBUS, OHIO, March 15, 1918.

HON. JOHN W. DAVIS, *Probate Judge, Youngstown, Ohio.*

DEAR SIR:—I acknowledged receipt of your letter of March 11, requesting my opinion as follows:

> "May I have your opinion at once as to whether or not a bequest to the 'trustee of the board of publication and Sabbath school work of the Presbyterian church in the United States of America' is subject to collateral inheritance tax?"

On inquiry at the office of the secretary of state I find that no corporation of the name given by you is organized or in existence under the laws of this state. Therefore the legatee is either an unincorporated society or a foreign corporation.

The exemptions from the collateral inheritance tax are in part as follows:

> "Sec. 5332. The provisions of the next preceding section shall not apply to property, or interests in property * * embraced in a bequest * *, to or for the use of * * public institutions of learning, or to or for the use of an institution in this state for purpose only of public charity or other exclusively public purposes. * *."

The trust mentioned in the will must constitute "an institution in this state for purpose only of public charity or other exclusively public purposes" in order that the bequest may be exempt.

In Humphreys v. State, 70 O. S. 67, it was held in the language of the second branch of the syllabus that:

"Boards and societies and auxiliaries thereto, which are incorporated and organized under the laws of other states, for 'purposes of purely public charity or other exclusively public purposes,' are not 'institutions' of that class in this state * *; and where they are entitled to receive property within the jurisdiction of this state, by deed of gift, bequest or devise, such gift, bequest or devise is liable to a collateral inheritance tax * * although some of the charitable work, operations and enterprises of the institutions so incorporated and organized are carried on within this state."

The holding in the case from which quotation has been made was predicated upon the fact that certain missionary societies and auxiliary institutions of the Presbyterian church there involved were incorporated under the laws of other states. If they had not been incorporated, another question would have arisen, viz., as to whether, if organized in a voluntary way, they would be regarded as "institutions;" and if an affirmative answer had been given to this question, a still further question would have arisen, namely, as to whether, or upon what condition, such voluntary organization might be regarded as being "in this state."

It must not be forgotten that the exemption in the statute follows the use and not the legal title. Therefore, the mere fact that the bequest is made to individual trustees or even to a single individual is not controlling on the ground that the individual cannot be an institution, if he is to take in the capacity of trustee for an institution. So also the mere fact that the immediate taker of the legal estate or fund may be a foreign corporation is not controlling where the use is limited to the state.

In re Crawford, 148 Ia. 60.

As to the first question respecting what is meant by the word "institution," as I have above stated it, there is no direct authority in this state. It would seem, however, that the "institution" need not be incorporated, but it must be at the very least a specific organization of individuals. The word imports such an organization and is not merely descriptive of property.

Hooper v. Shaw, 176 Mass. 190.

But if the "institution" is an unincorporated organization or association of individuals, I do not think it can be deemed to be "in this state," unless it actually conducts activities in Ohio and substantially limits such activities to Ohio.

In Humphreys v. State, supra, some stress seems to be laid upon this point. The following appears in the opinion of Price, J., at p. 77:

"We are urged to conclude, that because the work of these societies and boards is in progress, * * and their influence felt in this state through the various subordinate agencies employed, the institutions themselves are in this state within the meaning of the statute. If this is true of Ohio, it is true of every other state, and we have these institutions, not only in the state where they are chartered, but omnipresent and in all the states. In other words, they would, as institutions, exist in any state where any of their charitable or religious enterprises are projected and carried on, no matter in what degree. Such a construction of the facts and the law we think is not permissible. * *

It is perhaps true, that these institutions now operating under charters, may have had another form of existence prior to the date of the charters, * *.

> The will * * gave no directions to her executor or her legatees as to the place where the money should be expended, nor does it undertake to control the time or place of the expenditure. Once in the possession of these institutions, it may be disbursed as they deem proper, and all of it may be disbursed in communities beyond our borders. So we do not find that we are adopting a narrow construction of our statute, if it appears that it undertakes to tax the right of the foreign, though charitable institutions, to receive and so absolutely control the disposition of property owned by the testatrix in this state. We think these legatees are not 'institutions in this state' within the meaning of the statue."

There is discernible in the above, though not clearly expressed, the idea that quite apart from the controlling weight given to the fact that the societies before the court in that case were incorporated in other states, consideration had been given to the fact that the will did not direct that the bequest should be devoted to the charitable work of the several societies in Ohio alone, nor—what is perhaps more to the purpose—prevent the societies from expending all the money arising from the bequest in other states.

Another point at least mentioned in Humphreys v. State, supra, was the fact that all the societies to which bequests had been made were auxiliaries of the General Assembly of the Presbyterian Church in America, which was incorporated in another state.

It is stated as a fact at p. 76 of the report that:

> "Where the subordinate societies and boards became incorporated, it was done under the direction of the general assembly."

I mention this fact because it appears that the board of publication and Sabbath school work of the Presbyterian church in the United States of America is also probably subject to the control of the general assembly of said church, and if so, it is to be regarded, whether incorporated or not, as an auxiliary of the general assembly, which is a foreign corporation.

I cannot unequivocally answer your question without seeing the will itself, but to avoid delay and in response to your urgent request for immediate advice, I beg to state as my conclusion that the fact that the bequest is to the legatee or legatees whom you have named in your letter does not of itself show that the bequest is exempt; that if the named legatee, or the "board of publication and Sabbath school work of the Presbyterian church of the United States of America" is incorporated, Humphreys v. State, supra, is authority against any possible exemption, unless the bequest limits the expenditure of the fund to this state; and if the beneficial legatee is unincorporated, but exists, as is apparent in the case, and generally throughout the United States conducts its activities, without regard to state boundaries, then the bequest is not exempt unless accompanied by direction that at least some of the funds shall be expended in the state of Ohio. If, however, such direction is made in the will and the board of publication and Sabbath school work is unincorporated, I would be of the opinion that the bequest would be exempt.

I feel that I need not state authority for the general principle that the section of the General Code which I have quoted is the sole source of exemption from the collateral inheritance tax. The exemptions from property taxation have no relation to such tax.

Very truly yours,

JOSEPH MCGHEE,
Attorney-General.

1074.

CONTRACT, WHEREBY COUNCIL AGREES TO PURCHASE WATER MAINS, ETC., CONSTRUCTED BY OWNERS OF AN ADDITION WITHIN LIMITS OF VILLAGE, WITHIN A SPECIFIED TIME, INVALID.

Where a village council has entered into a contract with the owners of an allotment within the limits of such village, whereby such owners agree to construct water mains and extensions, and such village agrees to purchase such mains within a period of five years at a price to be agreed upon and to pay water rentals up to $350.00 *per year during such period, such contract is invalid.*

COLUMBUS, OHIO, March 15, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Your favor is received in which you submit the following statement of facts and inquiries:

"Statement of Facts.

The village of Maumee, Ohio, has entered into a contract with certain realty companies in accordance with ordinance passed by the council of the village, granting such companies the right to construct water mains with necessary appurtenances in their allotments, all of which allotments are within the boundaries of the municipal corporation, such construction to be done at the expense of the realty companies. The contract further agrees that the village shall acquire title or ownership of said mains, hydrants, etc., by purchase from the owners thereof on or before five years from date of contract. The village further agrees to turn over as interest on the investment to the realty companies, the revenues received from occupants or owners of premises for water furnished within said allotments up to a specified maximum amount each year.

Question 1. Is such a contract legal and binding upon the village?

Question 2. May the council of the village bind its successors to purchase said mains, etc?

Question 3. Is there any authority of law which would empower the village to use water revenues to pay interest on this private investment?"

Upon request, you submit under date of February 25, 1918, a copy of the contract involved in your above inquiries.

It appears from this contract that the owners of the land proposed to the village that they would construct the water mains through their addition, provided the village would furnish water to the consumers in such addition at the same price and on the same terms and conditions as water is furnished to other consumers. It appears that council accepted this proposition and a contract was entered into.

Under the terms of this contract the owners agreed to make the required extensions under plans and specifications furnished by a civil engineer therein named. It was agreed that the water mains so constructed should be and remain the property of the owners of the land. The village reserved certain control over making of taps, extensions and other details.

The contract contains a provision:

"It is further agreed by said parties that the village of Maumee shall, on or before five years from the date hereof, acquire the title to and ownership to said water mains, hydrants and connections and attachments, by purchase from the owners thereof at a reasonable price to be determined and agreed upon by and between said owners and the board of trustees of public affairs of said village, * * *"

There is a further provision for fixing the price in case of failure to agree.

Said contract contains this further provision:

"Provided, however, that all revenues received from occupants or owners of premises for water furnished within the said 'Manitou grounds' shall be paid by the said village to the K. T. company, the amount so paid, however, to the said company shall not exceed $350.00 per annum, which amount is deemed to be the reasonable interest upon the cost of installing said water mains, connections, hydrants, etc., by the said the K. T. company as aforesaid; such payments to be made semi-annually unless the village of Maumee shall acquire the title to the mains, connections, hydrants, etc."

It appears from the terms of this contract that it is contemplated that the village of Maumee shall within the period of five years purchase such water mains and extensions and pay the owners thereof a reasonable price for the same. The amount of the purchase price is not stipulated.

There is no statutory provision which authorizes a village council to enter into a contract of the above nature.

In sections 3967 and 3970 General Code, which cover a case where persons lay down water mains and pipes outside the limits of a municipal corporation, provision is made for the purchase of such mains by the municipal corporation. These sections apply to water mains located outside the limits of the municipality. In the question now submitted, the water mains have been laid within the limits of the municipal corporation and these sections do not therefore apply.

The council of a village has only such authority as is expressly granted by statute or which is necessarily implied in order to carry out the powers expressly given.

As there is no express authority of statute granting to council power to enter into a contract of the above nature, council has no such authority and the contract is invalid. This contract is not binding upon the village or upon the land owners.

It is not necessary therefore to answer your second and third questions as the contract is not legal. The successors to the village council are not bound thereby.

Your third question is as to the right of the village to use water revenues to pay interest on a private investment. Inasmuch as the present contract is invalid, I do not deem it advisable to go into this question at the present time.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1075.

MUNICIPALITY MUST PAY COST OF COMBINED STORM AND SANITARY SEWER AT INTERSECTIONS, WHEN STREET IS IMPROVED ON THE ASSESSMENT PLAN—INTERSECTIONS DEFINED.

Where a street is improved by a municipality on the assessment plan it is required to pay the cost and expense of a combined storm and sanitary sewer constituting a part of said improvement at the intersections formed by the crossing of one street or public highway by another.

COLUMBUS, OHIO, March 15, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I have your communications in which you request my opinion upon the following matter:

> "In the city of Lima, Ohio, legislation covering street improvement under the provisions of section 3815 G. C., designated the various matters that entered into the improvement and included in such designation a combined sanitary and storm water sewer, the sewer in question being part of the street improvement, which improvement was made under authority of sections 3814-3819 G. C., assessment being made on the benefit plan.
>
> We call your attention to section 3820 G. C., and to court decision in the case of Close v. Parker, 11 C. C. (n. s.) 85, affirmed by 79 O. S. 444, which is noted under section 3820 at page 279 of the fifth edition of Ellis municipal code.
>
> *Question:* In view of the above statement of facts and court decision referred to, shall the city bear the cost of the intersections of such sewers, or may the city assess such cost against the properties benefited by such improvement?"

In considering your request I am assuming that the combined sanitary and storm water sewer which you have in mind is one that was constructed of sufficient size and in such a manner that it would take care of sewage that consists of waste matter which is deposited from sanitary sewage laterals and waste matter from storm water laterals, and that said sewer is not built in such a way that it would be considered that one separate part thereof is for the carrying sanitary sewage and the other for storm water.

Section 3820 G. C. reads:

> "The corporation shall pay such part of the cost and expense of improvements for which special assessments are levied as council deems just, which part shall be not less than one-fiftieth of all such cost and expense, and in addition thereto, the corporation shall pay the cost of intersections."

The above quoted section provides, in effect, that the corporation shall pay such part of the cost and expense of improvements for which special assessments are levied as council, in the exercise of its judgment and discretion, might deem just, except that it is made mandatory that the corporation's part shall be not less than one-fiftieth of all such cost and expense, and in addition thereto the corporation shall pay the cost of intersections.

Section 3820 G. C. was originally a part of section 53 of the municipal code of 1902 (96 Ohio Laws, 40), which read as follows:

> "In all cases of assessments, the council shall limit the same to the special benefits conferred upon the property assessed, and in no case shall there be levied upon any lot or parcel of land in the corporation any assessment or assessments for any or all purposes, within a period of five years, exceeding thirty-three per cent. of the tax value thereof; provided, that the assessments levied for the construction of main sewers shall not exceed the sum that would in the opinion of council be required to construct an ordinary street sewer or drain of sufficient capacity to drain or sewer the lots or lands to be assessed for such improvement, nor shall any lots or lands be assessed that do not need local drainage or which are provided therewith. In all municipalities the corporation shall pay such part of the cost and expense of improvements for which special assessments are levied as council may deem just, which part shall not be less than one-fiftieth of all such cost and expenses; and in addition thereto, the corporation shall pay the cost of intersections; provided, that whenever special assessments have been levied and paid for the improvement of any street or other public place, the property so assessed shall not again be assessed for more than one-half the cost and expense of repaving or repairing such street or other public place unless the grade of the same is changed; provided, that any city or village is hereby authorized to issue and sell its bonds as other bonds are sold to pay the corporation's part of any improvement as aforesaid, and may levy taxes in addition to all other taxes authorized by law to pay such bonds and the interest thereon."

In the case of *Close* v. *Parker, et al.*, 11 O. C. C. n. s., 85, which was affirmed by the supreme court without report in 79 O. S. 444, and which is referred to by you in your request, the third branch of the syllabus reads:

> "The provisions of the municipal code as to improvements for which special assessments are made, that 'the corporation shall pay the cost of intersections' has reference to the parts of street improvements at the intersection of streets one with another, and has no application to the crossing of a street by a sewer for purposes of local sanitary drainage."

In the opinion of the court in *Close* v. *Parker et al.*, supra, it was said on pages 89 and 90:

> "It is claimed also in the petition that the assessment is invalid in that there is no deduction for intersections. In order that I may state the position of counsel for the plaintiff fairly, I read from his brief:
>
> * * * *
>
> 'From paragraph 8 of the agreed statement it appears that the city was not charged with the cost of any intersection.
>
> If the crossing of the streets by sewer 930 forms intersections under the terms of the statute, it is conceded in paragraph 7 of the agreed statement that the assessment is excessive by 9.93 per cent.'
>
> The provisions of the municipal code of 1902, relied upon by counsel as changing the character of an intersection the construction of which is to be paid for by the city, is section 53 (Rev. Stat., 2373; 1536-213), which reads in part:

'In all municipalities the corporation shall pay such part of the cost and expense of improvements for which special assessments are levied as council may deem just, which part shall not be less than one-fiftieth of all such costs and expenses; and in addition thereto, the corporation shall pay the cost of intersections.'

It will be noted that the word 'intersections' is here used without definition, but by the former statute were clearly contemplated, as counsel agree, improvements extending along or in streets, and the provision was that the city should pay the costs of such improvements in the squares made by the intersections of two streets. The examination that I have given to this matter leads my mind to the conclusion that the word had acquired at the time of the passage of the municipal code of 1902 a familiar meaning, and that it had reference to intersections of the character described in the statute in force up to and at the time of the passage of the municipal code; and although the definition of 'intersections' is dropped out, I think that the new section—53 of the code—still had reference to the same class of intersections that had been before known."

The statute in force up to and at the time of the passage of the municipal code of 1902, which is referred to as defining "intersections," is section 2274 of the Revised Statutes, which is set forth in Bates' Revised Statutes of 1902 as follows:

"That when the council of a city, except in cities of the first grade of the first class, and in cities of the first grade of the second class, determines to grade, pave, sewer, or otherwise improve a street, alley or other public highway, and the improvement crosses or intersects another street, alley or public highway, the council shall levy and assess a tax, in addition to that specified in the last section, upon the general tax list of all the taxable real and personal property in the corporation, for the estimated cost and expense of so much of the improvement as may be included in the crossing or intersection of such street, alley or highway, which amount the corporation clerk shall certify to the county auditor, and the same shall be enforced against such real and personal property as other taxes are enforced and collected; and such amount may be so certified, and such levy made, after the contract is let, or said improvement completed, and the provisions hereof shall apply to improvements already determined upon or ordered and for the payment of which special assessments have not been made."

On pages 90 and 91 the court further states in said opinion:

"This entire legislation and adjudication as to intersections is based upon the idea that the part of the improvement at such intersections is connected with a street improvement to be paid for by assessment. If the property owners are benefited by the general street improvement, assessment is to be made upon such property owners along the street where the other expenses are being assessed. Upon the same principle, if a sanitary sewer is, at the intersection, still for the benefit of the people whose land it drains, although it crosses the street, the owners of the property drained should equitably pay the expenses. *The city derives no benefit from a sanitary sewer at the point of crossing a street. The city does not need it. It is not there to take off the surface water; it is not for the purpose of draining the street, but it is for the purpose of caring for the sanitary drainage of the lots which are assessed.* Both upon authorities, so far as we are able

to find them, and upon principle, as it seems to us, the cost of the improvement at *the kind of intersection we have here should not be paid by the city*. To the extent that the city is in any way benefited by this sanitary drainage, as I have already suggested, the city does pay one-fiftieth of the cost."

The direct question that was presented for the consideration of the court in the foregoing case was whether or not the crossing of a street by a sanitary sewer constituted an intersection within the meaning of the statutory provision that a municipality shall pay the cost of intersections. The court held that such a crossing was not an intersection within the meaning of the asssessment law, stating in effect that the term "intersection" referred only to the crossing of one street or public highway by another.

I might say that I have taken occasion to examine the records on file in the above cause in the supreme court and find the following statement in the brief of the city solicitor (page 2):

"Woodsdale avenue and the boulevard, in which sewer 898 was constructed, are intersected by several streets and it was at once conceded by the city that the city should pay the cost of that part of said sewer lying within the lines of such intersecting streets. The amount of the cost of such intersection was agreed upon and an abatement made accordingly. As to this sewer plaintiff seeks no further relief. Plaintiff's brief, page 2."

It is therefore seen that it was considered by the city that it should pay the cost of the sanitary sewer where it was located in the intersection of one street or public highway with another. In reference to this assessments, then, the city was only objecting to its paying the cost of that part of the sewer where it crossed a street, which said crossing being claimed by the property owners to constitute an intersection within the meaning of section 53 of the municipal code of 1902, now section 3820 G. C., and the city was sustained in this contention, as has been seen, by the court.

The first branch of the syllabus in the case of *Ball* v. *City of Portsmouth, et al.*, 82 O. S., 151, reads:

"The provision of section 53, municipal code of 1902, which requires the corporation to 'pay the costs of intersections' when streets are improved includes all manholes, catch basins and tiling at intersections."

Nothing is said in the opinion of the court in the Ball case, supra, to indicate whether the catch basins, manholes and tiling referred to therein were parts of a storm sewer or a sanitary sewer, or a combination of both. However, the court lays down the general proposition that when streets are improved and manholes, catch basins and tiling make up a part of the improvement, the city must pay the cost of these in the intersections formed by the crossing of streets.

As I have stated heretofore, I have assumed that the combined storm and sanitary sewer which was constructed in the particular case could not be divided into separate parts so that it could be said that there was one part for sanitary sewage, which cost so much, and a part for a storm water drainage, which cost so much. It is therefore unnecessary for me to determine whether it would make any difference in the matter of making the assessment if the sewer in question only carried sanitary sewage.

I advise you therefore that I am of the opinion, on the authority of the Ball case, supra, that the city of Lima is required to pay the cost and expense of a combined storm and sanitary sewer constituting part of a street improvement at the intersections formed by the crossing of one street or public highway by another.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1076.

BEQUEST TO STATE OF OHIO SHOULD BE PAID INTO GENERAL REVENUE FUND.

A bequest "to the state of Ohio" should be paid into the state treasury to the credit of the general revenue fund.

COLUMBUS, OHIO, March 15, 1918.

HON. CHESTER E. BRYAN, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—In your letter of March 11 you request me to advise you as to the disposition of the bequest made by John Crater, late of Seneca county, to the state of Ohio. This bequest, amounting to $960.00, and with accrued interest, to $988.80, has been paid to you by executors. You say that you do not wish "to carry this as a cash item on our books, but wish to convert the same into Liberty bonds, if it can be legally done."

Section 18 G. C. authorizes the state to receive money by bequest for its benefit and also to receive it in trust and apply it according to the terms and conditions of the bequest.

You do not furnish me with a copy of the will, but a copy of the letter received by you from the attorneys for the executors indicates that the bequest is unlimited and that the full beneficial interest in the fund is thereby vested in the state.

In its proprietary capacity the state is represented by the general assembly, which might make any disposition it should see fit to make of moneys coming to it in such fashion. If the legislature had not acted at all, some embarrassment might arise. However, in my opinion section 270 G. C. is broad enough in its terms to cover all possible cases in which moneys are paid into the state treasury. That section provides in part that:

> "All moneys paid into the state treasury, the disposition of which is not otherwise provided for by law, shall be credited by the auditor of state to the general revenue fund. * * *"

It is true that section 18 G. C., which enables the state to receive moneys by bequest for its own benefit, does not expressly provide that such moneys shall be paid into the state treasury. Indeed, I am unable to find any statute which expressly states that moneys accruing to the state as such shall be placed in the state treasury, unless it be section 24 G. C. In my opinion, however, such is the disposition of all funds accruing to the state beneficially in its proprietary capacity, and the absence of an express statute on the subject is not of any significance.

Inasmuch, then, as the money belongs to the state, must be paid into the state treasury and must there be credited to the general revenue fund, your duty in the premises is clear. This money should be treated the same as any other miscellaneous revenue. There is no need for holding it as a separate and distinct fund, and no authority to do so. It not only need not, but may not lawfully be invested separately and apart from the other moneys coming into the state treasury, but must be commingled with them and placed in depositories as provided by law.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1077.

OFFICES COMPATIBLE—MEMBER OF THE GENERAL ASSEMBLY AND PROFESSOR IN THE STATE NORMAL COLLEGE.

A professor in the state normal college at Athens, Ohio, holds merely an employment and he is eligible, therefore, to hold at the same time the office of member of the general assembly.

COLUMBUS, OHIO, March 15, 1918.

HON. JOHN J. RICHESON, *Dean, State Normal College, Ohio University, Athens, Ohio.*

DEAR SIR:—I have your communication of February 21, 1918, which reads as follows:

> "One of our professors—T. N. H.—is considering the matter of becoming a candidate for representative from our county if the people so desire.
>
> The question of the legality of his serving the state as representative and being on leave of absence while the legislature was in session has come up and we should like to have your opinion on this matter. Of course as representative his salary would go for two full years, while his salary here would run for the same time except while he was on leave of absence, and except for that short period of time it seems to us that Mr. H. would be holding two state positions at the same time. We should be glad to have your opinion on this matter."

The principle which lies at the foundation of the answer to your question is found in section 4 of article II of the constitution, which reads as follows:

> "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."

From the provisions of this section of the constitution it is evident that no person holding a lucrative office under the authority of this state can at the same time hold the office of member of the general assembly.

With this section in mind it will be necessary for us to note the nature of the state normal college located at Athens, as to whether or not it is a state institution.

Section 7897 G. C. reads as follows:

> "There are hereby created and established two state normal schools to be located as follows: One in connection with the Ohio university, at Athens, and one in connection with the Miami university, at Oxford."

Section 7926 G. C. reads in part as follows:

> "For the purpose of affording support to the state normal college, in connection with the Ohio university, there shall be levied annually a tax on the grand list of the taxable property of the state, which shall be collected in the same manner as other state taxes and the proceeds of which shall constitute 'the Ohio normal school fund.' * * *."

From these two sections it is seen that the state created and established the normal school under consideration, and that it is maintained at least in part by taxation, as provided in section 7926 G. C.

So it is evident that the state normal school is strictly a state institution. Hence a person holding a position in said institution would be holding a position under the authority of this state, and of course the person whom you mention draws a salary and therefore would be holding a lucrative position.

The next question to be considered is as to whether a professor in said normal college holds an office, or if he is merely in the employment of the trustees of said institution.

In Butler v. The Regents of the University, 32 Wis. 124, the court in the syllabus said:

> "A professor in the state university is not a 'public officer' in such a sense as prevents his employment as such creating a contract relation between himself and the board of regents * * *."

On p. 131 of the opinion the court say:

> "The learned counsel for the defendants has argued with great ingenuity that the plaintiff was a public officer, and not a mere servant or employe of the board of regents by whom he was appointed a professor in the university; * * * We are unable to agree with the counsel on his first proposition. We do not think that a professor in the university is a public officer in any sense that excludes the existence of a contract relation between himself and the board of regents that employed him, in respect to such employment. It seems to us that he stands in the same relation to the board that a teacher in a public school occupies with respect to the school district by which such teacher is employed; and that is purely a contract relation."

In Ward v. Board of Education, 21 O. C. C. 699, the court held in the first branch of the syllabus as follows:

> "A superintendent of public schools appointed by a board of education under Rev. Stat. sec. 3982, is an employe of the board, and not a public officer within the purview of the constitution forbidding a change in the salary of public officers during their term of office."

In State ex rel. v. Vickers, 58 O. S. 730, an unreported case, the court held as follows:

> "Judgment for defendant on the ground that a superintendent of schools is not an officer."

From all the above decisions and from what seems to be sound logic as well, it is my opinion that a professor in the state normal college at the Ohio university is not an officer, but is a mere employe under the control and authority of the board that employs him. If he is not an officer, but merely an employe, then the provisions of article II, section 4 of the constitution would not apply and therefore there is nothing in the constitution that would prevent said professor from holding his position in the state normal college and at the same time holding the office of member of the general assembly of the state of Ohio.

The only other question would be as to whether there is any statutory provision which would prevent the professor of said normal college from holding the office of member of the general assembly. So far as I am aware, there is no such provision. I am not unmindful of the provisions of section 15 G. C., but this section would not apply to the case suggested by you. It merely forbids a member of the general assembly from being appointed to certain positions therein named.

Hence it is my opinion that there is no provision in the constitution of Ohio nor in our statutes, which would prevent a professor in the state normal college at Athens from being elected to the office of member of the general assembly and still hold his position in said college. Very truly yours,

JOSEPH MCGHEE,
Attorney-General.

1078.

FOREIGN CORPORATION PROPOSING TO PURCHASE MORTGAGES ON OHIO REAL ESTATE, THROUGH AN AGENT LOCATED WITHIN THE STATE, MUST COMPLY WITH SECTION 178 G. C., BUT NOT REQUIRED TO COMPLY WITH SECTION 183, NOR PAY FRANCHISE TAXES.

A foreign corporation organized for the purpose of buying, selling and investing in mortgages and other real estate securities and the issuing and sale of notes and bonds secured thereby and proposing to purchase mortgages on Ohio real estate as the basis of the securities to be sold by it, through the negotiations of an agent employed by it in Ohio, said agent not being authorized, however, to approve applications to the company, and making collections through agents in Ohio on mortgage notes purchased by it, must, before engaging in such business, comply with section 178 *of the General Code, but is not required to comply with section* 183 *of the General Code, nor pay annual franchise taxes.*

COLUMBUS, OHIO, March 16, 1918.

HONORABLE WILLIAM D. FULTON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—On January 4, 1918, you enclosed a communication from Warren F. Selby, submitting for my opinion the following question:

> "A corporation organized under the laws of the state of Pennsylvania for the purpose of 'buying, selling and investing in mortgages and

other real estate securities, and the issue and sale of bonds and notes secured thereby' is about to invest a part of its capital in mortgages on Ohio real estate, but does not contemplate disposing of any of its stock or securities in the state of Ohio nor conducting any office or maintaining any permanent agency in this state.

Is the corporation described required to comply with the laws of Ohio and to pay franchise taxes as a foreign corporation for profit doing business in Ohio?"

I found it necessary to obtain further facts from Mr. Selby in order to return a specific answer to your inquiry, and under date of February 14, he advised as follows:

"The company does not propose to maintain a general office in the state of Ohio, but will employ an agent in the state of Ohio to give receipts and collect moneys due under payment mortgages.

The agent or attorney above referred to would collect payments and report to the company. All books would be kept at the main office in Pennsylvania. The agent or attorney would submit applications for mortgages to the company and the proper executive officers would have to approve same before the mortgages would be taken up. The attorney would also examine the titles and prepare papers.

The company does not contemplate entering into a direct mortgage loan business, but desires to purchase mortgages that are already in existence, so that it will not be necessary for its agents or attorney to pay out money under the provisions of the mechanics' lien law."

The language of one of the compliance statutes and that of the taxation statute necessary to be considered in connection with this question is the same. The problem is to determine whether or not a corporation, on the above state of facts, is "owning or using a part or all of its capital in this state and doing business in this state," within the meaning of sections 183 and 5499 General Code, respectively.

I shall first consider the subordinate question as to whether or not the location of real estate security in Ohio constitutes the investment of capital and the use thereof in this state. It is to be observed that the capital of the company is invested by purchasing mortgage-secured notes. When the actual cash thus invested leaves the company's treasury, what remains is a chose in action, which is the property of the company. In effect, the property of the company is invested in a chose in action, and the invested capital is no longer represented by the money, which is the property of the seller. The residence of the original borrower with whom the company has not dealt at all, does not determine the situation of the capital. Nor does the fact that the real estate secured is located in Ohio affect the location or place of the use of the capital of the company. The natural situs of the "mortgage" as a subject of taxation—for example, meaning of course the loan secured by the mortgage, as a "mortgage" as such, is really not a subject of taxation at all—is at the domicile of the owner or at the business office where the investment is managed and controlled. Nor, does the fact that a legal estate in the mortgaged premises is created by the execution of a mortgage in my opinion alter the case. In Ohio the mortgagor is before condition broken the owner and entitled to possession against all the world. Rands v. Kendall, 16 O. 671. After condition broken he is the owner against all the world except the mortgagee. Martin v. Alter, 42 O. S. 94.

I do not feel it necessary to enter into an exhaustive discussion of the Ohio theory of mortgage in all of its peculiar incidents, but deem it sufficient to state that in my opinion the ownership of a legal title to Ohio lands by a mortgagee corporation, even after condition broken, would not constitute the ownership or use of a part or all of its capital or plant in this state within the meaning of the sections now under consideration.

For all these reasons, therefore, I am of the opinion that the fact that the real estate security on which the company invests its capital is located in Ohio does not constitute such a transaction, the employment or use of capital of the company in this state.

Does the fact that the notes may be placed in the hands of an agent in Ohio for collection localize the capital invested in them in this state within the contemplation of the statute under consideration? Some basis for an assertion to the effect that such facts would bring the notes, as property, within the potential taxing jurisdiction of the state is found in the decision of the supreme court of the United States in Metropolitan Life Ins. Co. v. New Orleans, 205 O. S. 298. There is room for doubt as to the application of this decision, however, arising from the fact that in that case the notes originated in the course of a loaning business transacted by the taxpayer in the state; while here the company is not the original lender. Aside from this fact, it appears that the Louisiana case is based upon the legislative policy of that state, as interpreted by the highest court thereof, which is, to quote Mr. Justice Holmes in Wheeler v. Sohmer, 233 U. S. 434, "to deal with negotiable paper on the footing of situs," i. e., as if it were tangible property, capable of a location of its own. Ohio's general policy is contrary to this, in that while rejecting a rigid application of the fiction *mobilia sequuntur personam* in such a way as to deprive its laws of application to notes owned by non-residents, it has consistently limited its doctrine to the establishment of a business situs for such paper, conditioning the latter upon the power of a resident agent to originate the credit or to reinvest the proceeds thereof. Bradley v. Bauder, 36 O. S. 28; Grant v. Jones, 39 O. S. 506; Myers v. Seaberger, 45 O. S. 232; Hubbard v. Brush, 61 O. S. 252; Lee v. Dawson, 8 C. C. 365. So even the permanent retention of the securities in this state for purposes of collection merely, is not enough to render them taxable. Myers v. Seaburger, supra.

These cases were all decided under the influence of what is now section 5328 G. C. which applies to property taxation only. I think, however, that the phrase "in this state" as used in section 183 G. C. must be construed in accordance with the policy of the property tax laws. The section itself is a tax law, though its subject is the franchise, not the property. (Sec. 184 G. C. See Southern Gum Co. v. Laylin, 66 O. S. 578.)

Indeed, I entertain some doubt as to whether or not section 183 was ever intended to apply to corporations having no tangible property in the state, though it is not necessary to decide that question. I call attention however to the word "use" in the section, as bearing upon this point. Mere location is not enough; active employment is required; and I am of the opinion that bringing a note into Ohio for collection purposes would not be "using capital" in this state. The word "or" must be read "and"; (see Sec. 185 G. C. Op. Atty. Gen. 1916, Vol. II, 1061.)

These things being true, the company would not be required to comply with the provisions of sections 183 and 5499 General Code.

This leaves open a further question as to the compliance with section 178 General Code, which provides:

> "Before a foreign corporation for profit transacts business in this state, it shall procure from the secretary of state a certificate that it has com-

plied with the requirements of law to authorize it to do business in this state, * * *"

This section, however, is not to apply to

"foreign banking, insurance, building and loan, or bond investment corporations."

A similar exemption from the scope of section 183, and, I think, by inference from that of the taxation section is made by section 188 General Code, but for reasons which have already been suggested I have not found it necessary to consider the effect of the exemption in discussing the application of those sections.

I am inclined to the view that the company in question would not be entitled to the benefits of this exemption section. The nature of the business which the company is authorized to transact clearly does not constitute it a banking, insurance or building and loan company. While it deals in investment bonds, yet I do not believe that it is a "bond investment company" in the sense in which the term is used in the statutes of this state. Such companies are those defined and described by section 697 General Code, as follows:

"Every corporation, partnership or association other than a building and loan association, which places or sells certificates, bonds, debentures, or other investment securities of any kind, on the partial payment or installment plan, and every investment guaranty company doing business on the service dividend plan shall be deemed a bond investment company."

It does not appear that the company proposes to sell securities on the partial payment or installment plan. In the absence of such a showing I do not think that the company constitutes a bond investment corporation within the meaning of the exemption clause of section 178 General Code.

This brings me to the question of whether or not the activities which the company proposes to carry on in this state would constitute the transaction of business within the meaning of section 178 of the General Code.

In my opinion the employment of an agent in this state with authority to receive payments on the part of the corporation would be enough to constitute the transaction of business, even though the agent was not authorized to represent the corporation to the extent of making the original contracts by which the obligations to make payments to the company would arise. A private corporation can of course transact business only through officers and agents. Wherever there is an agent authorized to represent the corporation in the transaction of any part of its business, there the corporation is; and the acts of the agent are the acts of the corporation. The making of collections on obligations due to the corporation is as essential a part of the business of the corporation as any other part of it which could be imagined. This proposition appears to me to be too clear to require citation of authority, though many are available.

This being true, I do not find it necessary to consider the more difficult question as to whether or not the solicitation of business by the agent in the state would of itself constitute doing business; nor the still more difficult question as to whether or not the mere fact that the company has loaned money to citizens of Ohio or purchased the obligations of citizens of Ohio would constitute the transaction of business in Ohio. Some of the cases from other states apparently go very far upon the last point which I have mooted, though the statutes of such states are not precisely similar to that of Ohio.

For the above reasons then I am of the opinion that a foreign corporation proposing to do as has been described, would be required to comply with section 178 of the General Code, but not with section 183 thereof, and not being subject to section 183 General Code, would not be subject to annual franchise taxation.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1079.

BIDS FOR THE DEPOSIT OF STATE COUNTY, ETC.,, FUNDS, WHERE INTEREST IS PAYABLE UPON THE MINIMUM AMOUNT ON HAND AT A GIVEN TIME, ARE ILLEGAL—ORDINANCE WHICH INVITES BIDS UPON CITY FUNDS WITH INTEREST PAYABLE UPON THE MINIMUM MONTHLY BALANCES.

Bids for the deposit of state, county, township, school district, municipal funds, or the reserve of the sinking fund trustees, where interest is payable upon the minimum amount on hand at a given time, are illegal.

An ordinance of a city which invites bids upon the city funds with interest payable upon the minimum monthly balance is invalid.

Where bids have been received and accepted under such ordinance, and the banks have paid interest as called for by their contracts, it is advised that no action be brought against such banks to recover any difference that may exist.

COLUMBUS, OHIO, March 16, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Under date of January 2, 1918, you submit the following facts and inquiries to this department:

> "In the case of the city of East Liverpool, Ohio, a contract was entered into with a bank which had bid for deposits at the rate of 2% on the minimum amount on hand within a period of three or six months.
>
> We hold this contract is illegal and hold the bank for 2% interest on actual deposits which can only be based on average daily balances. The county depository law stipulates interest on average daily balances but most depositary laws, especially municipal, generally cover the deposit of public moneys with banks that offer the highest rate of interest, but in all these laws we have held it contemplates interest on deposits.
>
> You will readily see that if interest was paid upon the maximum amount in the bank at any one time, the interest might run many times the interest on the actual deposits and vice versa on the minimum amount.
>
> We have searched and searched and can only say that depository interest can only be computed on average daily balances.
>
> QUERY: If a bank bids 2% on the minimum amount on deposit upon any one time within a fixed period, would they not be held for 2% on the actual deposits based on average daily balances?"

It appears from a letter received from the city solicitor of East Liverpool, that the above bids were received under authority of an ordinance which provided "interest shall be computed monthly on the minimum monthly balances."

The question which you submit is general in its nature and applies to all deposits made by any political subdivision. The facts which give rise to your question occur in a municipality. The statutes covering deposits in banks by municipalities do not provide a minimum rate of interest, nor do they provide the method of caculating the interest on deposits. The sections of the statutes covering deposits made in banks by the state, county, township or the board of education do provide a minimum rate of interest to be paid, and as to all of these political subdivisions, except that of school districts, the interest is to be computed on daily balances.

The deposits of moneys by a municipality are governed by sections 4295 et seq. General Code, which reads in part as follows:

> "The council may provide by ordinance for the deposit of all public moneys coming into the hands of the treasurer, in such bank or banks, situated within the municipality or county, as offer, at competitive bidding, the highest rate of interest and give a good and sufficient bond issued by a surety company authorized to do business in the state, etc."

Section 4296 General Code, reads as follows:

> "In such ordinance the council may determine the method by which such bids shall be received, the authority which shall receive them and which shall determine the sufficiency of the security offered, the time for the contracts for which deposits of public money may be made, and all details for carrying into effect the authority here given. Proceedings in connection with such competitive bidding and the deposit of money shall be conducted in such manner as to insure full publicity, and shall be open at all times to the inspection of any citizen. As to any deposits made under authority of an ordinance of the council, pursuant hereof, if the treasurer has exercised due care, neither he nor his bondsmen shall be liable for any loss occasioned thereby."

Sections 4515 and 4516, General Code, authorize the sinking fund trustees to deposit funds in banks.

Section 4515, General Code, reads as follows:

> "At least once every three years the trustees of the sinking fund shall advertise for proposals for the deposit of all sums held in reserve and shall deposit such reserve in the bank or banks, incorporated under the laws of this state or of the United States, situated within the county, which offer, at competitive bidding, the highest rate of interest and best security and accommodation and give a good and sufficient bond issued by a surety company authorized to do business in this state, or furnish good and sufficient surety in a sum not less than twenty per cent. in excess of the maximum amount at any time to be deposited. There shall not be deposited in any one bank an amount in excess of the paid-in-capital stock and surplus of such bank, or to exceed in amount four hundred thousand dollars except when such moneys are deposited for the purpose of meeting the payment of some obligation."

Section 4516 General Code reads:

> "The trustees of the sinking fund shall determine the method by which such bids shall be received, the authority which shall receive them, the suffi-

ciency of the security offered, the time for the contracts for which deposits of public money may be made and all details for carrying into effect the authority here given, but proceedings in connection with such competitive bidding and the deposit of money shall be conducted in such manner as to insure full publicity and shall be open at all times to the inspection of any citizen. As to deposits made under this authority, neither the trustees of the sinking fund nor their bondsmen, if such trustees of the sinikng fund have exercised due care, shall be liable for any loss occasioned thereby."

It will be observed that in sections 4295, 4515, General Code, there is no provision as to a minimum rate of interest to be paid, nor is there any provision that interest shall be paid upon the average daily balances or any other method of computing interest. The deposits are to be let at competitive bidding to banks which offer the highest rate of interest.

Under the provisions of section 4296 General Code, the council is given authority to determine all details for carrying into effect the provisions of said section. Under section 4516 General Code, the same authority is given to the trustees of the sinking fund.

Section 330-3 General Code provides for the deposit of state funds. The last sentence of this section reads as follows:

"* * * And further, said bonds so given shall include a special obligation to settle with and pay to the treasurer of the state for the use of the state interest upon daily balances on said deposit or deposits, at the rate bid for, but not less than 3% per annum for inactive deposits and 2% per annum for active deposits (on a 365-day basis) payable quarterly on the first Monday of February, May, August and November of each year, or any time when withdrawals are made or the account is closed."

This section provides a minimum rate of interest and this interest shall be computed upon daily balances.

Section 2716 General Code covers deposits by a county. This section reads:

"When the commissioners of a county provide such depositary or depositaries, they shall publish for two consecutive weeks in two newspapers of opposite politics and of general circulation in the county a notice which shall invite sealed proposals from all banks or trust companies within the provisions of the next two preceding sections, which proposals shall stipulate the rate of interest, not less than two per cent. per annum on the average daily balance, on inactive deposits and not less than one per cent. per annum on the average daily balance on active deposits, that will be paid for the use of the money of the county, as herein provided. Each proposal shall contain the names of the sureties or securities, or both, that will be offered to the county in case the proposal is accepted."

This section also provides a minimum rate of interest, the same to be paid on the average daily balances.

Section 2737 General Code reads in part as follows:

"All money deposited with any depositary shall bear interest at the rate specified in the proposal on which the award thereof was made, computed on daily balances, and on the first day of each calendar month or at any time such account is closed, such interest shall be placed to the credit of the

county, and the depositary shall notify the auditor and treasurer, each separately, in writing of the amount thereof before noon of the next business day."

Section 3322 General Code covers deposits made by a township. The first sentence of this section reads as follows:

"In townships containing two or more banks, such deposits shall be made in the bank or banks situated in the township that offer at competitive bidding the highest rate of interest on the average daily balance on such funds, which in no case shall be less than two per cent. for the full time the funds are on deposit."

This section also provides a minimum rate of interest which is to be paid on the average daily balance.

Section 7605 General Code pertains to deposits made by school districts. The first sentence of this section reads as follows:

"In school districts containing two or more banks such deposit shall be made in the bank or banks, situated therein, that at competitive bidding offer the highest rate of interest which must be at least two per cent. for the full time funds or any part thereof are on deposit."

In this section a minimum rate of two per cent. is provided for and this shall be paid, "for the full time funds or any part thereof are on deposit." For all practicable purposes this is substantially the same as providing that the interest shall be paid on the average daily balance.

It will be observed that all of the sections above quoted from provide for a minimum rate of interest to be paid upon the average daily balance, except those pertaining to deposits by a municipality and the trustees of the sinking fund. The funds of a municipality and of the sinking fund are to be awarded to those banks which offer the highest rate of interest after competitive bidding.

The matter of paying interest on public funds deposited in banks is one covered by statute or contract. The rule is stated at page 818 of Vol. 13 of Cyc.:

"A depositary is not liable for interest on deposits in the absence of statute or contract prôviding for the payment of interest."

Your question will be considered first as to deposits by a municipality and the sinking fund trustees. The contract for the payment of interest has been made upon competitive bids and awarded to the bank which has offered the highest rate of interest, payable on minimum monthly balances as provided by the ordinance.

Where a bank tenders a bid for the deposit of money by a municipality or the trustees of the sinking fund, upon the terms of interest at two per cent on the minimum amount within a given period, such offer would be in accordance with the letter of the sections covering the deposits of such money.

It is provided, however, in section 4295 General Code, that all public moneys shall be deposited, and in section 4515 General Code, that the sinking fund trustees shall receive proposals "for the deposit of all sums held in reserve." Bids are to be received under these provisions for the deposit of all moneys coming into the hands of the treasurer or all sums held in reserve by the trustees of the sinking fund, and such money is to be awarded to the bank offering at competitive bids the highest rate of interest. This provision clearly implies that interest is to be paid upon all deposits, which would in effect mean upon the average daily balances.

The ordinance which provided for payment of interest on a minimum basis is invalid, and any and all bids which are submitted for the payment of interest upon such basis would be illegal. A contract entered into upon such a bid would also be illegal.

Therefore where a bank bids to pay interest upon the minimum amount on deposit, within a given period, such bid is illegal and a contract entered into under such bid is also illegal.

It appears, however, that such a contract has been entered into, and the question arises as to the liability of the bank under such invalid contract.

The case of Franklin National Bank of Newark v. City of Newark was decided by the supreme court June 26, 1917, 96 O. S. ——, (Vol. 15, Ohio Law Reporter, No. 43, p. 664). The opinion is by the court, there being no syllabus. The city treasurer deposited funds of the city in a bank for safekeeping and without the knowledge or consent of the city or the consent of the bondsmen of the city treasurer. The funds were received by the bank with the knowledge that said funds were the public funds of the city of Newark. The city of Newark brought an action against the bank seeking an accounting of the profits made upon such deposits. It was found that the rate of profit earned by the bank on its deposit was one and forty-nine one hundredths per cent. of the amount of the deposits.

The court bases its opinion upon the provisions of section 4294 General Code. Said section 4294 General Code reads as follows:

> "Upon giving bond as required by council, the treasurer may, by and with the consent of his bondsmen, deposit all funds and public moneys of which he has charge in such bank or banks, situated within the county, which may seem best for the protection of such funds, and such deposit shall be subject at all times to the warrants and orders of the treasurer required by law to be drawn. All profits arising from such deposit or deposits shall inure to the benefit of the funds. Such deposit shall in nowise release the treasurer from liability for any loss which may occur thereby."

The conclusion of the court is stated on page 667 as follows:

> "We think it clear from the provisions of this and cognate sections of the General Code that any bank receiving funds of a municipality under the circumstances disclosed by this record, knowing the same to be the funds of the municipality, becomes a trustee and must account to the municipality for the funds so deposited and all profits arising from such deposit."

It is specifically provided in said section 4294 General Code that all profits arising from such deposits shall inure to the benefit of the funds deposited. This will apply to interest derived upon competitive bids under the provisions of section 4295 General Code, supra, and also to funds which have not been deposited in compliance with said section.

It is held in the case of State v. Citizens Bank and Trust Company, 178 S. W., 928, (supreme court of Ark.), that where an invalid bid has been made, accepted and money deposited thereunder, the bank will be estopped from claiming the invalidity of said bid and will be liable for interest the same as though the contract was valid.

It appears from your records that in an examination of the city of East Liverpool, covering a period from October 13, 1914, to June 28, 1917, on page 7 of said report the examiner has stated, referring to section 4295 G. C.:

"The law covers interest on deposits. This means actual amounts on deposit. A contract by which banks would have to pay on a greater amount than actual deposits or a maximum at any one time would be illegal. Likewise a contract by which the banks would pay on a lesser amount than actual deposits or a minimum at any time would be illegal.

Depository interest permits of but one method of computation, i. e., interest on average daily balances of actual moneys on deposit."

The examiner then proceeds, on page 8 of said report, to compute the amount of interest due on average daily balances and the amount of interest paid under the contract entered into in accordance with the ordinance and makes findings against the various banks for the difference. We assume that he has computed the amount of interest due at 2% on average daily balances. This in accordance with the decision of the supreme court in the case of Franklin National Bank of Newark v. Newark, supra, would be incorrect. The same is true relative to the finding made on page 64 in regard to the interest on the sinking fund.

In view of the fact that there is no allegation of fraud in the transaction in question, and that the banks proceeded to bid in accordance with the ordinance of council and fully carried out the terms of the alleged contract, I do not believe that an attempt should be made to enforce the findings as made in said report, but that the council and sinking fund trustees of said city should immediately proceed to pass valid legislation in regard to the depository and obtain bids for the moneys in accordance with law.

A copy of this opinion will be sent to Hon. R. G. Thompson, city solicitor of East Liverpool, Ohio.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1080.

MUNICIPALITY MAY REGULATE SPEED OF MOTOR VEHICLES—FINES COLLECTED FOR VIOLATION OF SUCH ORDINANCE MUST BE TURNED INTO CITY TREASURY.

1. *Under the decision of the supreme court in City of Fremont v. Keating,* 96 *O. S.* ——, *a municipality may provide, by ordinance, rule or regulation, the rate of speed of motor vehicles therein, subject to the condition that the rates so adopted must not be in conflict with section* 12604 *G. C.* (107 *O. L.* 513).

2. *The fines collected by the mayor, in prosecutions brought under ordinances adopted by the municipality, regulating the rate of speed of motor vehicles, must be turned into the city treasury by the mayor.*

COLUMBUS, OHIO, March 16, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I have your communication of January 14, 1918, which reads as follows:

"We refer you to decision of the Ohio Supreme Court as reported in Ohio Law Bulletin, issued on January 14, 1918, in the case of Fremont v. Keating, page 20.

Question: May municipalities now under legislation of council governing speed of motor vehicles try the same as violations of ordinances, and cover the fines into the municipal treasury?"

In order to understand the scope of the decision of our supreme court, to which you make reference, and that we may answer the question you suggest, we will consider one provision of our constitution and a number of sections of our statutes.

Section 3 of article XVIII of the constitution provides as follows:

"Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

Section 12604 G. C., as it was considered by the supreme court of Ohio in the case referred to by you, read as follows:

"Whoever operates a motorcycle or motor vehicle at a greater speed than eight miles an hour in the business and closely built-up portions of a municipality or more than fifteen miles an hour in other portions thereof or more than twenty miles an hour outside of a municipality, shall be fined not more than twenty-five dollars, and, for a second offense shall be fined not less than twenty-five dollars nor more than fifty dollars."

This section was amended in 107 O. L. 513, but said amendment does not relate to the principles which the court had in mind when rendering the decision to which you refer.

Section 6307 G. C. reads as follows:

"Local authorities shall not regulate the speed of motor vehicles by ordinance, by-law or resolution, but, for a given time, they may set aside a specific public highway for speed tests or races. The term 'local authorities,' as used herein, means all officers, boards and committees of counties, cities, villages or townships."

I will give a brief analysis of the above quoted sections. The section of the constitution hereinbefore quoted provides that municipalities shall have authority to adopt and enforce, within their limits, such local police regulations "as are not in conflict with general laws."

Section 12604 G. C., of course, is a general law and provides the rate of speed at which motor vehicles may travel within the limits of the municipalities of the state, or, rather, it provides the maximum speed at which motor vehicles may travel within said limits.

Of course, under the provisions of section 3 of article XVIII of the constitution, municipalities would have no right to legislate upon the particular matters regulated in this statute and enact provisions which would be in conflict with the provisions set out in said section 12604.

Section 6307 G. C. provides that:

"Local authorities shall not regulate the speed of motor vehicles by ordinance, by-law or resolution,"

and "local authorities," as used in the section, is made to include the officers of cities and villages. Here we find a provision of the General Code which absolutely forbids municipalities to legislate upon the question of the rate of speed of motor vehicles therein. This our supreme court held to be unconstitutional, in the case to which reference is made in your letter, inasmuch as the provisions of said section contravene those of section 3 of article XVIII of the constitution. The court found as follows in the first branch of the syllabus of said case (City of Fremont v. Keating, 96 O. S. ——) :

> "Section 6307, General Code, is in direct conflict with the provisions of section 3 of article XVIII of the Constitution of Ohio, authorizing municipalities to adopt and enforce within their limits such local police, sanitary and other similar regulations as are not in conflict with general laws, and is therefore unconstitutional and void."

In the opinion the court held:

> "This statute (section 12604 G. C.) is a police regulation, and, under the section of the constitution above referred to (section 3 of article XVIII) the municipality has the right to adopt and enforce within its limits police regulations in regard to the same subject matter, not in conflict with this statute."

Under the decision in the above quoted case, a municipality undoubtedly has the authority, under section 3 of article XVIII of the constitution, to legislate relative to the speed of motor vehicles, on condition that the regulations adopted by the council of a municipality must not be in conflict with the provisions of the general laws regulating the speed of motor vehicles. That is, the regulations adopted by the council, on the rate of speed of motor vehicles therein, must not be in conflict with the regulations set forth in section 12604 G. C. (107 O. L. 513).

If a municipality has the right to legislate upon the speed at which motor vehicles may travel under the conditions above set forth, then what is the answer to the question proposed by you, viz.:

> "May municipalities now under legislation of council governing speed of motor vehicles try the same as violations of ordinances, and cover the fines into the municipal treasury?"

Section 4270 G. C. provides that:

> "All fines and forfeitures collected by the mayor, or which in any manner comes into his hands, and all moneys received by him in his official capacity, other than his fees of office, shall be by him paid into the treasury of the corporation weekly. * * All fines, penalties and forfeitures collected by him in state cases shall be by him paid over to the county treasurer monthly."

Hence under this section if a prosecution is had under an ordinance of a municipality which regulates the rate of speed of motor vehicles, and said ordinance is not in conflict with section 12604 G. C., the fines collected as a result of such prosecution should be paid into the treasury of the corporation. To be sure, if the prosecution is had under the statute, the fine collected would be paid into the county treasury. This is the logical result following the decision of the supreme court in the case above quoted.

However, it seems necessary for me to go one step further relative to the power of a municipality to legislate upon the rate of speed of motor vehicles within the limits of the municipality. The mere fact that the court has declared section 6307 unconstitutional does not necessarily settle this question.

These is another section of the General Code which must be considered, viz., section 12608. This section reads as follows:

> "The rates of speed mentioned in section twelve thousand six hundred and four, shall not diminished or prohibited by an ordinance, rule or regulation of a municipality, board or other public authority, but municipalities, by ordinance, may define what are the business and closely built-up portions thereof."

The provisions of this section are not like those of section 6307 G. C., which the court declared to be unconstitutional, in that section 6307 forbids municipalities regulating the speed of motor vehicles by ordinance, by-law or resolution—that is, a municipality under this section is forbidden to legislate upon the rate of speed of motor vehicles therein; while section 12608 provides that:

> "The rates of speed mentioned in section twelve thousand six hundred and four, shall not be diminished or prohibited by an ordinance, rule or regulation of a municipality, * *."

The question naturally arises as to whether section 12608 G. C. is not unconstitutional for the same reasons given by the court for declaring section 6307 G. C. unconstitutional. I do not feel called upon to pass on this question. This is a matter for the courts to determine. But with section 12608 standing as it now reads, a municipality would have the right to enact an ordinance fixing the same maximum rates of speed as that provided in section 12604, or a municipality might fix a higher maximum rate of speed than that provided for in section 12604; but a municipality could not diminish the maximum rate of speed as set out in said section. Therefore, if legislation is had by a municipality within the limits just set out and prosecutions are brought under the ordinance so enacted, the fines collected would be paid into the treasury of the municipality as suggested before in this opinion.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1081.

APPROVAL OF CONTRACT BETWEEN TRUSTEES OF OHIO STATE UNIVERSITY AND THE UNDERFEED STOKER COMPANY OF AMERICA.

COLUMBUS, OHIO, March 16, 1918.

HON. CARL E. STEEB, *Secretary Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—You have submitted to this department for approval contract entered into on February 25, 1918, between The Underfeed Stoker Company of America, of Chicago, Ill., and the board of trustees of your university, for the con-

struction and completion of one 6-retort stoker for 600 H. P. boiler in the new power house on the university campus, for the sum of $6,468.00, and the bond securing the same.

I have examined the contract and bond and finding the same to be in compliance with law and having received from the auditor of state a certificate that there is money available for said purpose, have this day approved the same and filed the same in the office of the auditor of state.

There was no certificate of the industrial commission accompanying the contract, but due to the fact that the contract was merely for the purchase of a boiler to be erected by you under the supervision of the company, I do not believe that the law contemplates in such an instance that a certificate be required.

I am herewith returning to you the proof of publication made by the Cleveland News, re-advertising for said bids.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1082.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN MIAMI, SHELBY, ASHTABULA, GALLIA AND WOOD COUNTIES.

COLUMBUS, OHIO, March 16, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your communication of March 13, 1918, and one of an earlier date, in which were enclosed, for my approval, resolutions for the following improvements:

Dayton-Covington Road—I. C. H. No. 63, Sec. "A," Miami county.
Sidney-Wapakoneta Road—I. C. H. No. 164, Sec. "E," M. M. No. VII, Shelby county (type A).
Sidney-Wapakoneta Road—I. C. H. No. 164, Sec. "E," M. M. No. VII, Shelby county (type B).
Youngstown-Conneaut Road—I. C. H. No. 13, Sec. "C," Ashtabula county (type A).
Gallipolis-McArthur Road—I. C. H. No. 398, Sec. "B-1," Gallia county.
Gallipolis-Jackson Road—I. C. H. No. 399, Sec. "F-1," Gallia county.
Gallipolis-Ironton Road—I. C. H. No. 405, Sec. "E-1," Gallia county.
Findlay-Bowling Green Road—I. C. H. No. 220, Sec. "E," Wood county.
Findlay-Bowling Green Road—I. C. H. No. 220, Sec. "E," Wood county (duplicate).

I have carefully examined said resolutions, find the same correct in form and legal, and am therefore returning them to you, with my approval endorsed thereon in accordance with the provisions of section 1218 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1083.

APPROVAL OF PRIVATE SALE OF CERTAIN LANDS IN CITY OF MASSILLON TO THE INDEPENDENT COMPANY OF MASSILLON.

COLUMBUS, OHIO, March 18, 1918.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication in which you ask me to join with you in the sale of certain lands in the city of Massillon to the Independent Company, of, Massillon, and with which you enclose record of proceedings had by your department in reference to the sale.

I note that the sale is made for the sum of $500.00 and therefore can be made a private one, providing the governor of the state and the attorney-general join with you in the sale. I have carefully examined the different steps leading up to the sale and find all of them correct and legal, and believing $500.00 is a fair market value for said property, I herewith join with you in the sale of the same, as an evidence of which I have attached my signature to the resolutions attached to your communication and have forwarded them to the governor of the state for his consideration.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1084.

"OPEN" AS USED IN SECTION 6869 G. C., RELATIVE TO OPENING ROADS BY COUNTY COMMISSIONERS, DEFINED—DUTY OF COUNTY COMMISSIONERS RELATIVE TO OPENING ROADS—COUNTY LINE IMPROVEMENTS—NO PART OF THE DUTY OF COUNTY SURVEYOR TO OPEN ROAD.

1. *The word "open" as used in section 6869 contemplates the removal of obstructions above the surface of the earth from the boundaries of a road as established, but does not include any alteration of the surface of the earth itself, nor the building of bridges, culverts or ditches.*

2. *It is the duty of the county commissioners to cause the work necessary to "open the road" to be done, and in case of a county line improvement, this duty devolves upon the joint board of commissioners; such commissioners are not required to advertise for bids or otherwise proceed with any particular degree of formality in procuring such work to be done. In case of the opening of a county line road the expenses thereof are to be divided between the interested counties in the proportions agreed upon by the joint board.*

3. *It is no part of the duties of the county surveyor to open the road; the joint board of county commissioners may not call upon the surveyor of one of the interested counties to open a road established by such joint board.*

COLUMBUS, OHIO, March 18, 1918.

HON. ROGER D. HAY, *Prosecuting Attorney, Defiance, Ohio.*

DEAR SIR:—I am in receipt of your letter of January 19, 1918, enclosing a copy of a resolution adopted by a joint board of county commissioners of Defiance and

Paulding counties, and an opinion sent to the county surveyor of Defiance county by the prosecuting attorney of Paulding county.

The proceeding in which the joint board was organized appears to be one for the establishment of a new road on the line between Paulding and Defiance counties. The resolution recites that inasmuch as the assessments for benefits on the improvement have been paid into the county treasury of Paulding county, the auditor of Paulding county is instructed to issue his order on the treasury of the county to the persons who have been awarded damages and compensation; and it directs the county surveyor of Defiance county to open the road to traffic.

The opinion referred to instructs the county surveyor of Defiance county that it is "within the right and power of the joint board to direct who shall open up the road, and in this road improvement said joint board has directed that the surveyor of Defiance county open up and establish said road which is within their statutory rights, and it therefore becomes your duty to open up this road by removing all fences, trees and such other obstructions as might be thereon, and in the event any land owner shall refuse or neglect to remove any fence thereon it shall become your duty to remove the same, and you will further grade said road or see that it is done sufficient for public travel thereon. In the event it should become necessary to construct any culvert or bridge on the line of said road, it will then become necessary to construct the same under the laws relating to culverts and bridges."

You submit for my opinion the following questions:

> "1. Under section 6869 how shall the surveyor construe the meaning in the word 'open'?
>
> 2. The amount of the work and cost of the same would be between $800 and $1,200. No plans estimate or specifications have been ordered.
>
> 3. If the commissioners as a joint board have the power or authority to authorize or compel the surveyor to act as the within resolution and opinion of Paulding county prosecutor to open said road, has the surveyor the power to remove the fences, clear the right of way, grub the stumps, construct the culverts and grade the roadway?"

I quote the following provisions of the Cass law of 1915 and the White-Mulcahy law of 1917, which was an amendment of the former measure, under the General Code numbers which have been assigned to the several sections and adopted by the general assembly.

> "Sec. 6860. The county commissioners shall have power to locate, establish * * * or change the direction of roads as hereinafter provided. This power extends to all roads within the county, except the inter-county and main market roads."
>
> "Sec. 6861. All public roads hereafter located and established * * * shall be of such width, not less than thirty feet, as may be determined by the county surveyor, subject to the approval of the county commissioners, * * * If such public road is established upon a county or state line, the county surveyor may, subject to the approval of the county commissioners, determine the width of the strip of land in such county to be used for such purposes, but such width shall not be less than fifteen feet."
>
> "Sec. 6862. (107 O. L. 71.) Applications to locate, establish * * * or change the directions of a public road shall be made by petition to the county commissioners * * *. The word 'improvement' used in sections 6862 to 6878 inclusive of the General Code signifies any location, es-

tablishment * * * or change in the direction of a public road, * * * as requested in the petition filed under the authority of such sections, or determined upon by a board of county commissioners or joint board by resolution adopted by unanimous vote."

"Sec. 6863. * * * The county commissioners shall require the petitioners * * * to enter into bond with sufficient sureties in favor of the state of Ohio, for the use and benefit of the county, and conditioned that the petitioners * * * will pay into the treasury of the county, the costs and expenses incurred in the proceedings for such improvement, in case the prayer of such petition be not granted."

"Sec. 6865. If the commissioners after the view of said proposed improvement, consider such improvement of sufficient public importance, they shall instruct the county surveyor to make a plat and survey of the same. The surveyor shall make a report * * *. Such report shall set forth the opinion of said surveyor either for or against the granting of such proposed improvement. In case the petition requests the location or establishment of a road, such report shall state the width to which said improvement shall be opened. * * *"

"Sec. 6866. The commissioners shall at the date of the final hearing on said improvement * * * hear any testimony bearing upon the public utility of the improvement and offered either by the petitioners or by any interested persons opposing the granting of the improvement. If the commissioners find said improvement will serve the public convenience and welfare, they shall grant said improvement, if not, they shall refuse the improvement and dismiss the petition."

"Sec. 6868. If in the opinion of the county commissioners the improvement is of sufficient importance to the public to cause the compensation and damages on account thereof to be paid to the person or persons entitled thereto out of the county treasury they may so order. If in the opinion of the commissioners the improvement is not of sufficient importance * * * they may order the compensation and damages or such part thereof as they may deem reasonable and just to be paid by the petitioners and the balance, if any, to be paid out of the county treasury. * * *"

"Sec. 6869. When on the final hearing thereon the finding of the county commissioners is in favor of an improvement, the county commissioners shall cause a record of the proceedings including the survey and plat of said proposed improvement to be entered in the proper road records of the county * * *. *If the proceeding be one for the location or establishment of a road, the commissioners shall then cause said road to be opened up as established, and such road shall thenceforth be a public road, and shall be kept open, maintained and improved as provided by law.* * * * No road shall be opened up, however, until all compensation and damages allowed are paid. A county road or part thereof which remains unopened for seven years after the order establishing it was made *or authority granted for opening it,* shall be vacated, and the right *to build it* pursuant to the establishment in the original proceedings therefor shall be barred."

"Sec. 6874. When the improvement petitioned for is along or upon a county line, a petition shall be filed with the commissioners of either county. The commissioners of such county shall * * * cause a certified copy of such petition to be filed with the commissioners of the other county * * * and the commissioners of the county where the original

petition is filed shall fix a time and place for a joint meeting of the board of commissioners of the counties interested * * *."

"Sec. 6875. The joint board of commissioners at such meeting shall fix a date when the joint board will view the proposed improvement, and the date of the final hearing thereon, and such proceedings shall be thereafter had upon said petition by the joint board *as though the proceedings were before a single board as provided in the preceding sections of this act.* * * *"

"Sec. 6877. The compensation and damages awarded in case of a joint improvement, *together with the expenses thereof,* shall be divided between the counties interested, as the joint board may agree and determine, and in case of failure to agree * * * the joint board shall certify that fact to the state highway commissioner who shall thereupon make such apportionment."

"Sec. 6878. The commissioners of any county or any joint board of commissioners of two or more counties, at a meeting had for that purpose, may by resolution declare by unanimous vote their intention to locate, establish * * * or change the direction of any road, and such notice shall thereupon be given as is provided for upon the filing of a petition for such improvement and like proceedings shall be had by such commissioners or joint board thereof as in the case of the filing of a petition before them asking for such improvement."

I take it that the proceeding was to locate and establish a county line road. I am unable to understand the recital in the resolution to the effect "that the assessments for benefits on said improvement have been paid into the county treasury of Paulding county, Ohio," because in the location and establishment of a county line road or other public road under the statutes which have been quoted, there are no such things as assessments for benefits. I assume, however, that this recital is a mere misnomer, and that the reference here is to the payment by the petitioners of some part of the compensation and damages as provided by section 6868 above quoted.

The statutes neither define the phrase "open up" nor provide machinery or procedure by which this process, whatever it may be called, shall be carried out. However, there are certain inferences to be drawn from the statutes as we now find them. Thus section 6869, in which the phrase "open up" is found, in one place provides that the commissioners shall "cause" this to be done, and in another place refers to the action of the commissioners as "authority granted for opening it." These two forms of expression are on their face inconsistent with each other, one making it appear that the "opening up" of a road is in effect the act of the commissioners, though actually done by someone else at their instigation, the other making it appear that the action of the commissioners is limited to granting authority to someone to do the thing contemplated. None of your questions can be satisfactorily answered without resolving the ambiguity that appears upon the face of section 6869.

Fortunately the previous history of the statutes for the establishment of public roads in this state is comparatively simple, and may shed some light upon the meaning of the present statutes. Under such laws there were two kinds of roads, county roads and township roads. The pertinent provisions of the old law respecting county roads were as follows:

"Section 6881. Thenceforth such road shall be a public highway, and the county commissioners shall issue their order to the trustees of the proper township or townships directing it to be opened. * * *"

"Section 6885. The county commissioners shall not take possession of land appropriated for the purpose of a county road until the damages assessed for it are paid." (In this connection I may say that section 6886 of the old law provided for collecting damages from the petitioners by assessing them on abutting property, which apparently accounts for the form of words used in the resolution. This scheme of things is done away with, but evidently the commissioners are using phrases to which their predecessors were accustomed under the old law.)

The corresponding provisions of the township road law were as follows:

"The trustees shall * * * issue their order to the petitioners or any of them, or to the proper superintendent where it is made his duty to open such road, to open the road to the width named in the report of the viewers. Such road shall be a township road, subject to be kept open and in repair at the expense of the applicant for it, or otherwise as provided by law." Section 6965.

Section 7137 of the General Code as formerly in force, provided:

"A road superintendent shall open, or cause to be opened, and kept in repair, the public roads and highways which are laid out and established in his road district, *and remove or cause to be removed, all encroachments, by fences or otherwise, and obstructions that are found thereon. He may enter upon uncultivated or improved lands, unincumbered by crops, near to or adjoining such roads, cut or carry away timber, excepting trees or groves on improved lands planted or left for ornament or shade, and dig, or cause to be dug and carried away, gravel, sand or stone which is necessary to make,* improve or repair such road." (The last provision was held to be unconstitutional, Snyder v. McCollough, 6 N. P. 567, but the effect was probably cured by the later amendment of section 7138 General Code, providing for the payment of damages by an appeal to the courts.)

The section which I have just quoted, in my opinion is very important, showing as it does the character of the acts which then constituted opening a road.

In my opinion the first question is to be answered in the light of this section, which indicates clearly that among the things to be done in opening a road is the removal of encroachments, by fences or otherwise, and obstructions found thereon. In fact, in my opinion the removal of obstructions within the boundaries as established, constitutes its opening. Whether or not more is required, such as grading, is a question which will be postponed for the time being.

Original section 7137 of the General Code was of course repealed when the Cass law was passed. I am unable to find in that measure or in the White-Mulcahy act of 1917 any adequate substitute for it. True, the Cass law provided for a township highway superintendent, who may have been intended as a substitute for the road superintendent provided for in section 7137 et seq. of the original General Code. The duties of this highway superintendent, however, and of the township trustees themselves seem to be limited to "improving, dragging, repairing or maintaining" roads. (The above language is quoted from section 3298-1, Sec. 60 of the Cass Law; 106 O. L. 589.) All that was said upon the subject of the township highway superintendent is found in the following sections of the law:

"Under the direction of the township trustees he shall have control of the roads of his district and keep them in good repair." Sec. 3370; 106 O. L. 593.

"The township highway superintendent shall divide * * * the unimproved public roads of the township into road dragging districts * * *. He shall from time to time designate what districts shall be dragged." (There was more about dragging in the statutes which it is not necessary to quote. The above is quoted from section 3375 of the General Code as enacted in 106 O. L. 594.)

"* * * The township highway superintendent shall perform such other duties as may be prescribed by law or by the rules and regulations of the township trustees or the county highway superintendent. * * *" Section 3374.

But whatever might have been argued from the fact that the Cass law when repealing the provisions for township road superintendents substituted somewhat vaguer provisions for township highway superintendents which might be deemed to be analogous officers, becomes of little aid, when it is noticed that in the White-Mulcahy act, the sections of the former law providing for township highway superintendents, are greatly modified.

Section 3370 of the General Code as last amended by the measure referred to, now provides that,

"the township trustees shall have control of the township roads of their township and shall keep the same in good repair. * * * In the maintenance and repair of roads the township trustees may proceed in any one of the following methods as they may deem for the best interest of the public, to wit:

1. They may designate one of their number to have charge of the maintenance and repair of roads within the township, or

2. They may divide the township into three road districts, in which event each trustee shall have charge of the maintenance and repair of roads within one of such districts, or

3. They may appoint some competent person, not a member of the board of trustees, to have charge of the maintenance and repair of roads within the township which person shall be known as township highway superintendent, * * *."

Section 3373 now provides that,

"In the maintenance and repair of roads the township trustees may proceed either by contract or force account." (Then follows detailed provision for the making of contracts and for the purchase of material, machinery, etc.)

The provisions for dragging unimproved roads, sections 3375-3376, were amended so as to cast upon the township trustees or highway superintendent the duty formerly imposed upon the township highway superintendent.

Thus far, it appears that the duty of opening up roads which was under the original road laws definitely imposed upon the township road superintendent, or in the case of township roads, upon petitioners, is nowhere expressly provided for. We have only the vague provision that the county commissioners shall cause the roads to be opened up. However, for certain purposes, at least, one radical

change in the classification of roads was made by the Cass law and perpetuated by the White-Mulcahy law, which must be considered in this connection. Formerly (and perhaps at the present time for some purposes) roads were classified as county or township roads accordingly as they had been laid out and established by the county commissioners or the township trustees. Since the enactment of the Cass law, however, the authority to lay out public roads is vested exclusively in the county commissioners. Nevertheless we still have county and township roads.

Section 7464 of the General Code, section 241 of the Cass law, as still in force, makes a classification of the public roads of the state into state roads, county roads and township roads. The following quotation from this section will suffice:

> "(a) State roads shall include such * * * roads as have been or may hereafter be constructed by the state * * * or taken over by the state * * * and such roads shall be maintained by the state highway department.
>
> (b) County roads shall include all roads which * * * may be improved by the county * * * or heretofore built by the state and not a part of the intercounty or main market system of roads, together with such roads as have been or may be constructed by the township trustees to conform to the standards for county roads as fixed by the county commissioners, and all such roads shall be maintained by the county commissioners.
>
> (c) Township roads shall include all public highways of the state other than state or county roads as hereinbefore defined, and the trustees of such township shall maintain all such roads within their respective townships; * * *"

This classification is on the basis of and for the purpose of improvement and maintenance. An improved road is either a county or a state road. An unimproved road is always a township road. Therefore, a road newly established would, at least after being opened up, constitute a township road, and it would be the duty of the township trustees to maintain it.

This point gives rise to the inquiry as to whether or not the work necessary to be done in opening up a new road is maintenance. If it is, then manifestly the township trustees are charged by law with the duty of performing the work. I say this because the joint board of commissioners of Paulding and Defiance counties have sought to cast this duty upon the county surveyor of one of the counties, and I am unable to find in the statutes relating to the duties of the county surveyor in respect of roads, and provision from which an inference charging him with this particular duty can be drawn, unless it be those provisions thereof which impose upon him certain duties respecting repair and maintenance.

Section 7184 General Code, as amended in the White-Mulcahy act provided in part as follows:

> "The county surveyor shall have general charge of the construction, reconstruction, improvement, maintenance and repair of all bridges and highways within his county under the jurisdiction of the county commissioners. The county surveyor shall also have general charge of the construction, reconstruction, resurfacing or improvement of roads by township trustees * * *. The county surveyor shall not be authorized, however, to perform any duties in connection with the repair, maintenance or dragging of roads by township trustees, except that upon the request of any board of township trustees he shall be required to inspect any road

> or roads designated by them and advise them as to the best methods of repairing, maintaining or dragging the same."

For the purposes of the present question the section last above quoted is subject to the following analysis:

The phrase "the jurisdiction of the county commissioners" as used therein refers to jurisdiction as established by section 7464 of the General Code. Though the opening of a road is a matter within the jurisdiction of the county commissioners, the road in process of opening is not a "highway under the jurisdiction of the county commissioners" because it is not yet a highway at all. In short, this section with the others which have been quoted furnishes an answer to one of the questions so far left open, viz., as to whether or not the services contemplated in the opening of a road can be brought under the heading of maintenance and repair. In my opinion they cannot. A road is not a proper subject of maintenance and repair until it is open for travel and has acquired the status of a public highway for the purposes of section 7464 so that the duty of maintaining and repairing it can be assigned to the appropriate authorities defined therein. Therefore, though section 7184 clearly shows that the county surveyor is to have charge of the maintenance and repair of county roads and is not to have charge of such maintenance and repair of township roads, it is neither to be inferred on the one hand that by reason of this provision he is to perform the services of opening the road, nor on the other hand, by reason of this provision he is to have nothing to do with opening a road, and the township trustees are to have exclusive charge and supervision of such work.

These conditions bring us back to the starting point of our inquiry, for they establish that neither by express provision nor by inference from any of the express provisions of the present law is it the duty of any public officer other than the county commissioners, either on their own motion, or under the direction of the county commissioners, to perform the services incident to opening up a road established by the commissioners. The phrase "the commissioners shall then cause said road to be opened up and established" must be given its natural meaning, which is that the commissioners themselves must procure the performance of the necessary work without being entitled to call upon any other officer for the purpose. This result is strengthened by the provision of section 6877 to the effect that in case of a joint improvement,

> "the expenses thereof in addition to the compensation and damages shall be divided between the counties interested as the joint board may agree and determine."

If any part of the work of opening up a road was to be done by a salaried public official, such as the county surveyor, it would be impracticable if not impossible to ascertain the expenses of the establishment of a road.

It is my opinion, therefore, that a joint board of county commissioners proceeding in the establishment of a county line road, have no authority to call upon the county surveyor of either of the interested counties to perform any work in connection with the opening of the road, but that such work should be done by contract entered into by the joint board, and the expenses thereof should be divided between the interested counties, as agreed upon by the joint board. If the road were located only within one county a similar result would follow, and a county surveyor could not be compelled, nor would he be authorized to perform services in connection with the opening of a new road, but said services would

have to be provided by the commissioners and paid for out of the general county fund.

In passing I may say that there is no authority for ordering the petitioners or the owners of lands through which the road passes to do this work at their own expense. An express provision formerly authorized the township trustees to require the petitioners or some of them to open the road, in the case of a township road. This provision has been repealed.

It is true that section 7204 General Code provides that,

> "It shall be the duty of the owners or occupants of lands situated along the highways to remove all obstructions within the bounds of the highways which have been placed there either by themselves or their agents."

This, however, in my opinion refers to the removal of obstructions placed upon an existing highway. In my opinion a public road does not become a highway until it has been opened up.

The foregoing comments dispose of your third question and partially dispose of your first question. There remains in connection with your first question the one point as to whether or not any grading work is to be done in opening up a road. The former statute which I have quoted (section 7137 General Code now repealed) speaks of the removal of encroachments and obstructions. It also authorizes a road superintendent to take gravel necessary to "make, improve or repair such road." In my opinion no inference would arise under this section to to the effect that grading is a part of the opening of a road, because of the authority vested in the former township road superintendent to take gravel under the provisions thereof. The one word necessary to be interpreted in this connection is the word "make." In my opinion this is not equivalent to "open up." Without quoting several sections in the chapter relating to superintendents and road work as it formerly existed, I deem it sufficient to say that there was certain further work which might be done upon unimproved roads, such as construction of ditches and grading (section 7142 now repealed) and the like, which come under the general heading of road work to be performed by the township road superintendent by the aid of the compulsory labor on public roads, which in my opinion, followed the opening of the road and were not a part of the process, but came under the heading of "make" or "construct" and would now be contemplated in the general term "maintenance," whether or not initial grading of the road so as to make it passable for travel is a part of the work mentioned, or belongs in the class of services last above mentioned.

Section 7137 furnishes no conclusive answer to this question. There is, however, a judicial interpretation of the term "open" in this connection in the case of Reed v. Toledo, 18 O. 165, from the opinion of which, per Caldwell, J., I quote the following:

> "By the term opening we do not understand the improvement of a street or highway by grading, culverting, etc.; the term is generally (we think always) clearly distinguishable from such kind of improvement. The term opening, refers to the throwing open to the public, what before was appropriated to individual use, and the removing of such obstructions as exist on the surface of the earth, rather than any artificial improvement of the surface."

This definition is in accord with the great weight of authority and with what appears to me to be the correct inferences to be drawn from section 7137, though I have said that the section itself is not conclusive on that point. There is a clear distinction between opening a road and making a road. In my opinion an unimproved township road must be opened by the county commissioners and made by the township trustees. Therefore, it becomes necessary to determine carefully the distinction between the two processes, inasmuch as the power to conduct them is committed to different authorities. No clearer test could be laid down than that enunciated in Reed v. Toledo, supra. An opening is the removal of all obstructions which exist on the surface of the earth, such as buildings, fences, trees and the like. All alterations of the surface of the earth as it exists come under the other heading.

I think these comments answer your first question to the extent that they define "opening."

You will observe that in the main I agree with the prosecuting attorney of Paulding county, as I understand the meaning of his opinion, but I am obliged to disagree with that part of his definition which implies that a sufficient amount of grading in order to make the road passable, is a part of its opening. The road should indeed be graded, but not as a part of the opening thereof. The duty of grading it belongs to the township trustees under the existing laws.

The county commissioners are not absolutely obliged to open the road, and cannot be held liable if they do not do so. Herein is the explanation of the apparent ambiguity encountered when the last sentence of section 6869 is considered. If the petitioners for the road are not satisfied with the promptness of the county commissioners in causing the road to be opened, they may do so themselves, and all the authorities agree that such an opening would be perfectly efficacious to dedicate the road to public travel and prevent the loss or barring of the right to build it. In the event that such petitioners should open it at their own expense or by their own labor, there would be no recourse against the county commissioners. Whether the commissioners might be compelled by mandamus to open the road is a question which I do not intend to pass upon in saying that the commissioners cannot be compelled in any other way to do so.

Your second question remains unanswered. I do not understand to what you refer in mentioning the cost of the opening and stating that no plans and specifications have been prepared. I take it, however, that when you submitted this question you had in mind the possibility that grading was a part of the procedure of opening the road. I have pointed out that such is not the case. Of course, it would be impossible and unnecessary to prepare plans and specifications for cutting down trees, removing fences, etc. There is no provision which requires the county commissioners in opening a road to advertise for bids or have plans and specifications drawn or proceed with any particular degree of formality.

I answer your questions then by the following statements:

1. The word "open" as used in section 6869 contemplates the removal of obstructions above the surface of the earth from the boundaries of a road as established, but does not include any alteration of the surface of the earth itself, nor the building of bridges, culverts or ditches.

2. It is the duty of the county commissioners to cause the work necessary to "open the road" to be done, and in case of a county line improvement, this duty devolves upon the joint board of commissioners; such commissioners are not

required to advertise for bids nor otherwise to proceed with any particular degree of formality in procuring such work to be done. In case of the opening of a county line road the expenses thereof are to be divided between the interested counties in the proportions agreed upon by the joint board.

3. It is no part of the duties of the county surveyor to open the road; the joint board of county commissioners may not call upon the surveyor of one of the interested counties to open a road established by such joint board.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

1085.

APPROVAL OF LEASES OF STATE LANDS TO THE B. & O. RAILROAD CO., BUCKEYE LAKE; FORNSHELL AND THOMPSON, BUCKEYE LAKE; W. E. SHAW AND A. R. KELCH, LOGAN; THE CITY OF TOLEDO; HERMAN NOHR, INDIAN LAKE; AND C. S. LAWSON, RUSSELL'S POINT; DISAPPROVAL OF LEASE TO THE INDEPENDENT COMPANY OF MASSILLON.

COLUMBUS, OHIO, March 18, 1918.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of March 13, 1918, in which you enclose, for my approval, the following leases, in triplicate:

	Valuation.
To The Baltimore and Ohio Railroad Co., right of way over marginal strips of Buckeye Lake at the easterly end thereof between Thornport and Avondale	$2,500 00
To Fornshell and Thompson, lease for cottage site at west end of Buckeye Lake	400 00
To W. E. Shaw and A. R. Kelch, a portion of the abandoned Hocking Canal in rear of lots owned by these parties, in Logan, Ohio	400 00
To The Independent Co., of Massillon, Ohio, lease for 34 feet of the berme bank of the Ohio Canal at North street in Massillon, Ohio	400 00
To The city of Toledo, a portion of the Swan Creek Canal in Toledo, Lucas county, Ohio, which the city desires for street purposes. A new channel is to be excavated and a deed in fee simple executed by the state of Ohio for the new right of way. This lease is merely to put the city of Toledo in legal possession of the property while the improvements are being made, a statute having been enacted by the general assembly authorizing the exchange of deeds for the property in question	200 00
To Herman Nohr, 25 feet of the water front of Indian Lake for boat house and landing purposes	100 00
To C. S. Lawson, Russell's Point, Ohio, 25 feet of the water front at Indian Lake for boat house and landing purposes	100 00

I have carefully examined these leases and find them, with one exception, correct in form and legal, and am therefore endorsing my approval upon the same and forwarding them to the governor of the state for his consideration.

The lease made to The Independent Company of Massillon, Ohio, of thirty-four feet of the berme bank of the Ohio Canal in Massillon, is defective, in that the resolution adopted by said company authorized the president of the company and the secretary thereof to execute the lease for said company, and in the execution of the lease the manager of the company signed for and on behalf of said company, instead of the president and secretary thereof. For this reason I am of the opinion that this lease should not be approved and am therefore returning it to you for correction as above suggested.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1086.

THE STATE MAY ASSUME THE PART OF THE COST WHICH IS ORDINARILY BORNE BY THE COUNTY, IN THE CONSTRUCTION OF IMPROVEMENT OF MAIN MARKET ROADS—MAY NOT ASSUME TOWNSHIP'S OR PROPERTY OWNER'S SHARE.

In the construction or improvement of main market roads, wherein the township trustees co-operate, the state may assume the twenty-five per cent. of the cost and expense thereof which is ordinarily borne by the county; but it cannot assume any part of the proportion which is ordinarily borne by the township, viz., fifteen per cent. nor any part of the ten per cent. which is assessed against the property owners.

COLUMBUS, OHIO, March 18, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of March 4, 1918, which reads, as follows:

> "I have been authorized by the highway advisory board to ask your opinion as to whether or not the highway department, in co-operating direct with township trustees of any county in the improvement of a main market road, may pay more than seventy-five per cent. of the cost of the improvement."

In order to obtain a fundamental principle upon which to base an answer to your communication, it will be necessary for us to turn to section 1231 G. C. (107 O. L. 137). This section reads in part as follows:

> "Sec. 1231. * * County commissioners, township trustees and village councils *shall have the same power and authority* to co-operate in the construction, improvement, maintenance and repair of main market roads as is granted to them by this act in the construction, improvement, maintenance and repair of inter-county highways; and in case the commissioners of any county, the trustees of any township and the council of any village, or any of such authorities, determine to co-operate in the construction, improvement, maintenance or repair of any main market road, *the procedure shall*

be the same as in the case of co-operation by such authorities, in the construction, improvement, maintenance and repair of inter-county highways, as provided in this act. * *"

So it will be seen that in those cases wherein the township trustees co-operate with the state highway commissioner in the construction or improvement of a main market road, the same procedure should be had and the same power and authority is granted as in the construction, improvement, maintenance and repair of inter-county highways.

We will turn now to the provisions which have to do with the construction of inter-county highways when the township trustees co-operate with the state highway commissioner.

Section 1192 G. C. (107 O. L. 123) reads as follows:

"In case the county commissioners do not file any application for state aid before March first of any year in which the funds will be available for the construction, improvement, maintenance or repair of some one or more of the inter-county highways or main market roads, then the board of township trustees of any township within the county may file such application, and the state highway commissioner may co-operate with such trustees in the construction or improvement of said highway in the manner hereinafter provided in cases where the county commissioners make such application."

From this section it is clear that when the township trustees make an application for state aid, the state highway commissioner may co-operate with such trustees in the construction or improvement of a highway in the same manner as is provided in cases where the county commissioners make such application.

Section 1214 G. C. (107 O. L. 129) relates to the apportionment of the cost and expense of an improvement among the county, township and abutting property owners. This section reads as follows:

"Sec. 1214. Except as otherwise provided in this chapter, the county shall pay twenty-five per cent. of all cost and expense of the improvement. Fifteen per cent. of the cost and expense of such improvement, except the cost and expenses of bridges and culverts, shall be apportioned to the township or townships in which such road is located. * * Ten per cent. of the cost and expense of the improvement, excepting therefrom the cost and expense of bridges and culverts, shall be a charge upon the property abutting on the improvement, * *."

It will be noted that under this section, unless there is some other provision made, the county must bear twenty-five per cent. of the cost of an improvement, the township fifteen per cent. and the abutting property owners ten per cent.

However, section 1217 G. C. provides in part:

"* * Where the application for said improvement is made by the township trustees, the state may assume all or any part of the county's proportion of the cost of said improvement, * *."

This section further provides that:

> "In no case shall the property owners abutting upon said improvement be relieved by the state, county or township, from the payment of ten per cent. of the cost and expense of such improvement, * *."

From the provisions of this section it is evident that the state may assume the county's proportion of the improvement, which would be twenty-five per cent., but there is no provision made for the state assuming any part of the proportion to be borne by the township, which is fifteen per cent., and the statute specifically provides that in no case shall the property owners be relieved of the payment of ten per cent. of the cost and expense of an improvement.

In accordance with the provisions of section 1231, supra, if this principle is true in the construction and improvement of inter-county highways, it is equally true in the case of the construction or improvement of main market roads, wherein a township co-operates with the state highway department.

Hence it may be concluded that your department may assume the payment of fifty per cent. of the cost and expense of the construction and improvement of a main market road, and in addition may assume the part which otherwise would be borne by the county, viz., twenty-five per cent., thus making a total of seventy-five per cent. which may be borne by the state in such an improvement. But there is no provision made whereby the state may assume a part of the fifteen per cent. to be paid by the township, and the state is forbidden to assume any part of the ten per cent. which is to be borne by the property owners.

Therefore, the maximum amount which the state can assume in the improvement of a main market road, wherein the township trustees co-operate, is seventy-five per cent. of the cost and expense of the improvement.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1087.

LAYING OUT AND ESTABLISHING NEW ROADS GOVERNED BY SECTIONS 6860 ET SEQ. G. C.—COSTS WHEN PETITION NOT GRANTED —HOW COMPENSATION AND DAMAGES ALLOWED PROPERTY OWNERS ASSESSED WHEN ROAD ESTABLISHED—COSTS INCURRED IN OPENING UP ROAD BORNE BY COUNTY.

1. *Sections* 6860 *et seq. G. C. control in the laying out and establishing of a new road, and not the provisions of sections* 6906 *et seq. G. C.* (107 *O. L.* 95).

2. *If the prayer of the petition for the establishing of a road be not granted, then the petitioners must bear the costs of the proceeding. If the road be established, the compensation and damages allowed to property owners may be assessed either against the county or the petitioners, in the discretion of the county commissioners, the part assessed against the county being paid out of the general county fund; and the ordinary costs of the proceeding would be paid by the county out of the general county fund.*

The costs incurred in opening up the road to public travel by the county commissioners would also be borne by the county and be paid out of the general county fund.

COLUMBUS, OHIO, March 19, 1918.

HON. PERRY SMITH, *Prosecuting Attorney, Zanesville, Ohio.*

DEAR SIR:—I have your communication of March 2, 1918, which reads as follows:

> "The commissioners of our county are debating the question of establishing a new road in Blue Rock township, or Meigs. They have had a hearing on this matter and the question has been put to me, from what fund the damages and improvements of this road should be drawn. I cannot tell them from what fund it shall be paid.
>
> I would like to have your interpretation of the section of the law found in 107 O. L. at p. 98, whether it is to be paid out of the general county fund or the road fund.
>
> In case there is no money in the county fund or the road fund, how can the same be paid?"

From the fact that you ask me to place an interpretation upon section 6919 G. C. (107 O. L. 98), I take it that you have in mind that sections 6906 et seq. (p. 95 of 107 O. L.) control in the establishment or laying out of a new road.

In reference to establishing and laying out new roads, I desire to make the following general observations: Sections 6906 et seq. have particularly to do with the construction, reconstruction, improvement or repair of any public road or part thereof; while sections 6860 et seq. relate to the location, establishing, altering, widening, straightening, vacating or changing the direction of roads. On account of this fact it will not be necessary for us to interpret section 6919, which is a part of the act pertaining to the construction, reconstruction and repair of public roads, but we must look to the provisions of section 6860 et seq., which relate to the laying out, establishing, etc., of roads.

You desire to know, relative to the establishing of a new road, whether the costs and expenses thereof are to be paid out of the general county fund or out of the road fund.

Section 6863 G. C. provides that the petitioners petitioning for the establishing of a new road shall—

> "* * enter into bond with sufficient sureties * * conditioned that the petitioners asking for such improvement will pay into the treasury of the county, the costs and expenses incurred in the proceedings for such improvement, in case the prayer of such petition be not granted."

From this section it is evident that if the improvement is not made in accordance with the prayer of the petition, then the petitioners themselves must bear the costs and expenses of the proceeding.

Section 6868 G. C. provides as follows:

> "If in the opinion of the county commissioners the improvement is of sufficient importance to the public to cause the compensation and damages on account thereof to be paid to the person or persons entitled thereto out of the county treasury they may so order. If in the opinion of the commissioners the improvement is not of sufficient importance to cause the

compensation and damages to be paid from the county treasury, they may order the compensation and damages or such part thereof as they may deem reasonable and just to be paid by the petitioners and the balance, if any, to be paid out of the county treasury, * *."

From this section, so far as the compensation and damages to abutting property owners are concerned, the county commissioners must decide whether this part of the costs and expenses of the improvement is to be borne by the petitioners themselves or be paid out of the county treasury. This section further provides that if a part of the compensation and damages is assessed against the petitioners and they do not pay the same, they become liable then for the costs of the proceeding which shall be adjudged against them.

These sections take care of the costs and expenses of the establishing of a new road, excepting in those cases in which the county commissioners grant the prayer of the petition and establish a new road. In such cases these sections do not provide for the costs and expenses of the improvement, other than that part which is due for compensation and damages granted to abutting property owners.

Who, then, will pay what might be called the court costs in the proceeding; that is, such costs as are made by way of advertising or in securing witnesses, if any should be needed? The act seems to be entirely silent in reference to this matter, but from the provisions of section 6863 G. C., above quoted, it appears that it was the intention of the legislature that if the prayer of the petition be granted and a new road be established, the county should pay the costs and expenses incurred in the proceedings for such improvement, other than the compensation and damages granted to injured property owners, which is taken care of as set out in section 6868, above quoted.

It will be noted that section 6863 provides that a bond must be given, conditioned that the petitioners will pay the costs and expenses incurred in case the prayer of the petition be not granted.

The only reasonable inference is that if the prayer of the petition be granted and the road be established, the county should pay the costs of the proceeding and that these costs must be paid out of the general county fund. In fact I incidentally so held in an opinion (No. 1084), rendered by me to Hon. Roger D. Hay, prosecuting attorney of Defiance county. In that case, however, it was more in the nature of *obiter dicta,* rather than an answer to the request made by Mr. Hay. In said opinion, I went into the question at some length as to what the county commissioners might do in the opening up of a road which they establish. Of course, the expenses incurred by them in the opening up of the road would also have to be borne by the county and paid out of the general county fund. If the county commissioners are authorized to employ the necessary means to open up the road, the county would be compelled to pay for the costs of the same.

You further ask how the costs should be paid in case there is no money in the county fund. Of course, if there is no money in the county fund, the costs could not be paid other than by a transfer of money from some other fund to the county fund, in accordance with the provisions of law.

I am rendering this opinion upon the theory that the county commissioners have in mind merely the establishing of a new road. Your communication is a little uncertain from the fact that you use the word "improvements." But I do not gather from this language that the county commissioners are contemplating improving the road under the provisions of sections 6906 et seq. I am not unmindful of the language used in section 6906 G. C. (107 O. L. 95), which reads in part as follows:

"The board of commissioners of any county shall have power, as hereinafter provided, to construct a public road *by laying out and building a new public road,* or by improving, reconstructing or repairing any existing public road or part thereof * *."

I am not passing upon the question as to whether the county commissioners might proceed under the provisions of sections 6906 et seq., provided they have in mind both the establishing and laying out of a new road and at the same time the improvement of the same. But it is my opinion that the county commissioners should proceed under sections 6860 to 6889 inc. G. C. when they are merely contemplating the establishing of a new road and opening up the same to public travel, and not under sections 6906 et seq. G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1088.

WHEN AN ASSIGNMENT OF A CLAIM AGAINST THE STATE HAS BEEN MADE PRIOR TO AN APPROPRIATION THEREFOR, IT IS IMPOSSIBLE TO SAY WHETHER OR NOT APPROPRIATION WILL BE MADE DIRECT TO ASSIGNEE.

If an appropriation to pay claim against the state is not yet made and therefore conditions under which said claim will be paid not yet fixed, impossible to say whether assignee of said claim can be paid direct when appropriation made.

COLUMBUS, OHIO, March 20, 1918.

HON. N. E. SHAW, *Secretary of Agriculture, Columbus, Ohio.*

DEAR SIR:—Under date of March 1st you inquire as follows:

"When the legislature shall have appropriated the money to pay for the cattle slaughtered by the direction of this department, can this department legally pay to the bank the amount due the individual where an assignment of the claim has been made to the bank as evidenced at the bottom of the enclosed letter?"

The assignment to which you refer and which is attached to your letter is as follows:

"TO WHOM IT MAY CONCERN:

Mr. Chas. Koerber of Grafton, Ohio, has a valid claim against the agricultural department of Ohio for $727.50, for tuberculosis cattle slaughtered by state order.

This claim should have been passed by the legislature at their 1916-1917 session. The claim had been certified to the appropriation committee as valid by this department, and will be certified again at the next session of the legislature.

Very truly yours,
(Signed) N. E. SHAW,
Secretary of Agriculture.

"THEO. A. BURNETT, STATE VETERINARIAN.

WELLINGTON, OHIO, February 9, 1918.

Department of Agriculture, Columbus, Ohio:

GENTLEMEN:—Whenever the Ohio legislature shall have ordered the within claim paid, please pay over the funds to the First Wellington bank, Wellington, Ohio.

(Signed) CHAS. KOERBER,
Grafton, Ohio."

Accepted:
Department of Agriculture,
By----------

It appears that the cattle were slaughtered by state order on December 13, 1916, therefore section 1115 G. C., 106 O. L., 150, is the statute under which the then board of agriculture was operating. The first paragraph of said section reads as follows:

> "If an animal is killed under the provisions herein relating to the board of agriculture, the compensation to be made for the slaughtered animal shall be computed by the board of agriculture on the basis of the actual value of such animals immediately prior to infection or contagion or at such time as the board may determine."

Section 1116 G. C., 106 O. L., 150, reads as follows:

> "When approved by the board of agriculture all claims of owners of animals killed under the provisions herein relating to the board *shall* be paid from funds appropriated by the general assembly for that purpose."

It appears, therefore, that by legislative enactment the state has determined upon the policy of paying for the cattle slaughtered by appropriations to be made by the legislature. However, no such appropriation has as yet been made for reimbursement of the owner for the cattle slaughtered in the instant case. Therefore, the legislature will be the sole judge of the manner in which the claim for such cattle shall be paid.

There is no doubt that this claim against the state of Ohio, for which no appropriation has yet been made, is an assignable claim, but I would be unable to say whether your department can legally pay the assignee of such claim the amount due the individual until the legislature has appropriated money for the payment of the same, since I do not know what conditions the legislature will impose for the payment of this money. If a general appropriation is made the auditor of state, under section 243, 107 O. L., 640, would be required to "examine each invoice presented to him * * * or sundry claim allowed and appropriated for by the general assembly, and if he finds it to be a valid claim against the state and legally due, and that there is money in the state treasury duly appropriated to pay it and that all requirements of law have been complied with, he shall issue thereon a warrant on the treasurer of state for the amount found due, and file and preserve the invoice in his office."

If the appropriation is made in the sundry bill and the legislature adopts the same language in such appropriation as did the 80th general assembly in passing

House Bill 721, 106 O. L., 834, the moneys will not be payable save on approval of a special auditing committee, consisting of the budget commissioner, the attorney-general, the auditor of state and the chairman of the finance committee of the house and senate.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1089.

COUNTY ROAD MAPS—HOW AND WHEN PUBLISHED—COPYRIGHT.

1. *Under the provisions of sections 2284-1 and 2284-2 G. C., the different county road maps of the state are published as one set of maps.*

2. *This set of maps is published as soon as information regarding the character of the improved roads of the state has been compiled and when plates showing the same have been prepared.*

3. *This set of maps shall be copyrighted from time to time when published, according to the federal laws controlling the matter of copyright.*

COLUMBUS, OHIO, March 20, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of March 4, 1918, in which you ask for additional information in reference to opinion No. 796 as of date November 20, 1917. You particularly refer to the answer given to question No. 5 of your former request.

I am not quite sure that I understand the question suggested by you, hence I am going to lay down a few fundamental propositions which will, I think, clearly cover the difficulty you may have in mind.

In your former communication and in the communication of March 4th you use the language "either singly or in separate sets." I am not quite sure as to what you have in mind in reference to the language used, but I assume that you inquire as to whether the maps of the different counties of the state could be copyrighted singly without combining them in one complete set of maps. In order that we may be sure about this proposition, let me say that it is my opinion that there is but one set of maps, that is, the maps of all the counties of the state are combined in one set of maps and are to be published as the "Highway Maps of Ohio." This seems to be fairly clear from section 2284-2 G. C., which reads in part:

> "An edition of five thousand copies of the highway maps of Ohio shall be published. * * *"

This language evidently means that there is to be an edition published covering all the county maps of the state.

Further along in the same section we find the following language:

> "Future editions of not to exceed five thousand copies each, may thereafter be published when ninety per cent of the last preceding edition has been sold. The commissioners of public printing shall have charge of the printing and binding of the editions of the highway maps of Ohio."

From this language it is clearly evident to me that the legislature did not intend that the different county maps should be singly copyrighted, but that they should be taken together in one set and published by your department, which publication should be copyrighted by you.

The second question which arises in your communication is as to when this set of maps shall be published. This is answered in section 2284-2 G. C. in the following language:

> "An edition of five thousand copies of the highway maps of Ohio shall be published as soon as information regarding the character of improved roads has been compiled and plates showing the same have been prepared."

From this language it is clearly evident that you must get information from the different counties of the state regarding the character of improved roads, so complete that you will be able to prepare plates showing the same, before you have authority to publish the highway maps of Ohio.

The next question about which you inquire is a matter of copyright. When shall you secure the copyright? This is answered in section 2284-1 G. C. as follows:

> "He shall secure a copyright of the said maps from time to time when so published."

That is, after the highway maps are published as set out in sections 2284-1 and 2284-2 G. C. You will then follow the federal law in reference to the matter of securing a copyright of the same.

I might say in passing that you will have to be very careful to follow the provisions of the federal law in reference to giving notice of copyright before any of the copies are distributed, and relative to the filing of copies with the government as provided by law, as well as other provisions of the copyright act.

I think the above answers the question you had in mind and covers the points which ought to be covered.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1090.

APPROVAL OF LEASE MADE BY WILLIAM B. LEE AND MARY W. LEE OF CERTAIN LANDS IN PIKE COUNTY.

COLUMBUS, OHIO, March 20, 1918.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—You have submitted to me, for my approval, a lease (in duplicate) made by William B. Lee and Mary W. Lee, his wife, under date of March 15, 1918, of certain lands located in Pike county, Ohio.

I have carefully examined this lease and find it correct in form and legal. I am therefore returning same to you, with my approval endorsed thereon.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1091.

A JUSTICE OF THE PEACE MAY CONDUCT THE TRIAL OF A CRIMINAL CASE ANY PLACE IN THE COUNTY—IN CIVIL CASES HE MUST HEAR THE CASE IN THE TOWNSHIP FOR WHICH HE IS ELECTED.

In a criminal case a justice of the peace may conduct the trial any place in the county. In civil cases, however, he must hear the case in the township for which he is elected and where he resides. Consent by the parties to hold the trial outside of such township will not confer jurisdiction, and the proceedings so held and the judgment so rendered are null and void.

COLUMBUS, OHIO, March 20, 1918.

The Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I have your letter of January 22, 1918, as follows:

"We find in many instances that justices of the peace, who are elected in rural districts, after election and qualification move their offices into neighboring large cities, which in many cases are entirely separate and distinct from the township from which they have been elected, and conduct their office of justice of the peace in such cities.

1. Can a justice of the peace legally operate outside of the township from which he was elected?

2. If not, what procedure could this department adopt to break up the practice?"

Sections 10223 and 10224 of the General Code read:

"Sec. 10223. Unless otherwise directed by law, the jurisdiction of justices of the peace in civil cases, is limited to the township wherein they have been elected, and wherein they reside. No justice of the peace shall hold court outside of the limits of the township for which he was elected."

"Sec. 10224. Justices of the peace within and co-extensive with their respective counties shall have jurisdiction and authority: (Here follow twelve classes of cases.)"

Section 13422 G. C. reads:

"A justice of the peace shall be a conservator of the peace and have jurisdiction in criminal cases throughout the county in which he is elected and where he resides, on view or on sworn complaint, to cause a person, charged with the commission of a felony or misdemeanor, to be arrested and brought before himself or another justice of the peace, and, if such person is brought before him to inquire into the complaint and either discharge or recognize him to be and appear before the proper court at the time named in such recognizance, or otherwise dispose of the complaint as provided by law. He also may hear complaints of the peace and issue search warrants."

Section 13423 G. C. reads in part:

> "Justices of the peace, police judges and mayors of cities and villages shall have jurisdiction within their respective counties, in all cases of violation of any law relating to:" (Here follow fifteen classes of cases.)

It will be noted that section 10223 G. C. limits the jurisdiction of justices of the peace to the township wherein such justice has been elected and wherein he resides, unless otherwise directd by law. It will be noted, too, that section 10224, above quoted, gives the justice of the peace jurisdiction throughout the county in the matters set out in that section. Justices of the peace in criminal cases, by reason of the sections quoted, have jurisdiction throughout the county.

In the case of Stark v. Treat, decided November 7, 1904, and found in 6 O. C. C. Reports, N. S., 286, it was held:

> "A justice of the peace, having jurisdiction of the subject matter, may by consent of all the parties hear the evidence and the arguments outside of the township in which he resides and for which he was elected."

The court in that case did not pass upon the question as to whether a justice of the peace could hear criminal cases outside of his township. The whole discussion was as to the provisions of section 582 of the Revised Statutes, now section 10223 G. C., and quoted above. In that case the court said:

> "When the parties have all consented that the hearing of a case shall be in a given place, there seems to be no good reason why such hearing should not be treated as a hearing within the limits of the territory in which the court has jurisdiction. There are a number of authorities that go to support the proposition that parties may consent to a hearing outside of the territorial jurisdiction of the court."

In the case of Ex parte George M. Boswell, 3 O. N. P., n. s., 555, it was held:

> "Neither the statute now in force nor the history of the law furnish authority for the holding of a criminal trial by a justice of the peace outside of the township in which he resides and was elected, and such authority is not conferred by consent of the accused."

Section 10223 of the General Code, above quoted, was formerly section 582 of the Revised Statutes. Section 12422, conferring criminal jurisdiction, was formerly Revised Statues 610. In this case Dillon, J., after quoting section 582, of the Revised Statutes (now General Code section 10223), and section 610 of the Revised Statutes (now section 13422), says:

> "So far as civil actions are concerned, section 582, above quoted, leaves no doubt. The argument is made, however, that this limitation upon the justice to the effect that he shall not hold court outside of the limits of the township in which he is elected, following as it does the matter referring to civil actions, was intended to apply to civil cases only. The very positive and sweeping terms of the clause, however, would raise great doubt that this is the true construction. The limitation is positive, and without exception provides that no justice shall hold court outside of the limits of the

township, and I am of the opinion that the limiting of the jurisdiction of justices of the peace in civil cases to the township wherein he is limited would of itself be sufficient to limit the place of his holding court, for the reason that he would have no jurisdiction in such cases outside of the township and therefore under the well settled principles of law would have no jurisdiction to hold court outside. The addition therefore of the limiting clause would be unnecessary if it were to refer solely to the jurisdiction of the justice in civil cases."

* * * * * * * * *

"In the case at bar it was further argued by the state that the defendant himself when arrested was willing to be tried within the city, as a matter of convenience, rather than travel eight or ten miles to the residence of the justice in the country. I think it hardly needs the citation of any authorities to observe the well known principles of law in a criminal case; whatever consent may be given to the jurisdiction of the person, nevertheless jurisdiction of the subject-matter can only be conferred upon a court by consent."

This case was decided on September 25, 1905.

It will be seen from the above that after this latter decision a circuit court had held that, in so far as civil proceedings were concerned, the justice of the peace having jurisdiction of the subject-matter, might, with the consent of all parties, hear the evidence and the arguments outside of the township in which he resided and for which he was elected. Also the court of common pleas had later taken the view that the justice of the peace was without authority to hold a trial, either criminal or civil, outside of the township in which he resided and was elected, and that such authority was not conferred even by consent of the accused.

In June, 1908, the supreme court of the state, in the case of Steele v. Karb, 78 O. S., p. 376, held:

"Under the provisions of section 610, Revised Statutes, a justice of the peace has 'jurisdiction in criminal cases throughout the county in which he is elected and where he resides', and his authority to hear and dispose of a criminal case in the manner prescribed by the statute, is not limited to the township for which he is elected and where he resides."

In this case the plaintiff in error had been convicted of a violation of the hunting laws before a justice of the peace of Perry township, Franklin county. The petitioner, Steele, alleged that the justice has no jurisdiction to issue the warrant, render the judgment or make the order of commitment because the justice of the peace attempted to hold court and try the charges preferred against the petitioner outside the limits of Perry township, Franklin county, for which township the justice had been elected. The supreme court in that case said:

"Let us notice that section. It provides: 'The jurisdiction of justices of the peace in civil actions, unless otherwise directed by law, is limited to the township wherein they have been elected, and wherein they reside; but no justice of the peace shall hold court outside the limits of the township for which he was elected.'

This is the law after the section was amended April 19, 1898. Sec. 93 O. L., 146. The last clause of the present section, to wit: 'But no jus-

tice of the peace shall hold court outside the limits of the township for which he was elected,' was added to the former language of the section, and so it has since remained.

That such restriction does not pertain to criminal cases is very apparent. The section itself confines the definition of jurisdiction to civil cases, and it may be reasonably surmised that prior to the foregoing amendment, the right to hold court in civil cases outside of the township for which the justice was elected, was claimed and to some extent practiced. To hedge against and settle all doubt upon the subject was the intent of the legislature in adding the clause just quoted. No such clause is found in section 610. The legislature in said section 582 provides that 'the jurisdiction of justices of the peace in civil cases, unless otherwise directed by law, is limited to the township wherein they have been elected, and wherein they reside.' While by virtue of section 610 they have jurisdiction in criminal cases throughout the county and there is no prohibition against holding criminal court outside of the township for which they were elected, and in which they reside. They have this jurisdiction throughout the county in which they are elected and where they reside. This is an old jurisdiction, as we have seen, and during the many years of its existence, the legislature has not seen fit to limit it as it has in civil cases, and we think this argues against the contention of the plaintiff in error."

It will be noted from this opinion that while the supreme court was only passing upon the jurisdiction in criminal cases, a reading of the opinion of the court plainly shows that the court was of the view that section 582 R. S., now section 10223 G. C., prevented the justice of the peace from holding court in civil cases outside of the township for which he was elected and in which he resides. Following this decision the matter was, in so far as civil cases were concerned, again passed upon by the common pleas court of Cuyahoga county. For convenience in considering this case it might be well to again, at this point, quote section 10223 of the General Code and part of section 10224:

"Sec. 10223. Unless otherwise directed by law, the jurisdiction of justices of the peace in civil cases is limited to the township wherein they have been elected, and wherein they reside. No justice of the peace shall hold court outside of the limits of the township for which he was elected."

"Sec. 10224. Justices of the peace within and co-extensive with their respective counties shall have jurisdiction and authority:

* * * * * * * *

7. To issue attachments and proceed against the goods and effects of debtors in certain cases, except that in Cuyahoga and Franklin counties the jurisdiction and authority in such cases is co-extensive only with the township for which the justice was elected or otherwise as provided in the next following section, his jurisdiction in attachment shall be co-extensive with the county."

It would be well here to bear in mind that section 10223 G. C. was formerly section 582 Revised Statutes, and section 10224 G. C. was section 583 of the Revised Statutes. It will be noted that section 10223 limits the jurisdiction of justices of the peace in civil cases to the township in which they have been elected and reside, except where the law directs otherwise. Section 10224 gives the justice of the peace jurisdiction co-extensive with the county in the classes of cases mentioned therein. Inasmuch as the supreme court has held that justices of the

peace in criminal matters may hold court outside of their township, largely because their jurisdiction in such matters is co-extensive with the county, the question arises here whether or not the justice of the peace should not hold court for the same reason outside of his own township in regard to those matters mentioned in section 10224. This proposition is discussed by the court in the case of K. B. Company v. Brenner et al., 11 O. N. P. (n. s.), 657, as follows:

> "Section 582, of the Revised Statutes, now contains the provision that no justice of the peace shall hold court outside the limits of the township for which he was elected. The style of the original act, of which section 582 was a part, confined itself to providing for the jurisdiction of justices of the peace in civil courts (S. & C., 769). Sections 583 and 584 are part of the same original act. Sections 583 and 584 provide that in certain particular matters the jurisdiction of a justice shall be co-extensive with the county. Among these provisions are those in reference to attachment cases. Attachment cases are, therefore, wholly civil cases; and while, by the provisions of sections 583 and 584, a justice has jurisdiction to issue attachments and proceed against goods and effects of the debtor, co-extensive with the county, it is manifest that these sections do not specify where he shall hear such proceedings; * * * These sections purport to give jurisdiction over the persons of the defendants and particular subject-matters. They do not provide as to the place where the justice shall hold his court in respect to such proceedings. But section 582 plainly says where he shall hold his court, which is in the township which elected him.
>
> The whole policy indicated by the constitution and the various sections in respect to jurisdiction and duties is, that the justice court is a township court of limited powers. Within the limits set up by the statute, justice judgments are valid as those of any other court. And while a justice is given jurisdiction of certain subjects throughout the county, as attachments, and over persons outside his township in certain instances, yet the legislature has seen fit to place a limit as to where he shall hold his court. Section 582 determines the place where he shall hold his court in civil actions, as well as his jurisdiction of both causes of action and persons of defendants, save in certain matters, and as to certain persons set out in the subsequent sections. None of these sections provide any other place than his township for holding court. The later sections pertain wholly to subject-matter and persons, and give him jurisdiction to hear and determine matters in controversy arising outside of his township, and over persons residing outside of his township, but are silent as to the place he may hold his court; so we are remitted to section 582 as to the place where he must hold court. This part of section 582, as to where he shall hold his court, was not provided for until 93 Ohio Laws, page 146, enacted in 1898. By that enactment the place of holding court was expressly provided for. This provision cannot be taken as merely directory. There can be no question under the constitution but that the legislature may define and regulate the place where a justice shall hold his court as well as the matters that he shall hear therein and the persons who shall be answerable therein. This power to regulate includes the power to limit his operations and duties; and when the legislature has said he may exercise certain powers and duties in civil cases in a certain manner, the manner and mode become limitations just as much as the limitation as to causes, persons and amount."

At page 664 the court said:

"And it is the conclusion of this court, upon this part of the case, that if the justice of the peace attempts to hold court in a civil action outside of the jurisdiction for which he is elected, he thereby loses his official function and becomes merely a private citizen; and that a judgment rendered in a proceeding wherein his court is held at a place other than as prescribed by the statute is null and void."

Again at page 666 the court says:

"But whether the plaintiff consented or not, in view of the construction which I have placed upon the statute, which seems to me to be its only proper construction, the consent of the party cannot change the jurisdiction of a justice of the peace so as to permit him to hold his court in any other place than that prescribed by the statute."

From a consideration of these sections and the decisions quoted, we must conclude that a justice of the peace has authority to hear and dispose of a criminal case outside of the township in which he was elected and where he resides, but that in civil cases he has no such authority, and consent by parties to the action that such justice of the peace hold court outside of his township in such civil cases will not confer jurisdiction on such justice to pronounce a valid judgment. Where the trial of civil actions is held by the justice outside of his own township, the proceedings and the judgment rendered are null and void, but I know of no suggestion to make your department as to stopping such practice.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1092.

BIDS FOR IMPROVEMENT OF STATE PROPERTY MUST BE ACCOMPANIED BY BOND EQUAL TO SUM TOTAL OF BID, AND MUST BE WITHIN THE ESTIMATE—ESTIMATE MUST BE REDUCED WHEN PART OF WORK ELIMINATED, TO DETERMINE WHETHER BID IS WITHIN THE ESTIMATE.

Since the amendment of section 2319 *G. C.,* 107 *O. L.,* 455, *a bid must be accompanied by a bond in a sum equal to the sum total of the bid. Under the provisions of section* 2323 *G. C.,* 107 *O. L.,* 456, *the bid must be within the estimate. If a certain part of the work to be done is eliminated, the estimate must be correspondingly reduced in order to determine whether or not the bid is within the estimate.*

COLUMBUS, OHIO, March 22, 1918.

Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—Under date of March 9th your board, through Hon. Frank B. O'Bleness, executive clerk, submitted for my approval contract for the erection of dormitory, design B-3, at the Ohio hospital for epileptics.

Upon examination of the papers submitted it appears that there were three bidders who bid for the said job, the lowest thereof being Charles W. Schneider & Son at $74,179.62.

Upon an examination of the bid submitted by Charles W. Schneider & Son it appears that there are two bonds accompanying the same, one in the sum of $35,000.00 signed by the J. J. Snider Lumber Co., G. O. Schoedinger, the Columbus Wire & Iron Works Co., the Huffman-Conklin Co., Charles W. Schneider, R. O. Schneider and the D. A. Ebringer Sanitary Mfg. Co. This bond, as I view it, is totally unauthorized both as to amount and sureties, a manufacturing corporation not being authorized in law to sign as surety on contract bonds.

The other bond referred to is a bond entered into by Charles W. Schneider & Son, of Columbus, Ohio, as principal and the Royal Indemnity Company of New York, N. Y., as surety, in the sum of $37,090.00.

Section 2319 G. C., 107 O. L. 455, provides in part:

> "* * * A proposal shall be invalid and not considered unless a bond, in the form approved by the state building commission, with sufficient sureties, *in a sum equal to the total sum of the proposal,* is filed with such proposal, * * *."

I am informed by your architect that the first bond referred to above was simply considered as a proposal bond and not a contract bond and was supposed to become ineffective after the bid was accepted. Whether or not that be the case, I am clearly of the opinion that the bond is invalid for the reason that some of the sureties were not authorized to sign the same. The second bond is clearly insufficient for the reason that the amount specified therein is not equal to the sum total of the bid.

The summary of the estimate of the cost and bill of materials of the dormitory referred to, approved January 9, 1918, by the state building commission, is as follows:

Excavation	$1,110 00
Concrete work	16,945 00
Cement floor finish	3,397 00
Brick furnished by the state	5,500 00
Brick work	7,850 00
Cut stone	800 00
Terra cotta .	1,200 00
Plastering	3,500 00
Painting and glazing	1,711 00
Roofing	2,685 00
Iron work	4,820 00
Wood work, hardware, etc	7,649 00
Plumbing, sewer and gas	4,760 00
Heating and ventilating	4,683 00
Electrical work	1,950 00
Total	$68,560 00

It appears, therefore, that the bid submitted is in excess of the estimate made. Section 2323 G. C., 107 O. L., 456, provides:

> "No contract shall be entered into pursuant to section 2317 at a price in excess of the entire estimate thereof. Nor shall the entire cost of the construction, improvement, alteration, addition or installation including changes and estimates of expenses for architects or engineers, exceed in the aggregate the amount authorized by law for the same."

In view of the fact that the bid received was in excess of the estimate your board proposed, so I am informed, to eliminate from the bid excavation; concrete work, footings, ducts and foundations; concrete floors, etc., and do such work itself, which was agreed to by the contractor, bringing the bid to the sum of $65,100.72. However, it was not proposed to deduct the amount estimated by the architect for such work. The estimate of the excavation was $1,110.00. The estimate for the cement floor finish was $3,397.00, and I am informed that a fair estimate of the concrete work necessary to complete the concrete footings, ducts and foundations is $3,000.00, making a sum total of $7,507.00.

Deducting the sum of $7,507.00 from $68,560.00, the total estimate, leaves the corrected estimate amounting to $61,053.00, or an excess of $4,047.72.

In view of the above I find it impossible to approve the contract as submitted and herewith return to you all the papers which you submitted.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1093.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN MIAMI AND LAWRENCE COUNTIES.

COLUMBUS, OHIO, March 22, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your two communications of March 20 and 21, 1918, in which you enclose, for my approval, final resolutions on the following named improvements:

Dayton-Covington Road—I. C. H. No. 63, section (f), Miami county.

Dayton-Covington Road—I. C. H. No. 63, section (f), Miami county (carbon copy).

Ohio River Road—I. C. H. No. 7, section "K," Lawrence county, type D.

Ohio River Road—I. C. H. No. 7, section "K," Lawrence county, type C.

Ohio River Road—I. C. H. No. 7, section "K," Lawrence county, type B.

I have carefully examined said final resolutions, find them correct in form and legal and am therefore returning the same to you with my approval endorsed thereon, in accordance with the provisions of section 1218 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1094.

COUNTY SURVEYOR MAY NOT CONSTRUCT BRIDGES BY FORCE ACCOUNT UNDER SECTION 7198 G. C.

The county surveyor is given no authority under section 7198 G. C. (107 O. L. 115) to construct bridges by force account, irrespective of what the cost of the construction might be.

COLUMBUS, OHIO, March 22, 1918.

HON. CLARE CALDWELL, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR:—I have your communication in which you request my opinion on the following:

> "Does section 7198, General Code, give authority to construct, by force account, a county bridge, the cost of which is in excess of one thousand dollars, or must the same be constructed after a contract has been awarded to the lowest bidder in compliance with sections 2333 et seq.?"

Section 7198 G. C. (107 O. L. 115) reads as follows:

> "The county surveyor may when authorized by the county commissioners employ such laborers and teams, lease such implements and tools and purchase such material as may be necessary in the construction, reconstruction, improvement, maintenance or repair of roads, bridges and culverts by force account."

Upon a mere cursory reading of said section it might be gathered that the county surveyor, when authorized by the county commissioners, can construct bridges by force account, but such is not the authority granted in the section. The authority therein contained is that the county surveyor may employ such laborers and teams, lease such implements and tools and purchase such material as may be necessary to do certain things therein set out. There is no authority granted

in said section to do anything by force account. But if authority is given either to the county commissioners or to the county surveyor, anywhere in the law, to construct or reconstruct bridges by force account, in that event the county surveyor could be authorized by the county commissioners to do the things set out in said section, viz., employ such laborers and teams, lease such implements and tools and purchase such material as would be necessary to enable him to construct a bridge by force account. However, there is no authority anywhere in the statutes, given either to the county commissioners or county surveyor, to construct bridges by force account, irrespective of the cost of same.

In an opinion rendered by me on December 13, 1917, to the bureau of inspection and supervision of public offices (No. 857), I went into detail relative to the construction which should be placed upon section 7198, supra. In that opinion, however, I was answering this question:

> "Are the commissioners of a county legally empowered to construct bridges or repair the same by force account?"

I arrived at the following conclusion in said opinion:

> "This section (Sec. 7198) does not confer power upon either the county surveyor or the county commissioners to do anything by force account. However, it does confer authority upon the county surveyor, when authorized by the county commissioners, to employ laborers, lease implements and purchase material for the construction, etc., of roads, bridges and culverts by force account. This makes it necessary for us to look elsewhere for the power and authority to construct by force account, and when we do this we find no other provision permitting of the construction by force account, than section 6948-1 supra, and this goes no further than to permit the construction of *roads* by force account."

In said opinion I found that the term "roads" does not include bridges.

Hence answering your question specifically, it is my opinion that the provisions of section 7198, supra, do not confer upon the county surveyor the authority to construct bridges by force account, irrespective of what the cost of the construction might be.

I am enclosing a copy of said opinion No. 857 for your consideration.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1095.

SCHOOL DISTRICT NOT LIABLE ON CONTRACT AT SO MUCH PER DAY FOR TRANSPORTATION OF PUPILS WHEN SCHOOLS ARE CLOSED ON ACCOUNT OF ROADS BEING IMPASSABLE—WHEN CONTRACT IS SO MUCH PER DAY FOR FULL SCHOOL YEAR THE DISTRICT MUST PAY FOR EACH DAY UNLESS RELEASED FROM SAME IN SOME MANNER PROVIDED BY LAW—DRIVER NOT COMPELLED TO PERFORM SERVICES ON SATURDAY.

Where a school district enters into a contract with a person to drive a school wagon at so much per day, and there is no provision therein covering the time the school is closed, and the schools are closed because the roads are impassable on account of snow drifts, such school district is not liable to the driver for time he did not perform the service.

Upon a contract providing that the driver is to serve for the full school year at a price per day, payable monthly, for services well and truly rendered in accordance with specifications attached to the contract, the driver is entitled to compensation for each day of the full school year whether school be held or not, unless the school board is released from the obligation of the contract in some manner recognized by law, and if they are so prevented from having school by the action of public officials under lawful authority, they are excused from paying for the days upon which they are so prevented.

Driver is not required to perform services on Saturday.

COLUMBUS, OHIO, March 22, 1918.

HON. P. A. SAYLOR, *Prosecuting Attorney, Eaton, Ohio.*

DEAR SIR:—Under dates of February 15 and 20, 1918, you have submitted copies of two contracts entered into by school districts in your county for the employment of a person to drive a hack for the conveyance of pupils to the school. You state:

> "These hack drivers were unable to drive for a part of the time because of the fact that the schools were closed down on account of the lack of fuel with which to heat the buildings, and also because it was impossible for them to transport the pupils for a part of the time on account of the roads being impassable because of snow drifts," etc.

Two subjects are involved in the consideration of these questions. First, the proper interpretation or meaning of the contracts; second, the operation upon them of the causes beyond the control of the parties preventing complete performance.

We will take up first the Camden contract, which is simplest.

The provision necessary to notice is as follows:

> "That the party of the first part has this day employed the party of the second part at the sum of $3.20 per day, to drive the school wagon on the route known herein as No. 4, and which route is more particularly described as follows:"

There are many other provisions providing for all details arising out of the contract, but the above is sufficient to dispose of the question involved.

This contract has no term giving it any duration. It does little else than fix the price the driver is to receive for his services. It might be terminated by either party at any time. Under it plainly the driver is entitled to no compensation except for services actually performed; that is, for the days he actually hauled, as the statement is only that the first party has employed him at that price. It is unnecessary to consider whether he was not entitled to do all the hauling until such time as he were discharged. There is no doubt as to the fact that he is not entitled to recover anything for days when he did not haul by reason of the closing of school whether on account of impassable condition of the roads or lack of fuel.

The other contract is entirely different. The controlling clause after the commencement reciting the making of the agreement is as follows:

> "Witnesseth, That said party of the second part agrees to transport the pupils to the Central school building from the district or districts hereinafter specified for the full school year, in accordance with the specifications which form a part of this contract for the sum of $_____ per day, payable monthly, which sum said party of the first part agrees to pay for services well and truly rendered in accordance with the specifications of this contract."

Here we have a provision really requiring interpretation or construction, because in a way containing ambiguity. The last statement above quoted would seem to restrict the per diem pay to the days upon which he actually hauled, as the pay is to be for services well and truly rendered; that is to say, he is to receive so much per day for services actually rendered. However, looking to the full text of the provision, other language seems to require the opposite construction. He agrees to do this transportation for the "full school year." "School year" is emphasized in the kind of type used in the contract, being on a printed form.

Now the provisions on both sides showing the consideration each party gives the other, or the mutual agreement of the parties, is all in one sentence. He is to render the services for the *full* school year for the sum of $3.00 per day. Here you have for this purpose your whole contract; he is to do the hauling for the full school year for the sum of $3.00 per day, and this not being one of those poor rules which do not work both ways, you may transpose the sentence and say he is to have $3.00 per day for doing the hauling for the full school year. The word "full" must be given some application. The presumption is that every word in a document is used to add some meaning to it. This is not always true, as frequently there are instances where words are used as opposites or synonyms or repetition, but it is ordinarily not proper to so consider them if they are capable of such construction as gives any added meaning.

While in a sense the school year is the full school year, because anything is all of that thing, yet this is not universally true. A man may still be a man, even though he be a one-legged man, and a basket of potatoes might hold a few more. In such cases if language is used indicating that the thing must be complete, it is plain to be seen that such language does have additional effect.

Therefore, in construing this whole provision together, it may be said that the driver has well and truly rendered services on every day of the school year upon which he hauled pupils, or was ready and willing and able to do so.

This conclusion is strengthened by the connection in which the phrase "well and truly rendered" is found. It is,

> "which sum said party of the first part agrees to pay for services well and truly rendered in accordance with the specifications of this contract."

So that it seems to be rather a requirement of compliance with the specifications than a limitation upon the amount of compensation. This does not contemplate the question of impossibility by act of God, or prevention by act of law.

As to those days upon which he failed to haul because of the impassable condition of the roads, he is not entitled to recover, because he himself was not able to perform. Whether an unprecedented snow drift be classed as *actus dei* or *vis maior* in the legal sense, need not be determined for this purpose as the terms of the contract made by the parties fully settle the question of liability, in connection with well known and established principles.

As to the other question, however, the closing of schools for lack of fuel, another element enters. It is understood that a portion of the time they were so closed was simply on account of the impossibility of obtaining coal, and for part of the time they were prevented, or would have been prevented by the order of the fuel administrator even had it been possible really to secure fuel.

As to that portion of the time when it was simply a question of not having fuel, the answer is sufficiently indicated by what is stated above. The driver was ready and willing and able to perform the contract. Nothing interfered with him except that there was no school, and consequently the pupils could not or would not go.

As indicated above, the proper interpretation of his contract gives him pay for the full school year, he being ready, etc., as above stated. The contract, therefore, entitled him to pay for this time.

When it comes to a question of remedy, it cannot be said that he is necessarily entitled to the last cent; if it be a breach of the contract on the part of the school board, he would be entitled to be made whole under the form of damages, which might be a more or less different sum.

Coming lastly to the question of liability at such times as the schools were closed by act of officials under the law, the authorities seem to be all agreed that this relieves parties from the obligations of contracts. The subject is fully discussed by a recent text writer.

Elliott on Contracts, Section 1901.

This section is headed "Impossibility Caused by Subsequent Law." An examination of it, however, and of authorities cited, shows that impossibility created by law includes administrative acts of officers in pursuance of law.

Among the cases on the subject is one by the supreme court of New Hampshire.

Theobald v. Burleigh, 66 N. H. 574.

The syllabus is:

> "Where the plaintiff's failure completely to perform his contract is due to the fault of the defendaant, or to the act of the law without fault of

> either party, he can recover what his services were reasonably worth, and the defendant is not entitled to damages for the plaintiff's non-performance."

It was a contract to move a building, and after part performance, completion was prevented by an injunction on behalf of a city restraining the location of the building on the lot to which it was moving until permission received as required by an ordinance.

Out of many similar cases, one more will be selected by the court of appeals of New York.

Heine v. Meyer, 61 N. Y. 171-176.

In this case the contract was for the alteration of a building. After it had begun, completion was prevented by an order of the superintendent of buildings, under authority given him by law. The chief justice in the opinion quotes from another opinion in a former case of the same court, as follows:

> "Judge Gardiner, giving the opinion of the court, after stating that the plaintiffs were prevented, by the authority of the state, from completing their contract, said they were entitled to recover for the work performed by them at the contract price; that the performance of the required condition, entitling them to payment under the contract, 'became impossible by the act of the law, and of course the plaintiffs were entitled to recover without showing a compliance with the agreement in this particular.' That decision was in accordance with a well recognized exception to the general rule or principle of law that a contracting party who absolutely engages to do an act must perform it notwithstanding any accident or other contingency not foreseen by him or within his control, yet if the performance is rendered impossible by the act of the law, then he is excused."

These cases both hold that the contractor in such circumstances may recover at the contract price, or at least recover the value of service done by him under the contract. This is equivalent to limiting his pay to that amount, and is in strict accordance with the principle that where the carrying out of a contract is prevented by authority of law, both parties are absolved from its obligations.

It follows therefore that this driver cannot recover for the days that school was not held because of the order of the fuel administrator closing the same.

You are therefore advised that under the Camden contract nothing can be recovered by the driver except for the days that he actually hauled pupils. Under the other contract, the driver can recover for the full school year, except for such days as school was prevented from opening by the order of the fuel administrator or roads were impassible.

You are, however, cautioned that this opinion is confined to the two contracts submitted, and is not intended to apply to any other case, except in so far as the principles above announced have proper application thereto.

As to your remaining question, these contracts are made in contemplation of

the well known custom that school is not held on Saturdays, and the driver is therefore not required to perform services upon that day.

Yours very truly,

JOSEPH MCGHEE,
Attorney-General.

1097.

FALSE STATEMENT IN APPLICATION FOR LUMP SUM AWARD TO INDUSTRIAL COMMISSION NOT A CRIME UNLESS STATEMENT MATERIAL.

Where in a proceeding before the Industrial Commission of Ohio on the hearing of the application of one Mrs. K. for the allowance of a lump sum award off compensation for the death of a former husband, one P. M. K. falsely stated in an affidavit used at said hearing that he was the brother of said Mrs. K. when as a matter of fact he was her husband.

HELD: That said P. M. K. had not stated a falsehood as to a material matter in said proceeding before said commission and therefore had not committed an offense under section 12842 *G. C.*

COLUMBUS, OHIO, March 22, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have your communication requesting my opinion on the following:

"Your opinion is desired as to whether the following case is a proper one for the institution of action for the prosecution for perjury of one P. M. K. The facts are as follows:

M. K. was injured while in the course of his employment, which injury resulted in his death, and the commission made an award in favor of his widow, Mrs. M. K. and four minor children. On October 22, 1917, the widow made an application to the commission for the payment to her in a lump sum of the balance due upon the award, approximately $1,500.00, for the expressed purpose of purchasing a home. The property she desired to purchase was priced at $4,250.00, and the commission requested the widow to furnish evidence that she would be able to maintain the children and make the payments on the balance, over and above the amount remaining unpaid on her award. In order to induce the commission to make a lump sum payment, P. M. K., on November 5, 1917, made an affidavit before R. F. B., a notary public of Mahoning county, Ohio, to the effect that he was employed by the Erie Railroad Company as brakeman, earning an aver-

age monthly wage of $120.00, and stating that he agreed to make the monthly payments on the property sought to be purchased by Mrs. K., his sister.

Investigation developed the fact that Mrs. K. and the affiant were married on or about October 16, 1917, and therefore were husband and wife instead of brother and sister at the time of the making of the affidavit aforesaid. The lump sum award was not granted.

Your opinion is desired in this case for the reason that the commission wishes, if it is proper, to take up with the prosecuting attorney the matter of prosecuting Mr. K."

You have also furnished me a copy of the above mentioned affidavit of P. M. K., which is as follows:

"YOUNGSTOWN, OHIO, Nov. 5, 1917.

Industrial Commission, Columbus, Ohio.

GENTLEMEN:—I am employed by the Erie Railroad Company as brakeman and my average monthly wages amount to $120.00, and I agree to make the monthly payments on the property which is being purchased by my sister, Mrs. M. K.

P. M. K.

Sworn to and subscribed in my presence this 5th day of November, 1917.

R. F. B.,

(SEAL) *Notary Public."*

Section 12842 G. C., as amended 104 O. L., 7, reads:

"Whoever, either orally or in writing, on oath lawfully administered, wilfully and corruptly states a falsehood as to a material matter in a proceeding before a court, tribunal or officer created by law, or in a matter in relation to which an oath is authorized by law, including an oath taken by any person making any affidavit required for verifying or filing a nominating, initiative, supplementary or referendum petition, or part thereof, is guilty of perjury and shall be imprisoned in the penitentiary not less than one year nor more than ten years."

It is noted from the foregoing section that to constitute perjury the matter falsely sworn to must be material. The following is said in 30 Cyc., 1418, in reference to the test of materiality:

"False testimony is deemed material not only when directly pertinent to the main issue, but also when it has a legitimate tendency to prove or disprove any material fact in the chain of evidence. It is enough if it be circumstantially material, although not in itself sufficient to establish the issue. The guilt of one who has falsely sworn does not depend upon the result of the proceedings in which it occurred, and if a person swears falsely in

respect to any fact relevant to the issue, he is guilty of perjury, although the case failed from defect of proof of another fact, and although the other fact alleged had no existence."

As you have set forth in your request, the false statement by Mr. P. M. K. consisted in his stating that he was the brother of Mrs. K. when as a matter of fact he was her husband. I am unable to see how the fact of whether Mr. P. M. K. was the husband or brother of Mrs. K. was material in any way in so far as the consideration of the industrial commission as to her right to a lump sum award was concerned. It seems to me that this fact was absolutely immaterial since it was not directly pertinent to the main issue of whether she was entitled to a lump sum award, nor did it have a legitimate tendency to prove or disprove any material fact in the chain of evidence to show her right to such an award.

I advise you, therefore, it is my opinion from the facts given that said P. M. K. has not stated a falsehood as to material matter in the proceeding before you and therefore has not committed an offense under the perjury section of the criminal code.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

1098.

APPROVAL ABSTRACT OF TITLE TO LAND DEEDED BY DARIUS F. HIATT TO OHIO STATE UNIVERSITY.

Approval of abstract of title to land situated in Clinton township, Franklin county, deeded to Ohio State University by Darius F. Hiatt.

COLUMBUS, OHIO, March 23, 1918.

HON. CARL E. STEEB, *Secretary Board of Trustees Ohio State University, Columbus, Ohio.*

DEAR SIR:—You recently submitted to this department abstract of title covering the following described premises:

"Situated in the county of Franklin, in the state of Ohio, and in the township of Clinton, and bounded and described as follows:

Being a part of the third quarter of the first township of the eighteenth range, United States military lands:

TRACT 1. Beginning at a point in the west boundary of said quarter township number three now known as North Starr avenue being the S. W. corner of a 10-acre tract of land owned by Frank Miller et al., and in the center line of North Starr avenue; thence south 109 poles, 4½ links to a point; thence east 73 poles, 4½ links to a point; thence north 109 poles, 4½ links to a point; thence west 73 poles, 7 links to the place of beginning containing fifty (50) acres more or less, excepting therefrom a strip fifty-two (52) feet in width by 1840.40 feet in length off of the east side there-

of, conveyed by Jacob E. Slyh to Ephraim Sells on April 3, 1891, by deed recorded in Deed Book 223, page 545, recorder's office, Franklin county, Ohio, containing 2½ acres.

TRACT 2. Beginning at a stake in the northwest corner of the lands formerly known as the Daniel Lakin lands; thence with the west line of said Lakin land, S. 2° 30′ W., a distance of 32.61 poles to a stake in said line, the northeast corner to a 10-acre tract or lot formerly sold by Eli M. Lisle to John H. Reed; thence with the north line of said 10-acre tract, N. 88° W., 68.69 poles to a stake in the west line of said quarter section; thence with the west line of said quarter township, N. 32.61 poles to a stake or stone, northwest corner to the land formerly known as the Lisle land; thence with the north line of said Lisle land S. 88° E. 70 poles to the place of beginning containing 14 acres of land more or less, subject, however, to the rights of the county of Franklin to a strip of land 60 feet wide running east and west across said tract and joining on the east end a strip 60 feet in width deeded by Ephraim Sells to the county of Franklin for road purposes, said 60-foot strip having been conveyed by Jacob E. Slyh to the county of Franklin, April 3, 1891, and recorded in Deed Book 224, page 269, recorder's office, Franklin county, Ohio.

The aforesaid tracts join each other north and south and being the same premises conveyed to Charlotte C. Pheneger by Jacob E. Slyh, on September 19, 1905, by deed recorded in Deed Book 410, page 454, recorder's office, Franklin county, Ohio, and deeded by the said Charlotte C. Pheneger to Darius F. Hiatt by deed dated the sixteenth day of March, 1918."

With the abstract you also submitted a deed to said premises from Darius F. Hiatt and Ella E. Hiatt, his wife, who releases her dower in said premises, to the state of Ohio.

I have carefully examined the abstract, dated March 9, 1918, and the addition thereto, and find that the title to the premises described is in the name of Darius F. Hiatt; that the following special assessments are charged against said land for the improvement of Ridgeview road:

On 47.81 acres—$19.12, and 48c interest.
On 14 acres—$ 4.48, and 11c interest.
Payment due in July.

and that the deed submitted will convey a clear title to the state of Ohio for the premises described, save and except special assessments thereon not due, which under the deed are excepted.

The taxes for the last half of the year 1917, due June, 1918, amounting to $46.33, are a lien on the premises and the amount necessary to pay the same should be retained from the purchase price.

Finding the title to said premises to be in said Darius F. Hiatt and finding the deed to be in proper form, duly executed and proper documentary stamp affixed, I hereby approve said title and return to you the deed and abstract submitted.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1099.

APPROVAL OF CONTRACT BETWEEN THE BOARD OF TRUSTEES OF MIAMI UNIVERSITY AND A. W. SIMS AND ANDREW BENZING.

COLUMBUS, OHIO, March 23, 1918.

HON. R. M. HUGHES, *President Miami University, Oxford, Ohio.*

DEAR SIR:—The board of trustees of Miami University, through its architect, has submitted to this department two contracts:

1. Contract entered into on December 31, 1917, between A. W. Sims and Andrew Benzing, a partnership doing business as Sims & Benzing, of Hamilton, Ohio, and the board of trustees of Miami University by its special building committee, for the construction and completion of the addition to the chemistry building, Miami University, exclusive of plumbing, heating and ventilating or equipment, for the sum of $7,233.13, together with bond securing same.

In the contract it is provided that "at the option of the owner the contractors shall furnish any or all of the equipment at the price named in the proposal." I am informed that the equipment referred to is table and shelves that, if the option be exercised, the contractor is to build and put in the plumbing and is not what may be known as movable furniture, and would not therefore come within the provisions of section 1847 as amended 107 O. L., 427.

2. Contract entered into on December 31, 1917, between Joseph Wespiser of Oxford, Ohio, and the board of trustees of Miami University by its special building committee for the construction and completion of the plumbing, heating and ventilating for the addition to the chemistry building, Miami University, in the sum of $1,175.00, together with bond securing same.

I have obtained from the auditor of state a certificate in each case to the effect that there is money available from the appropriation for the payment of the sums called for by the two contracts in question, and finding said contracts to be in compliance with law I have this day approved the same and filed the same in the office of the auditor of state.

I have returned to your architect, Hon. F. L. Packard, the other papers submitted in the matter.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1100.

OHIO STATE UNIVERSITY REQUIRED TO OBTAIN PERMIT FROM STATE PLUMBING INSPECTOR FOR WORK DONE AT THE UNIVERSITY—FEES.

Under section 1261-6 *G. C., as amended in* 107 *O. L., page* 608, *the Ohio State University is required to secure a permit from the state plumbing inspector for any plumbing work to be done in such institutions, except in cases of leaks and repairs in existing plumbing, and the fee prescribed in this section must be paid to the plumbing inspector by the university.*

COLUMBUS, OHIO, March 23, 1918.

HON. A. W. FREEMAN, *Commissioner of Health, Columbus, Ohio.*

DEAR SIR:—You have just advised me that you are now desirous of an opinion based on your letter of September 17, 1917, as follows:

> "Some weeks ago you telephoned me in regard to the inspection of plumbing being installed at the state university; the matter having been presented to you by Mr. Steeb. Mr. Steeb's visit to you was because of a requirement of this department that the university file an application and pay the legal fee for plumbing inspection before the work is done, as is required of all other public institutions. I was under the impression that Mr. Steeb had submitted to you for your opinion the question as to whether or not the Ohio State University was exempt from paying inspection fees.
>
> The law creating the office of state inspector of plumbing, section 1261-1 et seq., G. C. 101 O. L., p. 395, originally provided:
>
> 'Section 1261-6. For each inspection and certificate so issued, except on inspections of state buildings or structures, he shall charge a fee of five dollars, such fee to be turned into the state treasury. If upon first inspection such work is found in sanitary condition, no charge is made for such inspection or certificate.'
>
> This law was amended at the last session of the general assembly, 107 O. L., 608.
>
> You will note that the present statute does not exempt 'state buildings or structures' from the payment of fees. Plumbing is now being installed in certain buildings at the state university without application having been made or a fee paid, and I shall be glad to have your opinion as to whether or not this department shall demand payment of fees from the Ohio State University and other similar institutions, which under the provisions of the old law were exempt from such payments."

The act to which you refer is found in 107 O. L., page 608. Section 1261-6, as amended in said act, reads:

> "No plumbing work shall be done in this state in any building or place coming within the jurisdiction of the state inspector of plumbing except in

cases of repairs or leaks in existing plumbing, until a permit has been issued by the state inspector of plumbing and the executive office of the state board of health. Before granting such permit, an application shall be made by the owner of the property or by the person, firm or corporation who is to do the work. Such application shall be made on blanks prepared for the purpose, and each application shall be accompanied by a fee of one dollar, and an additional fee of fifty cents for each trap or vented fixture up to and including ten fixtures, and for each trap or vented fixture over ten a fee of twenty-five cents. The fees so collected shall be paid into the state treasury and credited to the general revenue fund. Whenever a re-inspection is made necessary by the failure of the plumbing contractor to have the work ready for inspection when so reported, or by reason of faulty or improper installation, he shall pay a fee of ten dollars for each such inspection."

Section 1261-14 reads:

"Any person or persons, owner, agent or manager refusing, failing or neglecting to comply with any of the provisions of this act, shall be deemed guilty of a misdemeanor, and upon conviction shall be subject to a fine of not less than ten nor more than one hundred dollars, or imprisoned for not less than ten nor more than ninety days, or both; but no person shall be imprisoned under this section for the first offense, and the prosecution shall always be as and for a first offense, unless the affidavit upon which the prosecution is instituted contains the allegation that the offense is a second or repeated offense."

Your inquiry raises two questions: (1) Are the buildings at the Ohio State University within the jurisdiction of the state plumbing inspector, and (2) can he require such university to pay fees provided for in section 1261-6?

As to your first question, I observe that section 1261-3 provides:

"Such inspectors shall not exercise any authority in municipalities or other political subdivisions where in ordinances or resolutions have been adopted or being enforced by the proper authorities regulating plumbing or prescribing the character thereof."

However, in an opinion of this department, found in the Annual Report of the Attorney-General for 1914, volume 2, page 1307, this section was quoted in a statement made that it "does not operate to deny to the state plumbing inspector authority to inspect" plumbing at the Ohio State University. It was also held in that opinion that the state building code applied to the Ohio State University. I am informed that since this opinion was rendered the state plumbing inspector has assumed jurisdiction of work done at the Ohio State University and the various institutions of the state, and I shall in this opinion look upon the question of the jurisdiction of the state plumbing inspector as no longer an open one.

Section 1261-6, before its amendment in 107 O. L., 609, provided that certain fees were to be paid for each inspection by the plumbing inspector. Section 1261-6 now provides that the fees be paid before the work is performed, viz., when the permit is issued. Section 1261-6, before amendment, provided that certain fees

should be charged for each inspection and certificate so issued, *except on inspections of state buildings or structures.* In the amendment in 107 O. L., this clause "except on inspections of state buildings and structures" was dropped altogether by the legislature from this section. This to my mind clearly indicates the legislative intention to charge fees under this section to the various state departments affected. Even though it were not for this provision, the same result would be effected by section 280 of the General Code, which reads:

> "All services rendered and property transferred from one institution, department, improvement or public service industry, to another, shall be paid for at its full value. No institution, department, improvement, or public service industry, shall receive financial benefit from an appropriation made or fund created for the support of another. When an appropriation account is closed, an unexpended balance shall revert to the fund from which the appropriation was made."

I am of the opinion, therefore, in direct answer to your question, that section 1261-6 of the General Code, as amended in 107 O. L., p. 608, requires the Ohio State University to secure a permit from the state plumbing inspector for any plumbing work to be done in such institution, except in cases of leaks or repairs in existing plumbing, and that the fee prescribed in this section must be paid to the plumbing inspector by the university, as provided. Very truly yours,

JOSEPH MCGHEE,
Attorney-General.

1101.

MUNICIPAL CORPORATIONS MAY PROVIDE A LICENSE FEE FOR DOGS.

Municipal corporations may legally provide a license fee for a dog under authority of section 3633 General Code, and such power is not superseded or taken away by the enactment of the act of 107 Ohio Laws, 534, which provides for the registration of dogs by the state.

COLUMBUS, OHIO, March 25, 1918.

The Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Under date of January 28th you submit the following inquiries:

"STATEMENT OF FACTS.

> For some years most cities of the state of Ohio have maintained a dog pound, have had a dog catcher, and have assessed and collected dog license.

Question 1: In view of amended H. B. No. 4, 107 O. L. 534, can municipalities now legally tax a dog license in addition to the other dog taxes?

Question 2: If not, should not such cities discontinue the operation of the dog pounds and the service of the dog catcher?"

Section 5652 General Code, as amended in 107 Ohio Laws, 534, reads as follows:

"Every person who owns, keeps or harbors a dog more than three months of age, annually, before the first day of January of each year, shall file together with a registration fee of one dollar for each male or spayed female dog, and a registration fee of two dollars for each female dog unspayed, in the office of the county auditor of the county in which such dog is kept or harbored, an application for registration for the following year, beginning the first day of January of such year, stating the age, sex, color, character of hair, whether short or long, and breed, if known, of such dog, also the name and address of the owner of such dog."

There are other provisions in this act pertaining to the registration by every owner of a kennel of dogs and providing for the enforcement of the act.

Section 5652 General Code, prior to the above amendment, read as follows:

"In addition to the proper tax on any valuation that is fixed upon dogs by the owners, which shall be included with the personal property valuation and taxed therewith, the auditor shall levy against the owner thereof one dollar on each male and spayed female dog, and two dollars on each unspayed female dog. The receipts from such tax shall constitute a special fund to be disposed of in the payment of sheep claims, as provided by law."

Prior to the above amendment, municipal corporations have been exercising the power of enacting ordinances providing for the licensing of dogs. This authority is granted by section 3633 General Code. It will be observed that the fees provided for in the old section 5652 General Code and in the amendment thereof, are the same. The difference is that now all dogs must be registered and must wear a tag or be subject to impounding.

Section 3633 General Code, enumerates one of the powers of municipal corporations, and reads as follows:

"To regulate, restrain and prohibit the running at large, within the corporation, of cattle, horses, swine, sheep, goats, geese, chickens and other fowls and animals, and to impound and hold them, and on notice to the owners, to authorize the sale of them for the penalty imposed by any ordinance, and the cost and expenses of the proceedings; to regulate or prohibit the running at large of dogs, and provide against injury and annoyance therefrom, and to authorize the disposition of them when running at large contrary to the provisions of any ordinance."

The question now arises as to whether or not the authority of council to enact ordinances to license dogs under the above section has been superseded by the act of the legislature which now requires dogs to be registered under the state law.

This question as to the licensing of motor vehicles is mooted, but not decided in the case of Frisbie v. City of Columbus, 80 O. S., 686, wherein the syllabus reads:

> "The ordinance of the city of Columbus, passed March 20, 1905, to license and regulate the use of streets of the city by persons who use vehicles thereon, in so far as it applies to motor vehicles, was annulled by the act passed April 2, 1906 (98 O. L. 320), and was not revived by the repeal of that act by the act passed May 9, 1908 (99 O. L. 538)."

On page 690, Summers, J., says:

> "Having reached this conclusion it is not necessary to determine whether municipalities under the statutes as they exist since the passage of the law of 1908, 'to provide for the registration, identification and regulation of motor vehicles' (99 O. L. 538) may regulate and license automobiles."

In the case of Stern v. City of Columbus, 16 N. P. (n. s.) 353, Evans, J., at the conclusion of his opinion, on page 357, says:

> "I am of the opinion that said ordinances are not invalid upon any of the grounds claimed in the petition, and that such is not a tax. On the other hand, I am of the opinion that such are valid and constitutional ordinances. By this I do not intend to hold that No. 11 in ordinance No. 27776, passed December 22, 1913, providing for license fees for motorcycles or autocycles, is within the power of council to enact, for the reason as I understand that such are now licensed by the state by a recent enactment of the legislature, but this execption does not invalidate all other provisions of said ordinance. For above reasons, the motion for a temporary injunction is overruled."

This is obiter dictum as that question was not involved in that case.

Hon. U. G. Denman, in an opinion recorded at page 1013 of the annual reports of the attorney-general for 1910-1911, makes this statement:

> "It is elementary that if the general assembly has itself enacted laws of state wide application on either of the subjects concerning which you inquire, the city may not exercise its general regulative and licensing powers with respect thereto. That is to say, if there are laws relating to the licensing of chauffeurs and the qualification of persons operating motor vehicles within the state, such laws should supplant and qualify a general municipal power to regulate the use of public streets and to license persons using vehicles upon such streets."

He does not cite any authority in support of the above conclusion.

The rule is stated at section 714 of Dillon on Municipal Corporations:

> "Municipal legislation pursuant to statutory authority has, almost of necessity, followed the same general lines as the various statutory requirements, and it has been held that the mere fact that the use and operation of automobiles are regulated by statute, does not preclude a municipal corporation under properly delegated authority from adopting compatible

local ordinances and regulations, unless the statute should be framed in such terms as necessarily or plainly to preclude municipal regulation of the subject."

McQuillan on Municipal Corporations at section 878 states the same rule:

"The general doctrine is supported by the weight of judicial authority that an act may be made a penal offense under the statutes of the state, and that further penalties may be imposed for its commission or omission by municipal ordinance. But to authorize such ordinance the local corporation must possess sufficient charter power and such power must be exercised in the manner conferred and consistent with the constitution and laws of the state."

In the case of Brazier v. Philadelphia, 215 Pa., 297, the syllabus reads:

"The ordinance of the city of Philadelphia of December 2, 1902, requiring the owner of an automobile to take out a license and to carry a city license tag is not repealed or superseded by the act of April 9, 1905, P. L. 217, which provides that the owner of an automobile shall procure a license from the state highway department of the commonwealth, and that state license tags shall be carried exhibiting the license number and the number of the year."

In the case of the city of Fairfield v. Shallenberger, 135 Ia., 615, it is held:

"The legislature in the exercise of its police power may require a state license for the practice of medicine and at the same time authorize municipalities to require a license of itinerant physicians."

On page 619, Sherwin, P., says:

"* * * That a license may be required from the same person for the same business by the state and by its municipalities is a rule of general application. 21 Am. & Eng. Enc. of Law (2nd Ed.), 778-815; Leavenworth v. Booth, 15 Kan. 627; State v. Foster, 22 R. I. 163; Justice v. City of Atlanta, 122 Ga. 152."

In the case of Simpson v. Savage, 1 Mo., 359, the syllabus reads:

"An auctioneer, in the city of St. Louis, is compelled to take a license from the state, as well as from the corporation, or be liable to a penalty."

In the above case a statute had been enacted which required auctioneers to secure a license from the state and thereafter specific authority was given to the city to require a license from auctioneers. It was contended that the state law no longer applied to the city of St. Louis. This contention, however, was not upheld.

In the case of Ex Parte Siebenhauer, 14 Nev., 365, it is held that the city under its charter, and the county under the state law may require a license from the same trade, business or profession.

In the case of Ex Parte Snowden, 12 Cal. App. 521, it is held:

"The mere fact that the state, in the exercise of its police power, has made certain regulations does not prohibit a municipality from enacting additional requirements so long as there is no conflict between the two, and so long as the requirements of the municipal ordinance are not unreasonable or discriminating, both will stand. The power of the city to pass the ordinance in question was conferred by its freeholder charter, and the amendments thereto, adopted prior to its passage."

In the above case no additional license was required.

The weight of authority is to the effect that where power is granted to a municipal corporation to require a license to be taken out for a particular thing or business, and there is also a provision in the state law to license or register the same thing or business, that such thing or business is required to comply with both provisions unless the power of council is prohibited by statute when covered by the state law.

There is no provision in the act of 107 O. L. 534, which prohibits a city or village from requiring license fees for dogs under authority of section 3633 G. C.

It is my opinion, therefore, that municipal corporations may still exercise such power under the authority of said section 3633 General Code.

Yours very truly,

JOSEPH MCGHEE,

Attorney-General.

1102.

CENTRALIZATION OF SCHOOLS—WHO MAY VOTE ON THE QUESTION.

1. *In a township in which there are seven rural school districts the qualified electors of all of such districts may vote on the question of centralizing the schools of such township district.*

2. *It is not permissible under the provisions of section* 4726-1 *G. C. for a part of the school districts of a township to vote on the centralizing of the schools of such districts and prevent the electors of other districts, located in whole or in part within the township, from participating in said election.*

3. *A part of the districts of a township may be united as one district and then provide for centralization under the provisions of section* 4726 *G. C.*

4. *The fact that certain territory is located in another civil township, but is attached to the territory of a township where all the districts desire to vote on the question of centralizing the schools of such township, will not prevent the electors residing therein from participating in the election upon the question of centralizing the schools of such township under section* 4726-1 *G. C.*

COLUMBUS, OHIO, March 25, 1918.

HON. C. A. STUBBS, *Prosecuting Attorney, Celina, Ohio.*

DEAR SIR:—Your request for my opinion reads as follows:

"Franklin township, of Mercer county, is considering the centralization of their schools under G. C. 4726-1.

There are seven special school districts in this township, three of which contain portions of adjoining townships.

1. Can centralization extend beyond the township lines?
2. If not, what action must be taken by the three districts partly in other townships before the township can proceed with centralization?
3. May the four districts wholly within the township centralize the schools in those four districts?
4. If so, will a majority vote of all votes cast in all four districts be sufficient for centralization, or must centralization carry in each district separately?"

Section 4726-1 G. C., cited therein, provides as follows:

"In townships in which there are one or more school districts, the qualified electors of such school districts may vote on the question of centralizing the schools of said township districts, or of special school districts therein, without interfering with the existing school district organization until the result of the election shall have been determined. If at such election in any township a majority of all the votes cast shall be in favor of centralizing the schools in said township, the probate judge of the county shall create a new board of education for the said township, without delay, by selecting from the several boards of education thus consolidated, five suitable persons, giving each former district its fair representation in such selection, which such five persons so selected shall constitute the board of education for said township until the first township election thereafter; at such first township election thereafter the electors of such township shall elect two members of the board of education for two years, and three members to serve for three years, and at the proper elections thereafter their successors shall be elected for four years. If a majority of the electors in said township vote against said centralization at the time above designated, then the several school districts in said township shall proceed as though no election had been held."

The section is not clear when considered with a view to answering your several questions, but I am convinced from a careful consideration of same that all the school districts of a township must participate, where action is desired, under the terms of said section. While it was formerly the policy of the school law of Ohio, and provision was made therefor, that each civil township in itself should consist of a township school district, that provision of law no longer exists and the policy seems now to be that township lines shall not be seriously considered in forming or arranging school districts. In fact, when the new school code was enacted in 1914, section 4736 thereof provided that:

"In changing boundary lines the board may proceed without regard to township lines, and shall provide that adjoining rural districts are as nearly equal as possible in property valuation."

This provision no longer remains in said section but the policy thereof seems to be constantly followed in practice. Said section 4726-1 says, "in townships in which there are one or more school districts." It does not say where there are one or more entire school districts, but simply that there is more than one school district; that then the qualified electors of such school districts, meaning of course all the school districts of the township, may vote on the question of the centralizing of the schools of said township districts. If the language would say "may vote upon the question of the centralizing of the school districts lying only within the

township lines of the civil township," or would specifically provide that all territory outside of such township lines should be excluded and residents thereof not permitted to participate in such election, a different conclusion might be reached, but, as noted above, considering the language in its present form, I can come to but one conclusion and that is that all school districts with territory within the township must unite when the provisions of section 4726-1 are followed. You will understand, however, that each school district may centralize its schools separately, as is provided by section 4726 G. C., and in case such proceeding is impracticable, districts may be combined into one district and then centralize their schools.

Holding these views, then, I must answer your several questions as follows:

1. Centralization may extend beyond the township lines if territory is attached to territory of such township for school purposes.
2. Your second question is answered by the answer to the first.
3. The four districts wholly within the township cannot centralize unless the county board of education creates said territory as one school district in which such event centralization could be had under section 4726 G. C.
4. Your fourth question is answered by the answer to your third.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

1103.

BOARD OF EDUCATION MAY NOT EMPLOY A PERSON TO SECURE OPTIONS ON A SITE FOR SCHOOL BUILDING.

A board of education, in securing a site for a school building, is not empowered by statute to employ a person to secure options at a rate per cent. commission on the purchase price.

COLUMBUS, OHIO, March 26, 1918.

The Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Your statement of facts upon which you ask my opinion reads as follows:

"The board of education of the city of Lima, Ohio, in securing a site for a school building, employed a man to secure options at 2% commission on the purchase price.

Is such action legal?"

Authority is given to boards of education to purchase sites for school purposes. Section 7620 G. C. provides in part:

"The board of education of a district may * * * purchase * * * sites * * * for the schools under its control * * *."

Section 4749 G. C. provides in part:

"The board of education of each school district shall be a body politic and corporate and, as such, capable of suing and being sued, contracting and being contracted with, acquiring, holding, possessing and disposing of real * * * property * * *."

No method is provided by statute as to how such purchases shall be made, that is, whether propositions of sale shall be submitted as bids are submitted for the construction of buildings or by what other manner or means the selection of the property to be purchased is made. In your case the board of education employed a man to take options upon certain property or properties which the board desired to purchase as a site for a school building.

An option may be defined as the right of choice or election and the board, reserving to itself such right of choice or election, arranged for the options to be secured, as above mentioned. That in the ordinary case such procedure would be commendable is conceded, for it too frequently happens that property enhances in value very materially as soon as it is desired for the location of a school or other public building. But nowhere in the statutes do we find authority for a board of education to take options of purchase upon property which it desires to secure for school house sites or grounds and the commendability of their action in so doing would have to, therefore, be directed to the legislature instead of this department or the courts. That the purchase of real property by a board of education was carefully guarded is manifest from the language of section 4752 G. C., as found in 107 O. L., 46, and while it is noted above that no method of purchase is provided by statute, said section does place a limitation upon the procedure of boards of education in the purchase of same. It reads in part:

"A majority of the members of a board of education shall constitute a quorum for the transaction of business. Upon a motion to adopt a resolution authorizing the purchase * * * * * of real * * * property * * *, the clerk of the board shall publicly call the roll of the members composing the board and enter on the records the names of those voting 'aye' and the names of those voting 'no.' If a majority of all of the members of the board vote aye, the president shall declare the motion carried * * *."

It is thus provided that before a purchase of any real property can be made by a board of education, a motion or resolution therefor shall be presented to the board, and upon such motion or resolution the clerk shall publicly call the roll, and if a majority of the entire membership of the board fails to vote in favor of said motion, the purchase cannot be made, and if a majority of the entire membership of the board does vote in favor of said motion or resolution, then the president shall declare the motion carried and the purchase is thus made. The fact that the statute makes no provision for the taking of options is significant, and our courts have spoken firmly in relation to similar matters at various times. For instance, in speaking of the authority of a board of education to hire teachers, the court, in the case of Board of Education v. Best, 52 O. S., 138, says, on page 152:

"The authority of boards of education, like that of municipal councils, is strictly limited. They both have only such power as is expressly granted or clearly implied, and doubtful claims as to the mode of exercising the powers vested in them are resolved against them. Clearly, these organizations that derive their existence as bodies politic and corporate from the legislature, cannot be allowed the same latitude in the observance of their

statutory duties, as is permitted to the general assembly. Such subordinate bodies corporate are not privileged to treat express and explicit provisions of the statutes as only directory, discretionary, because there are provisions in the constitution that are held directory in their character for the reason that their observance by the general assembly is secured by their sense of duty and official oaths, and not by any supervisory power of the courts. * * * * * *To avoid uncertainty, therefore, in determining the conduct of boards of education in transacting such important official business as concerns the purchase or sale of property, * * * * * the general assembly has carefully guarded against ambiguity by prescribing a method of voting which should not be departed from, and in that regard, the rule expressio unius, should, we think, be strictly applied."*

And again, in State ex rel. Dunn, et al., v. Freed, Treasurer, et al., 10 O. C. C., 294-296, it was held that:

"The powers of boards of education are limited. They have such authority, only, as is conferred by law, and when they take action outside of the law and against the plain provisions of law, such action is absolutely void."

So that the board of education cannot be considered as being authorized to take options unless that authority could be clearly implied as a matter of necessity in carrying out the provisions of the authority to purchase or acquire real estate. But it cannot be urged that such implied authority is necessary, for a board of education is not subjected to the sharp business practice experienced by individuals in the purchase of real estate, for if a board is unable to agree with the owner upon the price which should be paid for property desired by it for a school house site, it may appropriate same as is provided by section 7624 G. C., which reads as follows:

"When it is necessary to procure or enlarge a school site or to purchase real estate to be used for agricultural purposes, athletic field or play ground for children, and the board of education and the owner of the property needed for such purposes are unable to agree upon the sale and purchase thereof, the board shall make an accurate plat and description of the parcel of land which it desires for such purposes, and file them with the probate judge, or court of insolvency, of the proper county. Thereupon the same proceedings of appropriation shall be had which are provided for the appropriation of private property by municipal corporations."

Even if a board could take an option upon property as incident to the purchase of same, it cannot delegate its authority to any other person to take same for the board, and I know of no authority for the board to hire any person to purchase property for it or take options therefor if the same could be considered being incident to such purchase.

Holding, then, these views, I must advise you that the action of the board of education of the city of Lima, in employing a man to secure options at two per cent. commission on the purchase price of a site for a school building, is not a legal action.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1104.

INITIAL STEP ON PART OF MUNICIPALITY IN ROAD IMPROVEMENT BY COMMISSIONERS WITHIN MUNICIPALITY IS ORDINANCE GRANTING CONSENT TO PROCEED—PUBLICATION OF SAID ORDINANCE—REFERENDUM—RESOLUTION OF NECESSITY UNNECESSARY—HOW COST OF SUCH IMPROVEMENT FUNDED.

1. *The initial step upon the part of a municipality, in the matter of the county commissioners' constructing a road improvement into, within or through a municipality is the adoption of an ordinance by the village council granting consent to the county commissioners to proceed.*

2. *Under the provisions of section* 6949 *G. C.* (107 *O. L.* 107), *this initial ordinance should be published in accordance with law.*

3. *Under the provisions of section* 4227-3 *G. C., the principle of the referendum would not apply to this initial ordinance, because it is the first ordinance in the matter of the improvement and is possibly the most vital one connected with the improvement.*

4. *The resolution of necessity provided for in section* 3814 *G. C. is not required in the matter of the county commissioners constructing such an improvement.*

5. *In the matter of providing funds to take care of the part of the cost and expense of the improvement to be borne by the municipality, there is no authority to issue notes under the provisions of section* 3915 *G. C., but section* 6950 *G. C.* (107 *O. L.* 107) *provides for the issuing of bonds and the conditions under which they may be issued.*

COLUMBUS, OHIO, March 26, 1918.

HON. A. B. UNDERWOOD, *Prosecuting Attorney, Medina, Ohio.*

DEAR SIR:—I have your communication of recent date which reads as follows:

"The commissioners of Medina county, Ohio, acting under sections 6949 et seq. G. C., plan to improve certain streets in the villages of Lodi and Medina, in Medina county. The county commissioners have funds on hand to pay their portion of the improvements. Bonds will have to be issued for the municipality's share and the property owners' share in each case.

Guided by your opinion rendered to the bureau of inspection and supervision of public offices, May 4, 1917, I had the councils of said villages take the initial step therein provided for, of passing a resolution declaring the consent of the village council to the improvement. This initial resolution by the council was passed July 2, 1917, but never published.

Other steps so far taken are as follows:

1. Resolution by county commissioners, ordering the improvement made under section 6949 G. C., offering to pay $2,000.00 towards the costs thereof, ordering the engineer to provide surveys therefor, and authorizing the president and clerk of the board of commissioners to enter into a contract with the village, covering a division of the costs.

2. Preparation of plans, profiles, cross-sections, specifications and estimates.

3. Return of same by county surveyor to county commissioners.

4. Resolution by commissioners, approving same and ordering copy sent to village council.

5. Resolution as required by section 6950 G. C., determining the public

convenience and welfare of the improvement, approving the plans, surveys, profiles, cross-sections, estimates, etc., agreeing to pay all cost over that to be paid by the commissioners, and authorizing mayor and clerk to enter into a contract with the board of commissioners. This resolution was published in accordance with law.

6. Execution of contract between village council and board of county commissioners, covering a division of the costs.

In view of your opinion to the bureau of inspection and supervision of public offices, dated May 4, 1917, No. 241, your opinion to the Industrial Commission of Ohio, dated January 23, 1918, No. 965, and your approval of the transcript of village bonds of West Carrollton, Ohio, issued under authority of said section 6949 G. C., I wish to ask these questions:

(1) What is the initial step for a village council to take in such street improvement proceedings?

(2) If it is a resolution declaring the consent of the village council to the improvement, as indicated by said Opinion No. 241, then should that initial resolution be published?

(3) Does the referendum law, sections 4227-2 and 4227-3 G. C., apply to said initial resolution declaring the consent of the village council, or would it more properly apply to the next step in the village legislation, namely, a resolution determining the public convenience and welfare of the improvement as required by section 6950 G. C.?

(4) Is a resolution of necessity required? (West Carrollton transcript included such a resolution, but Opinion No. 241 from your office states same is unnecessary, but that a resolution should be adopted in conformity with requirements of sections 3814 and 3818 G. C. What is meant by this?)

(5) If such a semi-resolution of necessity be passed, is there any necessity for the so-called 'ordinance to proceed,' as in ordinary village street improvements?

(6) Could notes be issued under section 3915 G. C. in anticipation of the collection of special assessments?

(7) In view of the confusion surrounding procedure under section 6949 G. C., will you please attach an itemized schedule of the different steps to be taken by both the commissioners and council, giving these steps in their proper order and carrying same down to the letting of the contract by the county commissioners? (This was attempted in your Opinion No. 241, but inasmuch as the law has since been amended, I believe it would add much to the clear administration of the law to do this.)

I understand that proceedings under section 6949 G. C. are being conducted in a number of counties, with difficulties and confusion attendant everywhere.

I trust that the importance of the questions is such as to excuse my lengthy request for your opinion. I am acting as prosecuting attorney of Medina county and as solicitor for the villages, on these improvements, and consequently am interested in the legislation on both sides."

Before answering the questions set out in your communication I desire to make a few general observations, which will assist somewhat in understanding the general line which your questions take. They have more particularly to do with the provisions of sections 6949 to 6953 G. C. These sections have to do with the matter of the county commissioners constructing a road improvement into, within or through a municipality; but it must always be kept in mind that the scheme set out in sections 6949 to 6953 G. C., inclusive, is a part of the general scheme of road

building provided by law for the county commissioners. This scheme begins with section 6906 G. C. The provisions set out in sections 6949 to 6953 G. C., inclusive, are a part of this general scheme, and when the county commissioners construct a road improvement into, within or through a municipality they follow the provisions set out in section 6906 G. C. et seq., as well as the provisions set out in sections 6949 to 6953 G. C., inclusive.

Furthermore, as a general observation I desire to suggest that the provisions of sections 6949 to 6953 G. C., inclusive, form a full and complete procedure to be followed by the authorities of a municipality, and that no part of the general course of procedure which is followed by a municipality in constructing or improving streets is to be applied. This would not apply, of course, when the provisions of sections 6949 to 6953 G. C., inclusive, refer to the provisions in reference to street improvements by municipalities.

With these general observations in mind let us turn to your questions and take them up in their order, answering each one in the order set out:

(1) Under the provisions of section 6949 G. C. there is no question in my mind that the initial step to be taken by a municipality is the granting of its consent by the council. While the county commissioners may construct a proposed road improvement into, within or through a municipality, yet this cannot be done until the consent of the council of said municipality has been obtained. From this it is clear to me that the very first step to be taken in reference to such an improvement is the step by virtue of which the council of the municipality gives its consent to the county commissioners to construct said improvement.

(2) Your second question has to do with the manner in which this consent should be given.

Section 6949 G. C. says:

> "and such consent shall be evidenced by the proper legislation of the council of said municipality entered upon its records."

While this language is not as clear as it might be in reference to the manner in which the council is to proceed, yet from the language used, it seems fairly evident that the intention of the legislature was to the effect that the council should act by ordinance. This is the method provided by law for the council in its action upon any matter of legislation. It seems that the legislature intended that the council should act as formally as it is possible for it to act, for it provides not only that it shall be evidenced by the proper legislation of council, but provides further that this legislation shall be entered upon its records. For this reason it is my opinion that the consent should be given by ordinance, and as section 4227 G. C. provides that

> "Ordinances of a general nature, or providing for improvements shall be published as hereinafter provided before going into operation,"

it seems to me that the ordinance granting the consent of the municipality to the county commissioners to proceed with any improvement would necessarily have to be published in accordance with law.

(3) Your next question has to do with the matter of the referendum, and is as to whether this initial ordinance is subject to the referendum, or whether it is the ordinance that is provided for in section 6950 G. C.

Section 4227-3 G. C. provides, in part, as follows:

> "Whenever the council of any municipal corporation is by law required

> to pass more than one ordinance or other measure to complete the legislation necessary to make and pay for any public improvement, the provisions of this act shall apply only to the first ordinance or other measure required to be passed and not to any subsequent ordinances and other measures relating thereto. * * *"

From this provision it would seem that it is "the first ordinance or other measure required to be passed" that is subject to the referendum. What is the first ordinance that is required to be passed in the matter under consideration? It is the ordinance granting consent to the county commissioners to proceed. Until this ordinance is passed no step whatever can be taken. This is the vital ordinance; it is the one that affects the property owners of the village as no other ordinance would affect them; it is not only the first ordinance, but it is the most important ordinance that is to be passed. Ordinarily when this ordinance is passed the proposed improvement will proceed to completion. Indeed, if the municipality pays no part of the cost and expense of the improvement, it is the only ordinance that must be passed by a municipality according to the provisions of section 6949 G. C. I note that section 6950 G. C. provides that:

> "It shall thereupon be the duty of the council of such municipality to examine said surveys and profiles, and if after such examination council is satisfied that the public convenience and welfare require that said improvement be made, it shall by resolution so determine, and shall approve said surveys and profiles."

Of course, at this point the council undoubtedly could interfere with the further progress of the improvement. But this is more of a formal matter than is the first ordinance, and it further provides that this may be done by resolution rather than by ordinance.

From all of the above it is my opinion that the ordinance granting permission to the county commissioners to construct said improvement is the one that is subject to the referendum and not the one provided for in section 6950 G. C.

(4) Your fourth question is: Is a resolution of necessity required?

As said above, it is my opinion that the provisions of sections 6949 to 6953 G. C., inclusive, form a complete scheme in reference to the matter under consideration, and that other provisions of the statutes would not apply unless reference is particularly made to them in the provisions of said sections.

Section 6949 G. C. provides for consent to make the improvement, and section 6950 G. C. provides for the approval of the surveys and profiles adopted by the county commissioners provided the council is satisfied that the public convenience and welfare require that said improvement be made. There seems to be no place under this procedure for a resolution of necessity. Neither do I think that such a resolution is required. It must be borne in mind that this is a proceeding over which the county commissioners exercise jurisdiction, and it is rather up to them to adopt a resolution of necessity as set forth in section 6910 G. C.

In this question you refer to Opinion No. 241 rendered by me and state that in said opinion I held that a resolution should be adopted in conformity with the requirements of sections 3814 and 3818 G. C. I have examined said opinion carefully and do not find any such holding therein. Neither do I recall having so held in any other opinion rendered by me. In fact, on page 10 of Opinion No. 241, in speaking of section 3814 G. C., I used the following language:

"But such an ordinance would be useless in the present case, due to the fact that section 6949 G. C. takes care of the one part of the question, and section 6952 G. C. takes care of the matter of fixing a time when claims for compensation and damages should be presented."

This language had reference to the resolution of necessity. It must be remembered, however, that this resolution under the statute contains more than merely the declaration of necessity.

Section 3815 G. C. sets forth the provision that the mode of payment and whether or not bonds shall be issued, etc., shall also be contained in said resolution. So that while the resolution of necessity is not required, in my opinion, yet a resolution or ordinance setting forth the other provisions mentioned must be enacted. In doing this, council would be guided by sections 3814 to 3818 inc. G. C.

(5) The answer to your fourth question really answers the fifth. The only "ordinance to proceed" that is necessary is set forth in section 6950 G. C., as above quoted, which is to the effect that if the council is satisfied that the public convenience and welfare require that said improvement be made, they shall so determine by resolution and shall approve said surveys and profiles. Of course, after this is done the county commissioners would proceed with the improvement.

(6) Your sixth question is as to whether the municipality could sell its notes under section 3915 G. C. in anticipation of the collection of special assessments.

Section 6951 G. C. provides, in part, as follows:

"* * * in anticipation of the collection of assessments to be made against abutting property as hereinbefore provided * * * said municipality is authorized to sell its bonds under the same conditions and restrictions imposed by law in the sale of bonds for street improvements under the exclusive jurisdiction and control of the council of a municipality."

Here we find a specific provision made to take care of the cost and expense of the improvement on the part of the municipality. It is to the effect that it may sell bonds under the same conditions and restrictions as it could sell bonds for street improvements under its jurisdiction. From this it is fairly evident that the municipality could not issue and dispose of its notes under the provisions of section 3915 G. C., but would be compelled to issue bonds under the same conditions and restrictions as it is permitted to issue bonds in street improvements entirely under the jurisdiction of the municipality.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1105.

APPROVAL OF RESOLUTIONS FOR SALE OF CANAL LANDS LOCATED IN THE CITY OF TOLEDO TO THE INVESTORS REALTY CO.

COLUMBUS, OHIO, March 27, 1918.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of March 26, 1918, in which you enclose, in duplicate, certain resolutions leading up to the sale of canal lands located in the city of Toledo, Ohio, to the Investors Realty Company, and ask my approval of the sale thereof, at private sale, same having been appraised at $265.00.

I have examined the proceedings leading up to the sale of said canal lands and find them correct in form and legal, and I consider $265.00 a fair valuation of said lands and therefore join with you in the sale of the same, in evidence of which I have attached my signature to the resolutions providing for such sale.

I am forwarding said resolutions to Hon. James M. Cox, governor of Ohio, for his consideration.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1105½.

BONDS OF THE INSULAR GOVERNMENT OF PORTO RICO AND FARM LOAN BONDS ARE NOT UNITED STATES GOVERNMENT BONDS WITHIN THE MEANING OF SECTION 330-3 RELATIVE TO THE DEPOSIT OF STATE FUNDS BY TREASURER OF STATE.

Neither bonds of the insular government of Porto Rico issued under the authority of the act of congress under date of April 12, 1900, nor farm loan bonds issued by a farm loan bank under authority of the act of congress under date of July 17, 1916, are "United States government bonds" within the meaning of section 330-3 General Code, providing that the treasurer of state, before making deposits of state funds in depositories, shall require every bank or trust company approved as such depository to deposit with him United States government bonds, bonds of this state, county, township, school district, road district, or municipal bonds of this state at not less than their par value, in an amount equal to the amount of money to be deposited with such banks or trust companies.

COLUMBUS, OHIO, March 27, 1918.

HON. CHESTER E. BRYAN, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your favor under date of March 14, 1918, asking opinion of this department, in which you say:

> "Enclosed you will find two issues of bonds—one $1,000.00 Porto Rico and one $1,000.00 federal farm loan bond—which are offered the state treasury as security for active depository funds by the New First National Bank, Columbus, Ohio.
>
> We would kindly ask your opinion whether these bonds can be accepted

as legal security for loan of funds under Sec. 14 S. B. No. 57, an act to provide a depository for state funds."

Section 330-3 General Code, which was enacted as section 14 of an act of the legislature passed March 7, 1911, entitled "An act to provide a depository for state funds," provides, in part, as follows:

> "The treasurer of state before making such deposits shall require that each and every approved bank or trust company to deposit with him United States government bonds, bonds of this state, county, township, school district, road district, or municipal bonds of this state at not less than their par value, in an amount equal to the amount of money to be deposited with such banks or trust companies, or surety company bonds, which when executed shall be for an amount equal to the amount deposited plus 5%, conditional for the receipt and safe keeping and payment over to the treasurer of state or his written order of all moneys which may come into the custody of such bank, or trust company under and by virtue of this act, and the interest thereon when paid shall be turned over to the bank or trust company so long as it is not in default. * * *"

I take it that the question which you have in mind is whether or not the bonds referred to in your communication are "United States government bonds" within the meaning of that term as employed in section 330-3 General Code.

I am of the opinion that your question should be answered in the negative with respect to both of the bonds referred to in your letter. To my mind the term "United States government bonds" as used in section 330-3 General Code means bonds which are the direct and primary obligation of the United States government in pursuance of its constitutional power to borrow money on the credit of the United States and for the payment of which the full faith of the United States is solemnly pledged by act of congress.

The first bond mentioned in your communication is one issued by the insular government of Porto Rico in pursuance to section 38 of an act of congress under date of April 12, 1900. This section of said act reads, in part, as follows:

> "Where necessary to anticipate taxes and revenues bonds and other obligations may be issued by Porto Rico or any municipal government therein as may be provided by law for expenditures authorized by law, and to protect the public credit, and to reimburse the United States for any moneys which have been or may be expended out of the emergency fund of the war department for the relief of the industrial conditions of Porto Rico caused by the hurricane of August 8, 1899."

Bonds issued by the government of Porto Rico in pursuance to the authority thus conferred are direct and primary obligations of Porto Rico, there being nothing in the way of statutory provisions making them obligations of the United States government, as such.

The other bond referred to by you is one issued by the Farm Loan Bank of Wichita, Kansas, pursuant to the provisions of sections 18 to 21, inclusive, of an act of congress under date of July 17, 1916, entitled "the federal farm loan act." By section 21 of said act the bond is the primary obligation of the farm loan bank issuing it, although ultimately said bond and the interest thereon, if not paid by the bank issuing the same or out of the proceeds thereof on liquidation, becomes an obligation payable by other farm loan banks.

There is nothing, however, in said act, nor in other legislation by congress making farm loan bonds obligations of the United States government; and though these bonds, as well as those issued by the insular government of Porto Rico, are in a sense intrumentalities of the United States and as such are exempt from state and local taxation, neither of said bonds are "United States government bonds" in any proper sense within the meaning of section 330-3 General Code.

I am therefore of the opinion that these bonds should not be accepted by you as legal security for state funds deposited by you under the provisions of the act referred to in your communication.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1106.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN LAWRENCE AND CARROLL COUNTIES.

COLUMBUS, OHIO, March 27, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your communication of March 25, 1918, in which you enclose, for my approval, final resolutions for the following improvements:

Ironton-Miller Road—I. C. H. No. 404, section "E," Lawrence county, type A.

Ironton-Miller Road—I. C. H. No. 404, section "E," Lawrence county, type B.

Ironton-Miller Road—I. C. H. No. 404, section "E," Lawrence county, type C.

Canton-Steubenville Road—I. C. H. No. 75, section "G," Carroll county.

I might suggest that the final resolution on the improvement of I. C. H. No. 75, section "G," Carroll county, sets forth the fact that the preliminary application of the board of county commissioners was made to the state highway department on the eleventh day of November, 1918. Of course the year 1918 was inserted by mistake, instead of 1917 or 1916. It would be well for your department to have this correction made to correspond with the facts.

However, I am approving this final resolution and the others above referred to, as I find the same correct in form and legal, with the above exception of mistake in year, which will be corrected by you, and I am therefore returning the resolutions to you with my approval endorsed thereon, in accordance with the provisions of section 1218 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1107.

UPON WHAT CONDITIONS CHILDREN OF SOLDIERS AND SAILORS IN PRESENT WAR MAY BE ADMITTED TO THE OHIO SOLDIERS' AND SAILORS' ORPHANS' HOME.

Children of soldiers and sailors of the present war may be admitted into the home upon the same conditions as the children of soldiers and sailors of the civil war or the Spanish-American war.

COLUMBUS, OHIO, March 28, 1918.

HON. J. P. ELTON, *Superintendent the Ohio Soldiers' and Sailors' Orphans' Home, Xenia, Ohio.*

DEAR SIR:—I have your letter of February 4, 1918, as follows:

"The question as to the proper construction of the statute, section 1932 G. C., relating to the admission of children to this home, has arisen. The precise point is whether children of men now serving in the military or naval forces of the United States are eligible for admission to the home. I may say that it has been the view of the board of trustees of the institution, from its inception, that only children of *honorably discharged* soldiers and sailors were entitled to admission. The statute does not so specify, but it does provide, and has always provided, that admission should be made 'under such rules and regulations as the trustees may adopt.' In year book No. 105-106, house bill 574, the above named section was amended to include children of members of the Ohio National Guard.

We are receiving many applications for the admission of children whose fathers are serving in the present war, and it is the desire of the board to have your opinion in respect to the proper construction of this statute at your earliest convenience."

Sections 1931, 1932 and 1932-1 of the General Code read:

"Sec. 1931. There shall be an institution under the name of 'the Ohio soldiers' and sailors' orphans' home,' which shall be a place for the care and education of children of deceased and disabled soldiers and sailors."

"Sec. 1932. Under such rules and regulations as they adopt, the trustees shall receive into the home the children and orphans, destitute of means of support and education and residing in Ohio, of soldiers and sailors who died by reason of wounds received or disease contracted while serving in the military or naval forces of the United States, and the children of permanently disabled or indigent soldiers and sailors in like manner destitute."

"Sec. 1932-1. That the board of trustees of the Ohio soldiers' and sailors' orphans' home, Xenia, Ohio, are hereby authorized and directed to receive into such home the children of all members of the Ohio national guard whose lives were lost, or who were permanently disabled at any time in the course of active duty in the service of the state, on the same basis and subject to the same laws as other children are admitted to such institution."

In addition to these statutes authorizing admission into the home, there was in 103 O. L., p. 665, an act passed April 17, 1913, reading as follows:

"Section 1. That the board of trustees of the Ohio soldiers' and sailors' orphans' home, Xenia, Ohio, are hereby authorized and directed to receive into such home the children of all members of the Ohio national guard whose lives were lost in the course of duty, or were permanently disabled, during the floods of March and April, 1913, on the same basis and subject to the same laws as other children are admitted to such institution."

This act, for the reason that it seemed to have been looked upon as temporary, was not numbered and carried into the General Code.

It will be noted from the above sections that to entitle a child to admission into the home it must not only be destitute of means of support and education, and reside in Ohio, but it must be:

(1) The child of a soldier or sailor who died by reason of wounds received or disease contracted while serving in the military or naval forces of the United States;

(2) The child of a permanently disabled or indigent soldier or sailor;

(3) The child of a member of the Ohio national guard, whose life was lost or who was permanently disabled at any time in the course of active duty in the service of the state.

You ask whether children, whose fathers are serving in the present war may be admitted into the home. You will note that the above three classes of children are eligible for admission into the home. The first two classes consist of children of soldiers and sailors of the United States. No limitation is found in the statute as to the war in which such soldiers or sailors must have served.

It is my opinion that children of soldiers and sailors of the present war may be admitted into the home upon the same conditions as the children of soldiers and sailors of the civil war or the Spanish-American war.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1108.

WHEN A CHECK DEPOSITED IN A BANK MUST BE LISTED FOR TAXATION BY DEPOSITOR—WHEN OUTSTANDING CHECK MAY BE DEDUCTED FROM BANK BALANCE FOR TAX LISTING PURPOSES—MISTAKE.

1. *Where a bank accepts by endorsement checks on other banks and places the amount thereof to the general credit of its depositor, said amount immediately becomes "moneys" of the depositor within the definition of the taxation statute, section 5326 General Code; and though the checks are not accepted by the banks on which they are drawn until after tax listing day the bank balance of the depositor, including the amount of such checks, should be listed for taxation as "moneys in bank" on such date.*

2. *Outstanding checks drawn by a depositor on his own account are not to be deducted from his bank balance for tax listing purposes unless and until they are accepted or certified by the bank. This rule is not altered by the fact that the checks are combined with vouchers and are accepted by the creditors of the depositor as payment.*

3. *When, through mistakes, checks which have actually been paid have not been debited against a depositor's account prior to tax listing day and such mistake is subsequently discovered, the amount of such checks should be deducted from the ostensible balance of the depositor as it existed on tax listing day for the purpose of determining the latter's taxable moneys.*

COLUMBUS, OHIO, March 30, 1918.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your letter of March 12, requesting my opinion upon the following facts:

"The Halmar Coal Mining Company, of Cincinnati, Ohio, in making its corporate return for the year 1917 to the auditor of Hamilton county, Ohio, returned the sum of $1,821 under the item of money, which was the amount as shown by the company's books to its credit at the bank on that day.

The auditor increased this item of money to $58,180, his increase being based upon the bank balance to the credit of said company on listing day as shown by the bank's books. The Halmar Coal Mining Company filed a complaint with the board of revision of Hamilton county asking that the finding of the auditor be decreased $56,359, or an amount equal to their original return, the company claiming that it had issued checks against its bank balance and should only be taxed for $1,821. The board of revision refused any relief. The matter was thereupon brought to the attention of the tax commission upon the appeal of the Halmar Coal Mining Company from the decision of the board of revision of Hamilton county, and the company is asking the tax commission to decrease the finding of the auditor $56,359. April 8th was tax listing day for 1917. Would you please give us your legal interpretation of the following questions:

1. Upon consideration of this appeal the commission finds that something over $9,000 of the bank balance of the Halmar Coal Mining Company, as shown by the bank book of said company, was placed to the credit of said company just prior to listing day. The company has furnished an affidavit of its auditor showing that $9,807.55 of this amount was made up of checks drawn by foreign concerns on foreign banks in Boston, Detroit and other cities, and which were in the process of collection and in transit on listing day. A list of these checks is set forth in the affidavit, marked 'Exhibit A,' which we are attaching to this letter. Should the amount of these checks be taxed? The affidavit shows that the checks were not acknowledged by the foreign banks until after April 7, 1917.

2. The checks issued by the Halmar Coal Mining Company are a combination voucher and check. Several of these checks were issued to Ohio concerns prior to listing day and were accepted and receipted for by said Ohio concerns, and endorsed and banked to the credit of said Ohio concerns prior to listing day. However, they did not pass through clearing house channels and reach the bank of said company, and were not charged off the account of said company until after listing day. I am enclosing one of these checks, marked 'Exhibit B.' Should amount of money in bank on listing day to the credit of the Halmar Coal Mining Company as evidenced by these checks, so issued and receipted for by payee, be taxed against said the Halmar Coal Mining Company?

3. Several of the checks issued by said the Halmar Coal Mining Company prior to listing day were receipted by the payee prior to listing day, endorsed and cashed by the payee prior to listing day, and the 'paid' perforation of the bank shows that they were paid by the bank on which they were drawn but for some reason not charged off the account of the said the Halmar Coal Mining Company prior to listing day. I am enclosing one of said checks marked 'Exhibit C,' the perforations on which show that it was paid the second day of April, 1917. Should the amount of money to the credit of the Halmar Coal Mining Company on listing day, as evidenced by these checks, be subject to taxation against said company?

I might cite you to the case of the Union Central Life Insurance Company v. Hynicka, in the superior court of Cincinnati. However, the court does not seem to have considered like questions and especially the question with reference to the deposits which were evidenced by checks on foreign banks and in the process of collection."

The case to which you refer is reported in 4 N. P. (N. S.) 296 (Special Term) and 5 N. P. (N. S.) 255 (General Term). I quote the following from the opinion of Hoffheimer, J., in 4 N. P. (N. S.) at p. 308:

"It appears from the evidence that large sums of money were on deposit to defendant's credit, in three banks of the city of Cincinnati, on the tax days in question. Certain gross amounts were returned by defendant company for taxation. The balance apparently to defendant's credit was reduced or wiped out, as defendant claims, and was not returned for taxation, because of an enormous amount of outstanding checks. The defendant's return was based upon its check book, but the treasurer now seeks to tax the actual balances in bank, as shown by the books of the banks, on the day preceding the second Monday in April, in the years in question, without allowing deductions for the outstanding checks. * * * The question whether defendant was justified in reducing amounts in bank by deducting therefrom the outstanding checks, is dependent for its answer upon two other questions: First, were there outstanding checks as a matter of fact? Second, assuming that there were some oustanding checks as a matter of law, were such checks properly deductible from defendant's local balances? The 'checks' in question fall within *four* distinct classes, and the stipulation sets out these so-called checks by tables * * *.

Table 1. This table represents checks drawn directly on the local banks. These were presented and paid after tax day.

Table 2. Checks drawn on New York banks. These checks were presented and paid after tax day.

Table 3. Checks on local banks that were never presented or paid, but canceled. *

Table 4. Checks on New York banks that were never presented or paid, but canceled." * *

(Considering first tables 3 and 4 the court held on obvious grounds that these checks ought not to have been deducted from the actual balance. No such question is presented in the case concerning which you inquire.)

"Taking up next the checks in table 1. If we assume that these checks were actually issued by defendant company, the evidence shows that they

had not been presented and paid on the tax days in question. The question then is, were defendant's funds in the local banks upon which such checks were drawn subject to the legal demand of defendant company on the tax days in question? 'Money' on deposit and subject to demand is taxable. Section 2731, Revised Statutes (this section has since become section 5326 General Code), reads as follows:

'The term money or monies shall be held to mean and include every deposit which the person owning or holding in trust or having a beneficial interest therein is entitled to withdraw in money on demand.'

* * * That the money was in the banks is conceded. It is not sufficient, in order to avoid taxation on a bank deposit, to merely issue checks thereon, because a check is nothing more than an order on the fund, 'payable instantly on demand.' It is simply an *executory promise* to pay the sum specified in the check according to the terms thereof. The mere giving of the check, is not an assignment *pro tanto* of the fund. It follows, therefore, that until the check is presented or paid or the bank in some way committed to the holder or payee the promise may be recalled. That is to say, the drawer may countermand up to the last moment. Up to that time the funds are subject to the drawer's legal demand."

(Citing:
Kahn v. Walton, 46 O. S. 195;
Covert v. Rhodes, 48 O. S. 66;
Metropolitan Bank v. C. H. & D. Ry.. Co., 54 O. S. 60;
Bank v. Yardly, 165 U. S. 648;
Bank v. Brewing Co., 50 O. S. 151.)

"* * * But because given to pay a debt, the rule is not altered, nor is the *bona fides* of the transaction involved. A check is subject to countermand before it is presented, or the bank committed to the payee, or before the check is cashed. Now, we know the local banks were in no sense committed to the payment of these particular checks. They were not certified, nor were they presented for payment on or before the tax days in question."

The court then considers the case of Ambach v. Sims, Treas., arising in Franklin county and resulting in an unreported decision by the supreme court, 71 O. S. 545, which the court finds to support the views which had been previously expressed. The general term affirmed the judgment pronounced at the special term, and though an opinion was published in that court I do not find it necessary to quote from the same.

It seems to me that the principles laid down in this case, which is generally accepted to be the law in Ohio, really suggest the answers to all your questions. Indeed they furnish an immediate solution of the second question. The mere fact that the check of the company has been accepted by its creditor as payment does not alter the case, if the bank has not been brought into privity with the transaction by either accepting and cashing the check or certifying it. It is my opinion, therefore, that your second question is to be answered in the affirmative.

The same principles lead to an opposite conclusion with respect to the third question. Here the checks had actually been paid but through some clerical error on the part of the bank the account of the company was not debited with the checks until after taxing day. Such a mistake is subject to correction and in law the company's real balance should be regarded as being in amount what it would have been had the mistake never occurred. Therefore, the amount of money appearing

on the books of the bank to the credit of the company on listing day should be reduced by such amount as represents the checks which had actually been cashed prior to that day but which were not properly entered against the account of the company until thereafter.

The only serious question exists as to your first inquiry. Yet upon consideration the doubt which at first blush would seem to arise in respect of it will, I think, disappear. If the bank had taken these checks endorsed to it by the company for collection merely, not crediting its general account with their amount, then, of course, such amount would not be taxable as "money" to the company but merely as "credits;" but if, as your statement seems to show, the bank accepted the endorsement of these checks to it without reservation and immediately credited its depositor's general account with the amounts thereof what happened was in contemplation of law, as between the bank and the depositor, exactly the same thing as would have happened had an equivalent amount of actual currency been placed on deposit. Suppose the depositor had presented these checks and had asked to have them cashed; and after receiving currency for them had placed the currency in the bank, the legal situation would be precisely the same as that which appears under your statement of facts; for should the checks have proved unacceptable to the banks on which they were drawn the bank of deposit could have held its depositor as the prior endorser by proceeding in the proper way to charge him as such. This is all that can be done by the bank under the circumstances as stated by you. Suppose, again, the depositor had chosen to withdraw his entire balance during the period between depositing these checks and the date of their final acceptance by the banks on which they were drawn; in such event the amount of these checks would have been included in the general balance; and if it had subsequently developed that none of the checks had not been accepted the bank's recourse against the depositor would not have been on the theory of the recovery of money paid by mistake (as it would be in the last case you state under a similar assumption) but upon its endorsement.

In short, when a bank accepts from its depositors checks on other banks endorsed to it by the depositors and gives general credit the transaction, in contemplation of law amounts to a purchase of the checks by the bank in consideration of the general credit which stands as and for so much cash, in the same sense as any other deposit represents cash in bank.

I answer your first question, therefore, on the assumption which I have stated in the affirmative.

Very truly yours,

JOSEPH MCGHEE,
Attorney-General.

1109.

HOW JURORS PAID, WHO WERE DRAWN FOR COMMON PLEAS COURT, AND SERVED ON JURY IN THE PROBATE COURT.

A venire had been drawn for the common pleas court and a venire for the probate court. There were not enough jurymen in the probate venire to complete the jury and regular veniremen of the common pleas court filled up the probate jury and served as jurymen throughout the case.

The clerk of the court of common pleas should certify to whatever mileage is involved with reference to these jurymen and that the same should be paid by the county treasurer on the warrant of the county auditor, and that the clerk of the probate court should certify as to the jury service which was rendered by these jurors as talesmen in the probate court.

COLUMBUS, OHIO, March 30, 1918.

HON. LEWIS D. SLUSSER, *Probate Judge, Akron, Ohio.*

DEAR SIR:—I have your letter of March 2, 1918, as follows:

"Kindly inform us who pays the costs of the jurymen under the following circumstances:

"A venire had been drawn for the common pleas court and a venire for the probate court. There were not enough jurymen in the probate venire to complete the jury and regular veniremen of the common pleas court filled up the probate jury and served as jurymen throughout the case. Are these jurymen from the venire for the common pleas court that filled out the jury in the probate court paid through the probate court or through the clerk's office for their services while acting as jurors in the probate court?"

Section 3008 of the General Code reads as follows:

"Each grand or petit juror drawn from the jury box pursuant to law, each juror selected by the court as talesman as provided by law, and each talesman, shall receive two dollars for each day of service, and if not a talesman, five cents each mile from his place of residence to the county seat. Such compensation shall be certified by the clerk of the court and paid by the county treasurer on the warrant of the county auditor."

Section 11212 G. C. provides:

"The provisions of law governing civil proceedings in the court of common pleas, so far as applicable, shall govern like proceedings in the probate court, when there is no provision on the subject in this title."

Section 11204 G. C. provides:

"The fees of witnesses, jurors, sheriffs, coroners and constables, for all services rendered in the probate court, or by order of the probate judge, shall be the same as is provided by law, for like services in the court of common pleas."

It will be seen from these sections that a juror in the common pleas or probate courts is entitled to receive $2.00 per day for each jury service and if he is not a talesman he is also entitled to receive 5c for each mile traveled from his place of residence to the county seat. The jurors referred to in your communication were drawn from the common pleas court, but served in the probate court. These jurors came to the county seat as prospective common pleas jurors, but were called for service in the probate court as talesmen. Being talesmen, as far as the probate court is concerned, they, by virtue of section 3008 G. C., are only entitled to receive the fee for jury service, viz., $2.00 for each day. However, having been duly summoned for service in the common pleas court according to law, they are entitled to receive 5c for each mile traveled from the place of residence to the county seat, under section 3008 G. C.

It is therefore my opinion that the clerk of the court of common pleas should certify to whatever mileage is involved with reference to these jurymen and that the same should be paid by the county treasurer on the warrant of the county auditor, and that the clerk of the probate court should certify as to the jury service which was rendered by these jurors as talesmen in the probate court.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1110.

APPROVAL—BOND ISSUE OF THE BOARD OF EDUCATION OF LICKING TOWNSHIP RURAL SCHOOL DISTRICT, LICKING COUNTY—$3,000.00.

COLUMBUS, OHIO, April 2, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of Licking township rural school district, Licking county, Ohio, in the sum of $3,000.00, for the purpose of completing a partially built school building in said school district.

I have carefully examined the corrected transcript of the proceedings of the board of education of Licking township rural school district, Licking county, Ohio, relating to the above bond issue.

The only question of any consequence presented on a consideration of said transcript is that which was discussed by me at some length in opinion No. 966, under date of January 25, 1918, and which opinion related to the validity of certain bonds issued by Canton city school district under authority of section 7629 General Code. In other words, the above issue of bonds, as that considered in the opinion above referred to, is an issue by the board of education under section 7629 G. C. without the vote of the electors for the purpose of completing a school building which has been constructed to its present condition from the proceeds of bonds issued by the board of education on a vote of the electors in an amount estimated by the board to be sufficient to completely construct said building.

Inasmuch as in my previous opinion above referred to I reached the conclusion that a board of education might issue bonds under section 7629 General Code, within the limitations of said section, for the purpose above indicated, and finding the proceedings of the board of education of Licking township rural school district otherwise regular and in conformity with the provisions of the General Code relating to bond issues of this kind, I am of the opinion that bonds properly prepared according to bond form submitted will, when properly executed and delivered, constitute valid and binding obligations of said school district to be paid in accordance with the terms thereof.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1111.

BOARD OF EDUCATION NOT AUTHORIZED TO INVEST FUNDS AT ITS DISPOSAL—WHEN BOARD HAS FUNDS RAISED BY BOND ISSUE AND DECIDES NOT TO MAKE IMPROVEMENT FOR WHICH BONDS WERE ISSUED, SAID FUNDS SHOULD BE PLACED IN SINKING FUND OF THE SCHOOL DISTRICT.

A board of education is not authorized to invest funds at its disposal; and where such board has in the building fund money as the proceeds of a bond issue for the purpose of erecting a school building in the school district, the money should be used for such purpose. If the project of erecting such school building is abandoned for any reason, these moneys under the authority of section 5654 General Code, should be passed to the sinking fund of the school district for the purpose of retiring outstanding bonds as they mature, and the interest thereon. The moneys can then be subject to the management and control of the board of sinking fund commissioners of the school district, and may be invested by such board in the manner authorized by section 7615 General Code.

COLUMBUS, OHIO, April 2, 1918.

HON. DEAN E. STANLEY, *Prosecuting Attorney, Lebanon, Ohio.*

DEAR SIR:—As previously acknowledged, this department is in receipt of a communication from you in which opinion is asked on facts stated therein. Your letter reads as follows:

> "The village school district of Franklin, Warren county, Ohio, issued $100,000.00 worth of bonds under the provisions of section 7630-1 G. C. for the purpose of erecting a school building. Owing to the increase in the cost of materials and labor, they have been unable to secure bids within the estimates and it seems that it is probable that they will not be able to erect the building for sometime to come. The bulk of their money is deposited in banks and the rate of interest is, I think, 2%.
>
> I desire to inquire whether or not it would be lawful for them to invest this money in United States government bonds of the Liberty Loans until such time as they can use the money for the purpose for which it was originally voted. If this is lawful, they would be able to receive an interst on the money substantially the same in amount which they must pay on their bonds."

In answer to your communication, I beg to say that I know of no statutory authority permitting a board of education to invest moneys at its disposal. The money here in question, as the proceeds of bonds issued for the purpose of erecting a school building, is now properly in the school district's depositories to the credit of the building fund of said school district, and should be used for the purpose for which said bonds were issued. If for any reason the board should finally decide not to use this money for this purpose, it would be its duty under section 5654 General Code to transfer the same to the sinking fund of the school district, where under the management and control of the board of commissioners of the sinking fund of the school district, said board would be required to keep said moneys invested in the manner provided in section 7615 General Code.

The question made by you is answered in the negative.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1112.

COUNTY COMMISSIONERS MAY NOT COMPENSATE AGENT OR BROKER FOR SELLING COUNTY BONDS AT PRIVATE SALE.

Under section 2295 General Code authorizing a board of county commissioners to sell county bonds at private sale after failure to sell same after advertisement for bids thereon, such board is not authorized to employ an agent or broker to negotiate a sale of such bonds issued by it and procure purchasers therefor, and to compensate such agent or broker by way of commission or otherwise, either out of the proceeds of the bond sale or out of the general funds of the county.

COLUMBUS, OHIO, April 2, 1918.

HON. A. V. BAUMANN, JR., *Prosecuting Attorney, Fremont, Ohio.*

DEAR SIR:—This department is in receipt of a communication from you under date of March 9, 1918, in which you advise that the board of county commissioners of your county have provided for the issue of inter-county road bonds in the sum of $45,000, and also for an issue of joint county ditch bonds in the sum of $39,800, which they have been unable to sell either as the result of advertising for bids therefor, or at private sale.

My opinion is asked on the question, whether the board of county commissioners is authorized to contract for the services of an agent or broker to effectuate a sale of these bond issues and pay him a reasonable commission therefor.

The county commissioners in the disposition of these bonds are governed by the provisions of sections 2294 and 2295 General Code, which read as follows:

> "Sec. 2294. All bonds issued by boards of county commissioners, boards of education, township trustees, or commissioners of free turnpikes shall be sold to the highest bidder after being advertised once a week for three consecutive weeks and on the same day of the week, in a newspaper having general circulation in the county where the bonds are issued, and, if the amount of bonds to be sold exceeds twenty thousand dollars, like publications shall be made in an additional newspaper having general circulation in the state. The advertisement shall state the total amount and denomination of bonds to be sold, how long they are to run, the rate of interest to be paid thereon, whether annually or semi-annually, the law or section of law authorizing the issue, the day, hour and place in the county where they are to be sold.
>
> "Sec. 2295. None of such bonds shall be sold for less than the face thereof with any interest that may be accrued thereon, and the privilege shall be reserved of rejection of any or all bids. When such bonds have been once advertised and offered at public sale, as provided by law, and they, or any part thereof, remain unsold, those unsold may be sold at private sale at not less than their par value and accrued interest. All moneys from the principal on the sale of such bonds shall be credited to the fund on account of which the bonds are issued and sold, and all moneys from premiums and accrued interest on the sale of such bonds shall be credited to the sinking fund from which said bonds are to be redeemed."

Essentially your inquiry is narrowed down to the question whether or not the county commissioners as an incident to their power to sell these bonds at private sale at not less than par and accrued interest, have the implied power to contract

for the services of an agent to negotiate a sale of said bonds and procure a purchaser or purchasers therefor at not less than the amount prescribed by statute as to each issue.

The question thus presented is one of considerable difficulty, and of great importance. The weight of authority furnished by the decided cases supports the proposition that a general authority to dispose of bonds at not less than par carries with it the implied authority to employ such reasonable and proper assistance as may be necessary to effectuate a sale of bonds and to pay a reasonable commission therefor.

The case of the Mayor, etc., of the City of New York v. Sands, 105 N. Y. 210, was an action to recover from the defendant the value of a certain check turned over to the defendant by the comptroller of New York, in payment of defendant's commission for services in procuring a sale of certain consolidated funding bonds of the county of New York under contract entered into between the defendant and the comptroller.

The bonds were sold at a premium of 4½%, and the defendant was paid for his services out of the amount realized on the sale of said bonds. The court, in sustaining the validity of the contract under which the defendant rendered the particular services there in question, in its opinion, says:

> "No question is made as to the legality of this issue, or but that the whole proceeds of the bonds, including premiums, excepting the check in question, were applied to the purposes of the county, or paid over to its treasurer by the comptroller. It would be difficult to conceive of a grant of power conferred in broader or more comprehensive language, and which could be less restricted by conditions and limitations upon an agent's authority. No limit is imposed upon the amount of bonds to be issued, except that implied from the use to which they were to be devoted, and no restriction as to the terms upon which they were to be disposed of, or the amount of the expenses to be incurred in their preparation, negotiation and transfer is found in the act. The comptroller was broadly charged with the duty of creating a public fund or stock to be denominated 'consolidated stock of the county of New York' and whatever power was necessary to enable him to perform his duty was necessarily conferred upon him by the act. Whether this was a wise or prudent grant of power, or whether in the exercise of it, the comptroller was enabled to commit abuses or frauds upon the people of the county with impunity, is not a subject for our consideration. We find the law upon the statute book and it is subject to the same rules of construction, as other statutes thus appearing. Citizens of the state having occasion to deal with the comptroller in reference to the subject-matter of the act, had the right to rely upon its provisions, and the authority apparently conferred upon him, to bind the fund or principals represented by him.
>
> * * * * * * * * * *
>
> It is a matter of public history, of which courts will take judicial notice, that in the sale of bonds, and negotiations for loans in behalf of states, municipalities and governments, the services of their own fiscal agents are usually, if not invariably, supplemented by the employment of bankers, brokers and other financial agencies to aid in raising moneys for public purposes.
>
> * * * * * * * * * *
>
> It is a matter of common knowledge that such loans, in all countries of the world, are usually negotiated through agencies outside of the regular

financial authorities of the government making the loans. Whether their employment in the case in hand was wise and prudent, or perhaps even necessary to the accomplishment of the object intended by the statute, cannot be determined as a question of law, for the statute gave the comptroller power to determine that question in his own discretion, subject only to the obligation to do so honestly and in good faith. Under these circumstances the question is presented, what were the duties of the comptroller and the extent of his power in carrying out the law. It is a well established principle that statutes containing grants of power shall be construed, so as to include the authority to do all things necessary to accomplish the object of the grant, and to enable the donee of the power to effect the purpose of the act."

In the case of Armstrong v. The Village of Fort Edward, 159 N. Y. 315, it was held that an express power in a village board of waterworks commissioners to sell water bonds, carried with it implied powers to employ such reasonable or proper assistance as might be requisite to bring about an advantageous sale of such bonds. The court in its opinion in this case, after noting the earlier cases of Mayor, etc., v. Sands, supra, and Brownell v. Town of Greenwich, 114 N. Y. 518, refers to the case of Village of Fort Edward v. Fish, 156 N. Y. 353, and then says:

"This last case calls attention to the rule by which the authority of officers, such as the members of this board of water commissioners, to make contracts may be determined. Where there is an express grant of power to them it carries with it, by necessary implication, every other power needful and proper to the execution of the power expressly granted. The authority to sell water bonds, therefore, carries with it the authority to secure such reasonable and proper assistance as may be requisite to bring about an advantageous sale of the bonds. It is suggested that the rule permits the employment of brokers only to sell the bonds, but it is not so confined. It was not a broker that was selected in Mayor, etc., v. Sands (supra), and it quite frequently happens that men who are not brokers, and never have been, have such relations that they can dispose of bonds fully as advantageously as brokers. Those having charge of the selling of bonds have the right to exercise their discretion in selecting the agencies by which they shall make disposition of them, but in the selection of such agencies it is their duty to exercise their best judgment in the interests of the public whom they serve. The selection, therefore, must be made in good faith and with a fixed purpose to further the interests of the constituency represented."

The court in its opinion in this case further says:

"The record contains evidence suggesting much of fruitless effort on the part of the local authorities to place the bonds, and while the matter of their disposition was in that situation, parties who were not brokers were at work on the matter, and the outcome was a sale of $97,000 of the bonds for the sum of $105,000. Such an agent the board of water commissioners had the right to employ at a reasonable compensation, whether his usual business was that of a broker, a lawyer or doctor."

In the case of Manitou v. First National Bank, 37 Cole, 344, it appears that statutory power was given to the municipality to sell the bonds there in question,

but that such bonds should not be sold for less than their par value. The town, through its board of trustees, agreed in writing to pay one Leddy $1,200 for his services in placing or selling at par an issue of its waterworks refunding bonds, amounting to $40,000; an unsuccessful attempt to dispose of the bonds having been previously made. The action was a contest with respect to the legality of warrants issued in payment of this $1,200, representing the agent's compensation for services rendered in the sale of the bonds. The court, after referring to the New York cases above noted, says:

> "We believe that the above states the law to be applied to this case, and that under the facts disclosed by this record, the contract made by the board of trustees with Mr. Leddy to pay him a commission for his services was within the implied powers of the municipal corporation; that the same was not *ultra vires* or illegal, and that the warrants issued in payment of the services rendered under the contract were valid and binding obligations of the municipality."

In the case just noted, it appears that the bonds were sold at their face value.

In the case of State v. West Duluth Land Co. 75 Minn., 456, the court, referring to certain statutory provisions of that state providing for the issue and sale of the bonds there in question, says:

> "Under the provisions of section 4, chapter 289, supra, a sale of the bonds issued thereunder at less than par value was forbidden. The bonds now under consideration, $140,000 in amount, were turned over to a broker for sale under a written contract with the board of county commissioners. In this contract, it was stipulated that the broker should pay for lithographing and printing the blank bonds, for legal advice and services, and all other expenses incident to a sale, for which, and as compensation in full, he was to receive the sum of $14,000—10 per cent. of the face value of the bonds sold. On these facts we are asked to hold that there was a plain violation of section 4, and that the bonds are void. There might be cases where the facts would very conclusively show that an agreed compensation of 10 per cent. for the sale of the bonds was a palpable evasion of such a section, but we have no such case before us. We cannot say, as a matter of law, that, under the conditions of this contract, there was a violation of section 4, which forbids a sale of the bonds at less than par."

In the case of Church v. Hadley, et al., the board of fund commissioners of the state of Missouri, 240 Mo. 680, held that under a statute authorizing such fund commissioners to issue and sell bonds of the state in the sum of $3,500,000 for the purpose of erecting a state capitol building, were authorized to pay a commission to brokers to dispose of said bonds after they had failed to sell the same by their own efforts, and this though the statute authorizing the issuance of said bonds provided that the same should be sold for not less than par. The court in its opinion in this case which notes and discusses the cases above noted, on this question, among other things, says:

> "The question therefore is, can a contract to pay a commission for procuring purchasers for these bonds be made by the board? We think so. First, it is a conceded fact that the defendants have tried to find purchasers and have failed. This might have been expected owing to the exceedingly low rate of interest (3½ per cent.) which the bonds bear, and owing to the

further fact that the members of such board are not in position to find purchasers, as would be some established brokerage company, with a clientele all over the country. Such boards are not usually in touch with the great mass of persons who invest in such securities. A large issue of bonds of this character might be sold to the clientele of any large brokerage firm, in small quantities to each client. Such companies have and can find persons among their customers who could be easily induced to take one or more of such bonds even at a low rate of interest, but this would require work. What a brokerage firm could do in this way, the usual board charged with the sale of low rate bonds could not do. Again we say that the question is, can this board, after having tried to perform the duties imposed upon it in the matter of selling these bonds, and after having failed to sell them, employ and pay a broker or brokerage firm a stipulated reasonable sum to find and procure purchasers who will take these bonds at their face value.

The power to make such a contract must be gathered from the laws of the state. There is no express provision of this law which authorizes the making of such contract, but we think the power, under the admitted facts herein, is clearly implied.

* * * * * * * * * *

The power granted in this law is to sell bonds. The limitation of the power is that the actual sale shall not be less than par. The power of sale is granted in general terms, in so far as the means of sale is concerned. The statute granting the power does not undertake to prescribe the means and manner of sale.

In State ex rel. Clark v. Gates, 67 M. 143, Sherwood, Ch. J., thus announces the fixed rule in such cases: 'If there is one principle in the law which finds abundant and oft-repeated recognition, it is this: That, where an agent is clothed with general powers, the means and measures necessary to effectuate the powers granted attend the grant of authority as inevitable incidents. Edwards v. Thomas, 66 Mo. 468. Thus, an agent employed to get a bill discounted may, unless expressly restricted, indorse it in the name of his employer; a broker employed to effect a policy of insurance may adjust the loss and do all that is requisite towards such adjustment; an agent employed to issue process may receive the debt and costs; and, in general, an agent has implied authority to use those means of which the principal could not but have forseen the necessity, and therefore could not but have intended to authorize (Smith Mercantile Law, 175, 176, and cases cited); and the same principle which applies to private agents is equally applicable in this regard to public ones.'"

The court in its opinion further says:

"We do not mean to say that this act would necessarily by implication authorize the board of fund commissioners to resort to extreme methods to sell in the first instance, but what we do mean is that the law imposes upon them a duty to perform to meet an emergency; that if such board exhausts the usual means of exercising the power (as has been done in this case), then there is a clearly implied power to make such reasonable contracts for the securing of purchasers as the judgment of such board dictates, and in such contracts to provide for the payment of a reasonable sum for the aid given in finding and procuring purchasers willing to buy such bonds from the board at a price not less than par."

In the case of Davis v. The City of San Antonio, decided by the court of civil appeals of the state of Texas, and reported in 160 S. W. Rep. 1161, it was held under a special act amending the charter of the city of San Antonio providing that all bonds shall net the city not less than their par value, with accrued interest to date of payment of the proceeds into the city treasury, no commissions, attorney's fees, or other expenses connected with the issuance and sale of bonds can be taken from the proceeds, unless the bonds are sold at a premium sufficient to pay such expenses; that in the issuance and sale of such bonds the city was not precluded from contracting to pay certain expenses incident thereto, including commission for the sale thereof, and fees of expert attorneys for an opinion as to their validity, out of the general fund.

The only authority that I have been able to find in this state on the question here presented, is the case of Barber v. The Commissioners of Lucas County, reported in 7 N. P. Reps. at page 330. In this case it appeared that the county commissioners having failed in several attempts to sell court house bonds, entered into a contract with a broker whereby they agreed to allow him a certain commission for the sale of the bonds.

The court held that although the statute did not expressly authorize the commissioners to enter into such a contract, yet it appearing that the sale was in the best interest of the county, and there being no collusion or fraud in the transaction, an application for an injunction restraining such contract should be refused.

The authorities above considered, however, have not persuaded me that under the accepted law of this state governing boards of county commissioners in the exercise of their powers generally, and in the issue of county bonds, a board of county commissioners is authorized to employ an agent to negotiate a sale of bonds issued by it and procure purchasers therefor, and to compensate such agent by way of commission or otherwise, either out of the proceeds of the bond sale or out of the general funds of the county. In this connection it will be noted that section 2295 General Code authorizing the sale of bonds of this kind at private sale when the same have not been sold on advertisement for bids therefor, provides that said bonds may be sold at private sale at not less than their par value and accrued interest, and that all moneys from the principal on the sale of such bonds shall be credited to the fund on account of which the bonds are issued and sold, and all moneys from premiums and accrued interest on the sale of such bonds shall be credited to the sinking fund from which said bonds are to be redeemed.

Aside from the case of Miller v. Park City, 126 Tenn., 427, the decided cases are uniform to the effect that under a statute authorizing the sale of bonds at par, it is not permissible to pay the purchaser of said bonds out of the proceeds of said sale or otherwise, a commission covering the services and expenses of the purchaser in the transaction, and this for the reason that such payment in substance and effect amounts to a discount in violation of the law which requires said bonds to be sold at par.

Whelen's App. 108 Pa., 162;
State of Illinois v. Delefield, 8 Paige, N. Y., 527;
Bay City v. State Bank, 193 Mich., 533;
Hunt v. Fossett, 8 Wash., 396;
Uhler v. Olymphia, 87 Wash., 1.

As to this, it may be observed that so far as the net amount received by the political subdivision issuing the bonds is concerned, it is not easily seen wherein the payment of the commission to an agent is anywise different from the payment

of such commission to the purchaser. However this may be, it will be noted that the provision of section 2295 General Code requires all of the moneys realized on the sale of the county bonds to be covered into the proper funds of the county, and this necessarily excludes the idea of any legislative intention that any part of the proceeds of said bonds should be paid to an agent for his services in negotiating the sale of such bonds.

Applicable to every aspect of the questions submitted by you, it will be noted as a legal principle well settled in this state,

> "that county commissioners in their financial transactions are invested only with limited powers, and that they represent the county only in such transactions as they may be expressly authorized so to do by statute. The authority to act in financial transactions must be clear and distinctly granted, and, if such authority is of doubtful import, the doubt is resolved against its exercise in all cases where a financial obligation is sought to be imposed upon the county."
>
> State ex rel. v. Menning, 95 O. S. 97, 99.
> Jones, Auditor, v. Commissioners of Lucas County, 57 O. S. 189.

Moreover, it will be remembered that with respect to some improvements for which the board of county commissioners are authorized to issue bonds, such board acts in a political capacity only, and as representatives of property owners benefited by the improvement without the county having any corporate interest in the improvement. See County Commissioners v. Gates, 83 O. S. 19, 30.

In such cases it would be obviously unjust that the taxpayers of the county at large should be charged with the payment of commissions on the sale of bonds, the proceeds of which is to be used for the sole immediate benefit of the property owners benefited by the improvement.

However, I prefer to base the conclusion reached by me that the board of county commissioners are not authorized to employ and compensate agents for negotiating county bonds, upon the settled principles of law governing the board of county commissioners in transactions of a financial nature, and finding nothing in the statutes which expressly or by fair import, authorize the county commissioners to incur this expense in the sale of county bonds, I am of the opinion that such power does not exist. There might be particular instances like that in the case of Barber v. The Commissioners of Lucas County, supra, where the circumstances might be such that a court of equity would not enjoin the employment of an agent in the sale of county bonds, but I do not feel that under the present state of statutory law, any court in this state would lay down the broad principle that as an incident to the county commissioners' right to sell bonds of the county at private sale, they in all cases have the right to employ and compensate an agent for this purpose, even though in the first instance they may not have been able to effect such sale themselves.

In the consideration of this question, I have not been unmindful of the opportunities for corruption and other manifest dangers that might result from a holding contrary from that here made. My conclusions in the matter, however, rest entirely upon what I conceive to be the limitations applicable to the exercise of the powers of the county commissioners in this state both with respect to financial transactions in general, and with respect to the specific power to sell the bonds of the county at private sale.

The question made by you is therefore answered in the negative with respect to both of the bond issues mentioned in your communication.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1113.

APPROVAL OF BOND ISSUE OF CANTON—$9,000.00.

COLUMBUS, OHIO, April 3, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of the city of Canton, Ohio, in the sum of $9,000.00, for the purpose of extending the time of payment of certain indebtedness which from its limits of taxation said city is unable to pay at maturity.

I have carefully examined the corrected transcript of the proceedings of the city council and other officers of the city of Canton, Ohio, relating to the above bond issue, and find said proceedings to be in conformity with the provisions of the General Code of Ohio relative to bond issues of this kind.

I am, therefore, of the opinion that properly prepared bonds covering the above issue will, when executed by the proper officers, constitute valid and subsisting obligations of the city of Canton, Ohio, to be paid according to the terms therein specified.

No bond form of the proposed bonds covering said issue was forwarded with said transcript, and I am accordingly holding the transcript until receipt of bond form.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1114.

APPROVAL OF BOND ISSUE OF CANTON—$10,000.00.

COLUMBUS, OHIO, April 3, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of the city of Canton, Ohio, in the sum of $10,000.00, for the purchase and installation of meters for use in the waterworks department of said city.

I have carefully examined the corrected transcript of the proceedings of the city council and other officers of the city of Canton, Ohio, relating to the above bond issue, and find said proceedings to be in conformity with the provisions of the General Code of Ohio relative to bond issues of this kind.

I am, therefore, of the opinion that properly prepared bonds covering the above issue will, when executed by the proper officers, constitute valid and subsisting obligations of the city of Canton, Ohio, to be paid according to the terms therein specified.

No bond form of the proposed bonds covering said issue was forwarded with said transcript, and I am accordingly holding the transcript until receipt of bond form.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1115.

APPROVAL OF BOND ISSUE OF CANTON—$20,000.00.

COLUMBUS, OHIO, April 3, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of the city of Canton, Ohio, in the sum of $20,000.00, for the purpose of extending and improving the waterworks system of said city.

I have carefully examined the corrected transcript of the proceedings of the city council and other officers of the city of Canton, Ohio, relating to the above bond issue, and find said proceedings to be in conformity to the provisions of the General Code of Ohio relative to bond issues of this kind.

I am, therefore, of the opinion that properly prepared bonds covering the above issue will, when executed by the proper officers, constitute valid and subsisting obligations of the city of Canton, Ohio, to be paid according to the terms therein specified.

No bond form of the proposed bonds covering said issue was forwarded with said transcript, and I am accordingly holding the transcript until receipt of bond form.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1116.

COUNTY COMMISSIONERS HAVE NO AUTHORITY TO EXTEND TIME FOR PERFORMANCE OF CONTRACT FOR CONSTRUCTION OF HIGHWAY TO A DAY CERTAIN—RIGHTS OF COMMISSIONERS AND SURETIES ON CONTRACTOR'S BOND WHEN CONTRACTOR IS PERMITTED TO CONTINUE ROAD WORK AFTER TIME FOR PERFORMANCE HAS EXPIRED—COMMISSIONERS MAY NOT RELEASE SURETY ON BOND.

1. *In those cases wherein a contractor for the construction of a highway has failed to perform the work within the time specified in the contract, the county commissioners have no authority to extend the time to a day certain within which the work may be completed.*

2. *The county commissioners might suffer or permit the contractor to proceed with the work after the day specified in the contract for completion, but this would not prevent the county commissioners or the sureties on the bond from asserting their rights under the contract, and hence under such conditions the sureties on the bond would not be released.*

3. *There is no authority in law by which the county commissioners may release the sureties on a bond given under the contract for a road improvement and compel the contractor to give a new or additional bond.*

COLUMBUS, OHIO, April 3, 1918.

HON. GEORGE S. MAY, *Prosecuting Attorney, Napoleon, Ohio.*

DEAR SIR:—I have your communication of March 16, 1918, which reads as follows:

> "On October 30, 1916, one William Creager, as principal, with three sureties, entered into a contractor's bond conditioned for the completion of a certain road improvement on or before the first day of September, 1917.
>
> Owing to the impossibility of securing material, the terms of said contract could not be complied with, either by the contractor himself or by force account. No action was taken on said bond and nothing was done by the commissioners in reference to said road improvement until within the last few weeks, when for good cause shown said commissioners extended the time for the completion of said road.
>
> Under the above conditions, does such extension operate to relieve the bondsmen or can the county commissioners legally release them and require the contractor to give new sureties?
>
> This condition applies to a number of roads in this county where the contractors are personally not responsible, and as said contracts under present conditions are not profitable, every effort possible will be made to get from under."

Your supplemental communication under date of March 21, 1918, reads as follows:

> "Having reference to your letter of March 18, 1918, I enclose herewith copy of the contract and bond in the case referred to. Upon the extension of the time by the commissioners, notice was sent to the sureties of such extension and while I am of the opinion that the consent of the sureties be obtained in writing before any extension is made, still it has occurred to me that if the sureties simply acquiesce in the extension and say nothing, they might be estopped to deny their liability on said bond."

The facts upon which you desire my opinion are as follows: On October 30, 1916, your county commissioners let a contract for a certain road improvement to be completed on the first day of September, 1917. The construction of said improvement not having been completed, owing to certain circumstances, your county commissioners some few weeks since, upon good cause shown, extended the time for the completion of the improvement to some future date, not specifically set out in your communications.

The sureties upon the bond given in connection with said contract did not give their consent to said extension of time, but the county commissioners after so extending the time gave notice to the sureties on the bond. The sureties, however, did not make any reply or take any steps relative to said notice.

The contract entered into by and between your county commissioners and William Creager, for the construction of said improvement, did not contain any provision reserving the right to the county commissioners to extend the time for the completion of this improvement. Said contract contains this provision:

> "He further agrees to complete the same on or before the first day of September, A. D. 1917."

Under these facts you ask my opinion upon the following questions of law:

1. Does such extension of time operate to relieve the bondsmen?

2. Can the county commissioners legally release the original bondsmen and require the contractor to give new sureties?

In answer to your first question it can be said that the bond is given in reference to the terms and conditions of the contract under which the bond is given. The sureties are liable under the terms and conditions found in the contract upon which the bond is based. In other words, the contract virtually becomes a part of the conditions under which the sureties on the bond may become liable.

Hence any change in the terms and conditions of the contract, without the consent of the sureties, will release the sureties from their obligation under the bond. If the conditions are changed by the county commissioners, there is practically a new contract entered into, embodying the terms and conditions of the old contract, together with the new terms and conditions. To this new contract the surety would in no sense be a party and therefore is not bound under the bond which he gave in reference to the contract as it formerly existed. It is universally held by the courts that the extension of the time within which a contract or agreement is to be completed is such a modification of the contract that the surety upon the bond is thereby discharged.

In 32 Cyc. 1991, the principle of law is stated as follows:

> "The rule is well settled that if a creditor or obligee, by a valid and binding agreement, without the assent of a surety, give further time for payment or performance to the principal debtor, the surety will be discharged."

In Ide v. Churchill et al., 14 O. S. 372, we find the following in the fifth branch of the syllabus:

> "Any material alteration of the terms of the agreement to which the surety acceded, made by a valid agreement between the principal parties, without his consent, will work his entire discharge from all liability; * *."

In the opinion on p. 387 the court lays down the following:

> "Where the agreement to which the surety acceded has been changed, his obligation is annihilated and gone, and there is no power, either in courts of law or equity, to revive it against him, or to make him a party to the substituted agreement concluded between the principal parties; and in such cases, his entire discharge necessarily ensues."

In Fawcett et al. v. Freshwater, 31 O. S. 367, the syllabus reads:

> "An agreement between the payee and principal of a note, for the extension of the time of its payment for a fixed and definite period, in consideration of the same rate of interest as that named in the note, is valid, without the payment of the interest in advance, and, if made without the knowledge of the sureties, will discharge them."

While this decision was rendered relative to the extension of time of payment of a promissory note, yet the principle therein stated would apply to the kind of a contract under consideration. Before the above principle of law will obtain, however, the extension of time must not be general or indefinite, but must be for some definite period of time; that is, the time within which the contract was

originally to be completed must be extended to some definite and fixed time set out in the supplemental agreement entered into between the principals. This I understand was done in the action taken by your county commissioners.

Further, there must be a consideration for the extension of time, in order to make the extension legal and binding upon both parties; otherwise the above principle of law would not obtain. You state in your communication that the commissioners, "for good cause shown," extended the time for the completion of said road. In my opinion it is very doubtful whether the courts would consider this to be a consideration for the extension of the time for the completion of the contract.

Such is the general statement of law which applies to the matter under consideration. There is left one most important question to be considered, and that is whether the agreement to extend the time within which the contract might be completed is a legal one. It will be noted that Cyc., in laying down the principle of law which controls, states that it must be a valid and binding agreement.

In Ide v. Churchill, et al., supra, the court was careful to state the proposition as follows:

> "Any material alteration of the terms of the agreement to which the surety acceded, made by *a valid agreement* between the principal parties, without his consent; will work his entire discharge from all liability."

The important question, therefore, which remains to be considered is this, had the county commissioners any authority, after the contractor had forfeited the contract by failure to complete the work within the time therein specified, to extend the time of completion of the work? If they had no authority so to do, then their extension of time amounts to nothing and works no injury whatever to the sureties on the bond of the contractor.

In 11 Cyc. 486 the following proposition relative to this matter is laid down:

> "Where a contract with a county has been forfeited because not completed within the time stipulated therein, the county board of supervisors cannot extend the time for performance and thus revive and validate a dead contract."

In Fanning v. Schammel et al., 68 Calif. 428, the court said:

> "The contract under which the work was done required its completion within sixty days. The work was not completed within the time, and subsequently the board of supervisors of the city and county extended the time for its completion. HELD: That upon the failure to complete the work within the time required, the contract expired and the board of supervisors had no jurisdiction to revive or validate it."

In the opinion the court added to this quoted principle the following:

> "The order of extension was therefore unauthorized and void."

In 10 Pac. Rep. 395, there is a case reported, in which the following principle is laid down:

> "The board of supervisors of the city and county of San Francisco cannot, after the expiration of the time for the completion of street work under a contract, extend the time; and any attempt to do so, or to validate an assessment for such work in pursuance of an extension of time is void."

To the same effect, is the case of Beveridge v. Livingstone, 54 Calif. 54. It must be stated, however, that the decisions of the California courts were based upon a statute which read as follows (p. 56):

> "But should the said contractor or the property owners fail to prosecute the same diligently or continuously, in the judgment of said superintendent of public streets, highways and squares, or to complete it within the time prescribed in the contract, or within such extended time, then it *shall be the duty* of said superintendent of public streets, highways and squares to report the same to the board of supervisors, *who shall, without further petition* on behalf of the property owners, order the clerk of the board of supervisors to advertise for bids, *as in the first instance,* and *relet* the contract *in the manner hereinbefore provided.*"

But it is my opinion that the same principle would apply in the matter under consideration. The California courts held that when the contract was not completed within the time provided for, the provisions of the above quoted statute should then be followed. Under the same reasoning it is my view that when the contract is not completed within the time provided for therein, then the county commissioners cannot revive the same by extending the time to a date further than that provided for in the contract, but they would have authority to assert their rights in law at any time after the expiration of the time provided in the contract.

If this theory be correct, and I believe it is, the county commissioners had no authority in law to enter into the agreement to extend the time for the compeltion of the work, and hence their agreement is void. If their agreement to extend the time is void, the sureties on the bond were not injured, in that they could assert their rights at any time and would not be compelled to wait until the expiration of the time to which the completion of the work was extended.

The case of Ampt v. Cincinnati, 6 O. N. P. 208, is somewhat in point. In the syllabus the court held:

> "Modifications of a contract made as provided by law, and not substantially affecting the general purpose and operation of the old contract, can be made and will be lawful."

In the opinion on p. 214 the court said:

> "A modification is a change or an alteration which introduces new elements into the details or cancels some of them, but leaves the general purpose and effect of the subject-matter intact. It is such change in a contract as leaves the original thing in operation, so far as its general purpose and effect are concerned. It must not make any substantially new engagement from the old one. Therefore, so long as the modifications are made as provided by law, and the changes thus entered into do not substantially affect the general purpose and operation of the old contract, then such modification could be made and would be lawful. In this case the court is of the opinion that the modifications and alterations contemplated do not change the general purpose and effect of the original contract, and such modifications or alterations as the petition sets forth the commissioners are about to enter upon, it seems to the court can lawfully remain, whenever it becomes necessary in the opinion of the commissioners in the progress of their work to make such alterations or modifications in the contract."

Using the argument in the above case, it is my opinion that the modification and alteration attempted to be made by your county commissioners did change the general purpose and effect of the original contract, for the reason that by doing so they set aside a contract in reference to which a good and sufficient bond for the faithful performance of the same had been given, and entered into practically another contract for which no bond whatever was given. This case was affirmed by the supreme court and hence is entitled to weight and respect.

To be sure, in arriving at the conclusion herein reached, I am not holding that a contractor would be compelled to finish the work upon the exact day set forth in the contract. If neither the sureties on the bond nor the county commissioners made a move relative to the matter, the contractor could proceed in carrying on the work after the date so provided. This the contractor could do in the present case, but the sureties on the bond or the county commissioners would have authority at any time to assert their rights under the law. Hence the mere fact that the county commissioners suffered or permitted the contractor to proceed with the work after the time limit provided in the contract, would not release the sureties on the bond; while on the other hand, if the time within which the work was to be completed under the contract could be legally extended by the county commissioners, both the county commissioners and the sureties would be prevented from asserting their rights until the new time limit had expired, and thus an entirely new condition would be inserted in the contract. In such a case, unless the sureties on the bond gave their consent to said extension of time, they could set up as a defense, in reference to their obligation under the bond, that the contract had been modified and that they were prevented from asserting their rights under the bond to a date beyond that to which they had agreed to be responsible, and for that reason ask to be released from their obligations under the bond.

Hence answering your question specifically, it is my opinion that your county commissioners have no authority in law, after the time had expired within which the contract was to be completed, to extend the time, within which the work should be completed, to some future date, and that such attempted extension of time is void and of no effect, and that the sureties on the bond given in reference to the original contract are still bound, for the reason that they at any time might assert their rights under the law as against the contractor for whom they became bound.

Notwithstanding the fact that your county commissioners had no authority to enter into a valid agreement for the extension of the time to a day certain, yet they might suffer or permit the contractor to proceed with the work, even though the day on which the work was to be completed has passed. This will not release the sureties on the bond, for the reason that it does not prevent them from asserting their rights under the law at any time they may see fit so to do.

Your second question is as to whether the county commissioners could release the present bondsmen and require the contractor to give new sureties.

There is no provision of law with which I am familiar, that would compel a contractor to give a new bond, with new sureties thereon. The law provides for the entering into of a bond before the contract is let, but when this is done the law seems to be fully complied with and there is no further provision made relative to an additional, supplemental or new bond.

My predecessor, Hon. Edward C. Turner, in an opinion rendered to Hon. Clinton Cowen, state highway commissioner, on August 9, 1916, and found in Vol. II, Opinions of the Attorney-General for 1916, p. 1346, had this question under consideration. Mr. Turner laid down the following proposition (p. 1348):

> "There is no provision in either section, either requiring or authorizing the taking of an additional or supplementary bond in case the surety on

the original bond should, subsequent to the execution of such bond, become insolvent or the affairs of a surety company signing such bond be thereafter placed in the hands of a receiver. Not only is this true but it is also true that no method exists by which a contractor could be forced to give an additional or supplementary bond."

While the above language was used in reference to the highway act as it applied to the state, yet the same could be made to apply to a county in the improvement of highways, and I am of the opinion that the principle stated by my predecessor is correct and that there is no provision of law which would compel a contractor to give a new, additional or supplementary bond. Of course, as stated by my predecessor, a contractor who had a good contract might be willing to give an additional bond, and might do so without raising any question, but a contractor who has an unprofitable contract and is looking for some means by which he could escape the obligations of the same, would simply refuse to give an additional bond, and as before stated, there is no principle of law which would compel him so to do.

Hence answering your second question specifically, it is my opinion that there is no provision of law authorizing the county commissioners to cancel a contract bond given in reference to the improvement of the highways of the county and requiring the contractor to give a new bond.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1117.

HIGHWAY IMPROVEMENT—RIGHTS OF LOWEST AND BEST BIDDER.

A contractor who presents the lowest and best bid for the improvement of a highway has the right to assume that he will be awarded the contract within a reasonable time, but in order to take advantage of this principle, he must assert his rights within a reasonable time or he will be estopped from raising any question in reference thereto.

The question as to whether the final resolutions, under the facts set out in the opinion, are legal or not, is not passed upon, for the reason that a former attorney-general passed upon the legality of the same and held them to be legal.

COLUMBUS, OHIO, April 3, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of March 6, 1918, in which you set out copy of letter received by you from C. H. Duncan, counsel for the Jones Construction Company, and ask my opinion in reference to the validity of a contract entered into by and between the Jones Construction Company and the state of Ohio, for the construction of section "R," Cleveland-East Liverpool road, Columbiana county. On account of the length of your communication I shall not quote the same in full, but from it I gather the following to be the important facts relative to which it must be determined whether the contract is valid or not:

1. On April 14, 1916, advertisement for bids was prepared by your department and forwarded to the Ohio Patriot and the Buckeye State for insertion.

2. On April 28, 1916, bids were opened by the state highway commissioner and it was found that there were three bids, viz.:

J. C. Devine Company	$32,985 00
The Jones Construction Co	32,900 00
The Public Contracting Co	32,750 00

3. On September 28, 1916, a contract was finally entered into by and between the state highway commissioner, on the part of the state of Ohio, and the Jones Construction Company, upon its bid, which contract was forwarded to the said Jones Construction Company.

4. On April 24, 1916, final resolutions were duly passed by the county commissioners of Columbiana county, in which they agreed to assume a certain part of the cost and expense of said improvement.

5. On July 17, 1916, the county auditor of Columbiana county filed his certificate with the county commissioners, certifying that the money was in the treasury, or in process of collection, necessary to enable the county commissioners to take care of the obligation assumed by them in said final resolutions.

6. Your communication shows that it was not until some months after the bids were opened that you determined the Jones Construction Company to be the lowest and best bidder.

Upon these facts the following questions of law are raised, on account of which it is contended by counsel for the Jones Construction Co. that the contract ought to be declared void and the said company released from the performance of the obligation of the same:

1. That an unreasonable length of time intervened between the opening of bids on April 28, 1916, and the awarding of the contract to the Jones Construction Co. on September 28, 1916.

2. That the filing of the county auditor's certificate with the county commissioners on July 17, 1916, while the final resolutions of the county commissioners were adopted on April 24, 1916, is not in accordance with the provisions of section 5660 G. C.

You will note these two questions of law in their order as applied to the facts herein set out.

The Jones Construction Co. bases its claim, that its contract ought to be declared void, mainly upon opinion No. 258 rendered by this department on May 11, 1917, to the state highway department. In that opinion I advised you that a contract entered into by you with Rinehart Brothers could not be enforced against them and based my opinion upon two grounds, viz., that an unreasonable length of time had elapsed between the opening of the bids and the letting of the contract and, further, that the final resolution of the county commissioners was entered into something like three months before the filing of a certificate by the county auditor to the effect that the money was in the treasury necessary to take care of the obligation assumed.

While the length of time elapsing between the adoption of the final resolution and the filing of the certificate by the county auditor is about the same in the Jones Construction Co. contract as it was in the Rinehart Brothers' contract, however, there is a vast difference between the facts in the Rinehart Brothers matter and

that now under consideration. Rinehart Brothers repeatedly complained to the state highway department, before and after the letting of the contract. They wrote to the state highway commissioner, asking for permission to begin the construction of the improvement on account of the fact that labor and material were greatly enhancing in price. After they were awarded the contract, they again took the matter up with the state highway department, with a view to being granted relief owing to the length of time that had elapsed between the opening of the bids and the awarding of the contract; while in the matter now before us the Jones Construction Co. never complained to the state highway commissioner, either before or after the letting of the contract. From this fact alone I am of the opinion that the Jones Construction Co. would be estopped at this late date from raising any question as to the length of time which elapsed between the opening of the bids and the granting of the contract. If it desired to take advantage of that fact, it should have been done either before it was awarded the contract or very soon thereafter.

The Jones Construction Co. claims that it received no notice until recently from the state highway commissioner to proceed with the work. It needed no notice. It had signed a contract and this contract was signed by the state highway commissioner and forwarded to it. Said company held it during all the months after the receipt of the same and had authority to proceed at any time with the work; hence it needed no further notice from the state highway commissioner to proceed.

It is also claimed by the Jones Construction Co. that at one time it notified the county commissioners of Columbiana county that it would not proceed with the improvement. The county commissioners had nothing whatever to do with the contract. They had nothing to do with the forfeiting of the contract. Notice given to them would have no force or effect upon the state highway commissioner relative to his rights under the contract for and on behalf of the state. So I do not think the first point is well taken.

We come now to the second question that is raised, viz., that this contract is void because of the fact that the county commissioners entered into an agreement with the state highway commissioner to assume a certain part of the cost and expense of the improvement on April 24, 1916, while the county auditor did not file his certificate to the effect that sufficient money was in the treasury to take care of the obligation so entered into by the county commissioners until July 17, 1916.

The theory upon which the Jones Construction Co. claims that its contract with the state is void is this, viz., that before a contract is entered into by and between the state of Ohio with a contractor final resolutions must be adopted by the county commissioners in which they agree to assume a certain part of the cost and expense of the improvement. Thus, the contract is virtually based upon the final resolution of the county commissioners and if the final resolution of the county commissioners is void, then the contract based upon said final resolution would likewise be void. This theory is based upon the provisions of section 1218 G. C., which reads in part as follows:

> "No contract shall be let by the state highway commissioner in a case where the county commissioners or township trustees are to contribute a part of the cost of said improvement, unless the county commissioners of the county in which the improvement is located shall have made a written agreement to assume in the first instance that part of the cost and expense of said improvement over and above the amount to be paid by the state. Where the application for said improvement has been made by the township trustees, then such agreement shall be entered into between the state highway commissioner and the township trustees. * * *"

In this case the final resolution was entered into by the county commissioners of Columbiana county and was filed with the state highway commissioner before he entered into the contract with the Jones Construction Co.

It will further be noted that section 1218 provides that:

> "Such agreement shall be filed in the office of the state highway commissioner with the approval of the attorney-general endorsed thereon as to its form and legality."

With reference to the action of the attorney-general upon this final resolution I desire to call your attention to an opinion rendered by my predecessor, Hon. Edward C. Turner, to the state highway commissioner on July 25, 1916 (opinions of the attorney-general for 1916, Vol. II, p. 1282). In reference to this opinion, one of the final resolutions, approved as being correct in form and legal, is as follows:

> "Columbiana county—Sec. 'R,' Cleveland-East Liverpool road, petition No. 2193, I. C. H. 12."

This is the same road in reference to which the Jones Construction Company, through its attorney, Mr. Charles H. Duncan, now asks its contract to be forfeited. It is to be noted that Mr. Duncan, who was formerly in the attorney-general's department, wrote the opinion holding that the final resolutions of the county commissioners of Columbiana county were legal, and that my predecessor agreed with the opinion as written and held said final resolutions to be correct in form and legal. Upon this finding of my predecessor you proceeded to enter into the contract with the Jones Construction Company for the completion of said highway.

Inasmuch as Mr. Duncan at one time held the final resolutions to be legal, and my predecessor agreed with him to the effect that the same were legal, and you proceeded to let the contract because of the fact that the said final resolutions were approved by my predecessor, I do not feel that I should open up the question of the legality of said resolutions at this late date and hold the contract based upon said resolutions to be illegal.

Hence, based upon the opinion written by Mr. Duncan and approved by my predecessor, it is my view that I should not pass upon the legality of the contract entered into by and between the Jones Construction Company and yourself, and that you should proceed to carry out its terms according to law.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1118.

APPROVAL OF ARTICLES OF INCORPORATION OF THE BUCKEYE MUTUAL HEALTH ASSOCIATION.

COLUMBUS, OHIO, April 5, 1918.

HON. WILLIAM D. FULTON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have carefully examined the articles of incorporation of the Buckeye Mutual Health Association submitted to me under date of April 6, 1918, and not finding said articles with respect to the purposes of said association to be contrary to the constitution and laws of the United States or of the state of Ohio, but finding the same to be in conformity with the provisions of sections 9445 et seq. of the General Code, and said articles to be otherwise executed in conformity to the provisions of the General Code relating to the incorporation of associations of this kind, the same are hereby approved.

Yours very truly,

JOSEPH McGHEE,

Attorney-General.

1119.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN LORAIN AND MEDINA COUNTIES.

COLUMBUS, OHIO, April 5, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your communication of April 2, 1918, in which you enclose for my approval final resolutions for the following improvements:

Medina-Elyria Road—I. C. H. No. 314, Sec. "O-1," Lorain county, types "A" and "B."

Ashland-Medina Road—I. C. H. No. 139, Sec. "R," Medina county, types "A" and "B."

I have carefully examined said final resolutions, find them correct in form and legal and am therefore returning the same to you with my approval endorsed thereon, in accordance with the provisions of section 1218 G. C.

Very truly yours,

JOSEPH McGHEE,

Attorney-General.

1120.

RIGHTS OF PREFERRED STOCKHOLDERS UNDER SECTION 8671 G. C. CANNOT BE LIMITED BY ARTICLES OF INCORPORATION.

A corporation is without authority to include in its articles of incorporation, by amendment or otherwise, any stipulation limiting the rights of preferred stockholders under section 8671 of the General Code.

COLUMBUS, OHIO, April 5, 1918.

HON. WILLIAM D. FULTON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have given careful consideration to the letter addressed to you by Mr. C. C. Middleswart, attorney at law, Marietta, Ohio, and by you submitted to me with a request for my official advise in the premises. The question submitted by Mr. Middleswart is as follows:

> "May a private corporation insert in its articles of incorporation, by proper procedure, a provision to the effect that the holders of the preferred stock which it is authorized to issue shall have the same right to participate in the assets of the corporation in case of its dissolution or insolvency as the common stockholders; and if this may not otherwise be done might it be authorized upon the stipulation that a recital to this effect should be placed upon each certificate of preferred stock?"

This inquiry involves consideration of the following provisions of the General Code:

> "Sec. 8671. On the insolvency or dissolution of a corporation, the holders of preferred stock shall be entitled to receive from the assets remaining after paying its liabilities, the full payment of its par value, before anything is paid to the common stock."

Section 8669 of the General Code as amended 107 O. L., 411:

> "A corporation issuing both common and preferred stock may create designations, preferences, and voting powers, or restructions or qualifications thereof, in the certificate of incorporation, and if desired, preferred stock may be made subject to redemption at not less than par, at a fixed time and price, to be expressed in the stock certificates thereof. * * *"

Although one of the sections which I have quoted has been recently amended, the quotations which I have made have been a part of the law of this state since 1902, when both present sections were enacted as parts of section 3235a Revised Statutes. The full subject-matter of the section as it was then passed need not be quoted, but certain of the other provisions thereof may appropriately be considered in connection with the question now asked:

> "Sec. 8668. When the capital stock is to be both common and preferred, it may be provided in the articles of incorporation that the holders of the preferred stock shall be entitled to * * * dividends of not more than eight per cent, * * * out of the surplus profits of the company each year in preference to all other stockholders. Such dividends also may be made cumulative."

"Sec. 8670. Upon the insolvency of the corporation no holder of preferred stock shall be liable for its debts until after the remedy against the common stockholders upon their liability, as provided by law, has been exhausted, and then only for such amount as remains unpaid. Such liability in no event shall exceed that fixed by law for the common stock of such corporation."

It will be observed that the designations, preferences and voting powers or restrictions and qualifications thereof which a corporation issuing both common and preferred stock may create with respect to the preferred stock are to be expressed in the certificate of incorporation, and are not required to be expressed on the face of the stock certificate.

So far as the mere question of power is concerned, and regarding it as a matter between the corporation and the state, it would seem at the outset therefore that no recital on the face of a certificate of stock would be efficacious to enable a corporation to create a restriction or preference which it could not provide for without such recital; in other words, that whatever the answer to the question might be it would not be affected in any way either by placing anything on the certificates of stock which was not required to be placed there, or by providing in the articles of incorporation that certain recitals not required to be placed on the face of the certificates of stock should be placed there. In this view of the question the legal problem is narrowed to the following statement:

May a corporation under the power to create "restrictions or qualifications of preferences" restrict or qualify the preference given to the holders of preferred stock in the event of insolvency or dissolution by sections 8670 and 8671 of the General Code, or are the latter preferences regarded as absolute and not subject to the restrictions and qualifications authorized to be made by section 8671?

Preliminary to this question there arises, of course, the question as to the modifying effect of the phrase "or restrictions or qualifications thereof" as found in section 8669 General Code. Does this phrase modify the immediately preceding phrase "voting powers" only, or does it also extend to the word "preferences"? This question is not free from doubt. There is no authority whatsoever in this state on the subject. I incline to the view that the phrase modifies all substantives and nouns which precede it and are capable of modification. This point, however, is not conclusive, because though it be admitted that the phrase "or restrictions or qualifications thereof" modifies the word "preferences," yet it appears upon careful examination of the provision that the power to create restrictions and qualifications is limited in this respect at least to restrictions and qualifications of such preferences as the corporation may by its own action in framing its certificate of incorporation create. In other words, a corporation may create preferences and it may restrict and qualify those which it creates, but so far as this section is concerned no power is given to restrict or qualify the preferences which the law gives to preferred stock.

If these conclusions are correct then it would follow that a corporation could not in its articles of incorporation modify or "restrict or qualify" the preferences which flow from the law itself as expressed in sections 8670 and 8671 of the General Code. This result is reached by taking the statutes as we find them, and it applies only to the question which is raised when the corporation seeks to file articles of incorporation or amendments thereof in the office of the secretary of state.

This conclusion having been reached I would be of the opinion further that

the right of a corporation to put such a stipulation into its articles of incorporation could not be enlarged by adding to the stipulation a further provision to the effect that the restriction in question is to be put on the face of the certificates of stock.

For the reasons which I have expressed I advise you that a corporation is without authority to include in its articles of incorporation, by amendment or otherwise, any stipulation limiting the rights of preferred stockholders under section 8671 of the General Code.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

1121.

APPROVAL OF BOND ISSUE OF GALLIA COUNTY—$40,000.00.

COLUMBUS, OHIO, April 5, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In re: Bonds of Gallia county, Ohio, in the sum of $40,000 for the purpose of refunding certain turnpike bonded indebtedness in like amount, which said county is *unable to pay at maturity.*

I have carefully examined the corrected transcript of the proceedings of the board of county commissioners relating to the above bond issue and find said proceedings to be in conformity to the provisions of the General Code of Ohio relating to bond issues of this kind.

I am therefore of the opinion that properly prepared bonds covering said issue will, when executed by the proper officers of the county and delivered, constitute valid and subsisting obligations of Gallia county, Ohio, to be paid according to the terms thereof.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1122.

TITLE GUARANTEE AND TRUST COMPANY, HOW OPERATIONS OF SAID COMPANY LIMITED.

Section 9853 G. C. limits the operation of a title guarantee and trust company to one county in the state, which must be designated in its application for a charter, but such companies may issue policies of title insurance on real estate located in other counties of the state, provided an additional deposit of $50,000 is made, as provided by law, for each additional county in which such company desires to issue policies of title insurance.

COLUMBUS, OHIO, April 6, 1918.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—O. E. Hawk & Company, of Youngstown, Ohio, has asked a question relative to section 9853 of the General Code, which pertains to title guarantee and trust companies, which seems to me to be of sufficient importance to merit an opinion thereon addressed to you, and I am accordingly addressing an opinion to you on the subject submitted, this department having held in Opinion No. 628, rendered December, 1913, by Hon. Timothy S. Hogan, attorney-general (Attorney-General's Report for said year, page 164), that the auditor of state had jurisdiction over the examination of title guarantee and trust companies.

The question submitted by O. E. Hawk & Company is as follows:

> "In the laws governing title guarantee and trust companies, section No. 9853 it states that a deposit of $50,000 is required to be made with the treasurer of state, for each county in which the company proposes to operate—I assume that the section means every county in which titles are guaranteed, and not every county in which parties may live who hold said guarantees or insurance policies. That is to say, if a title guarantee and trust company should form in Youngstown and would guarantee the titles to a property and payment of the principal and interest of a mortgage on the same property, which is located in Mahoning county, and a person living in Trumbull county should own said mortgage and insurance policy, I assume that there would not have to be another $50,000 deposited with the treasurer of state on account of the holder living in Trumbull county.
>
> The law means I suppose, that there shall be $50,000 deposited for each county in which a company guarantees or insures the titles to property located in that county, and not for every county in which a holder of a guarantee of titles, or a holder of a guarantee of the principal or interest of a mortgage lives."

Section 9850 specifies the powers of title and guarantee and trust companies and is as follows:

> "Sec. 9850. A title guarantee and trust company may prepare and furnish abstracts and certificates of title to real estate, bonds, mortgages and other securities, and guarantee such titles, the validity and due execution of such securities, and the performance of contracts incident thereto, make loans for itself or as agent or trustee for others, and guarantee the collection of interest and principal of such loans; take charge of and sell, mortgage, rent or otherwise dispose of real estate for others, and perform all the duties of an agent relative to property needed or otherwise entrusted to it."

Section 9851 provides for the deposit by such company, with the treasurer of state, and is as follows:

> "Sec. 9851. No such company shall do business until its capital stock amounts to at least one hundred thousand dollars fully paid up, and until it has deposited with the treasurer of state fifty thousand dollars in securities permitted by sections ninety-five hundred and eighteen and ninety-five hundred and nineteen. Except such deposit, the capital shall be invested as the board of directors of such company prescribes."

Section 9852 provides how the deposit should be held by the treasurer of state and the next section itself fully answers the inquiry submitted, it reads:

> "Sec. 9853. Any company so organized shall be limited in its operation to only one county in this state, which shall be designated in its application for a charter, except that if it desires to issue its policies of title insurance in more than one county it may issue them in such other county or counties upon depositing with the treasurer of state an additional sum of fifty thousand dollars in securities as above provided, for each additional county in which it proposes to operate."

It seems to me that the language of this section requires no construction. Section 9850 quoted above, states the powers of these companies, that is what business they can transact, in short, the operations in which they may engage, and section 9853 plainly states that such operation must be limited to only one county in the state, with one exception, namely, it may issue policies of title insurance in more than one county provided an additional deposit of $50,000 is made for each other county in which such policies may be issued. The residence of the policy holder has no bearing whatever upon this section; the only question is, in what county does it operate, and where is the real estate located, the title of which is guaranteed or insured. If the company has not deposited $50,000 for the county in which the real estate on which the company issues a policy of insurance, is located, it is without power to issue such policy.

It might be argued that upon a deposit of an additional $50,000 with the treasurer of state, such company could operate as fully in the additional county for which the deposit was made, as it could in the county designated in its application for a charter. But, as under section 9850 there are definite things which such companies can do; definite operations in which it may engage; under a well known rule of statutory construction, an exception being made allowing it to issue policies of title insurance in other counties upon the compliance with certain conditions, it would follow that no other exception is permissible.

Answering the question directly, my opinion is that section 9853 does not require an additional deposit for a county not designated in the application for a charter by a title guarantee and trust company, unless the company issues or desires to issue policies of title insurance upon real estate located in such other county; and when such policies are issued or are desired to be issued, then such additional deposit is mandatory.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1123.

FROM WHAT FUND MONEY NECESSARY FOR THE ERECTION OF DOG POUND TAKEN—COUNTY COMMISSIONERS MAY NOT ERECT A DOG POUND WHEN HUMANE SOCIETY HAS SUITABLE PLACE AND IS WILLING TO RENDER REQUIRED SERVICES.

COLUMBUS, OHIO, April 6, 1918.

HON. BERNARD M. FOCKE, *Prosecuting Attorney, Dayton, Ohio.*

DEAR SIR:—This department is in receipt of a letter from your office in which opinion is asked as follows:

> "1. In a county where there does not exist a dog pound and animal shelter, as contemplated by section 5652-8 of the General Code, can the county commissioners use the money that is collected from the license paid by owners of dogs and dog kennels for the purpose of erecting and maintaining a dog pound and animal shelter, as contemplated by the act of the legislature passed March 21, 1917, relating to the regulation of dogs and providing compensation for damages done thereby?
>
> 2. In a county where there is a humane society, and there is a dog pound and animal shelter, can the county commissioners provide a suitable place for the impounding of dogs and make proper provisions for feeding and caring for the same, and also provide devices and methods for destroying dogs; if so, can they use the funds that have been raised by the sale of licenses to owners of dogs and dog kennels for that purpose?"

Applicable to both of your questions, section 5652-8 General Code, as enacted in the act referred to in your communication, provides as follows:

> "County commissioners shall provide for the employment of deputy sheriffs necessary to enforce the provisions of this act, shall provide nets and other suitable devices for taking dogs in a humane manner, and, except as hereinafter provided, shall also provide a suitable place for impounding dogs, and make proper provision for feeding and caring for the same, and shall also provide humane devices and methods for destroying dogs. Provided, however, that in any county in which there is a society for the prevention of cruelty to children and animals, incorporated and organized as provided by law, and having one or more agents appointed in pursuance of law, and maintaining an animal shelter suitable for a dog pound and devices for humanely destroying dogs, county commissioners shall not be required to furnish a dog pound, but the sheriff shall deliver all dogs seized by him to such society for the prevention of cruelty to animals and children at its animal shelter, there to be dealt with in accordance with law, and the county commissioners shall provide for the payment of reasonable compensation to such society for its services so performed out of the county general fund."

Applicable to your first question, section 5652-13 General Code reads:

> "The registration fees provided for in sections 5652-1 and 5652-2 shall constitute a special fund known as the dog and kennel fund for which shall

be deposited by the county auditor in the county treasury and be disposed of by defraying the cost of furnishing registration applications, certificates and tags, by the payment of animal claims as provided in sections 5840 to 5849, both inclusive, of the General Code as amended herein; and in accordance with the provisions of section 5653 of the General Code as amended herein."

From a consideration of these statutory provisions I am clearly of the opinion that any expenditure of money made by the county commissioners for the purpose of erecting and maintaining a suitable place for impounding dogs should be made out of the general county fund, and not out of the special "dog and kennel fund" created by the collection of registration fees provided for in said act. Moneys in this special fund can be expended only for the purposes mentioned in section 5652-13 and in section 5653 of the General Code.

In answer to your second question, I do not think that section 5652-8 General Code, above quoted, contemplates any authority in the county commissioners to expend funds for the purpose of providing and maintaining a suitable place for impounding dogs in a county where there is a humane society which maintains an animal shelter suitable for the purposes of the act, and which is willing to render the required services for a reasonable compensation to be paid by the county commissioners.

However, if in the judgment of the county commissioners the animal shelter afforded by such humane society is not suitable for the purpose of a dog pound; or if the services rendered by such humane society are otherwise not suitable for carrying into effect the purposes of the act, I have no doubt but that in such case the county commissioners would be authorized to erect a suitable dog pound and equip and maintain same; and the same would be true in case such humane society refuses to afford to the county the use of its dog pound and services in connection therewith for a reasonable compensation. Any moneys expended by the county commissioners for such purposes, however, are required to be paid out of the general county fund and not out of moneys obtained by the collection of registration fees on dogs or kennels registered under said act.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1124.

HOW FUNDS RAISED TO CARRY OUT PROVISIONS OF CIVIL SERVICE ACT IN CITY AND CITY SCHOOL DISTRICT—BOARD OF EDUCATION MAY NOT CONTRIBUTE THERETO.

The money necessary to carry out the provisions of the civil service act in a city and city school district is to be appropriated by the council and paid from the city treasury. The board of education has no authority to contribute thereto out of the funds of the school district.

COLUMBUS, OHIO, April 8, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—On March 11th you addressed the following inquiry to this department:

"We respectfully request your written opinion upon the following matter:

We are calling your attention to the provisions of section 486-19 of the General Code in part as follows:

'The expense and salaries of any of such municipal commission shall be determined by the council of such city, and a sufficient sum of money shall be appropriated each year to carry out the provisions of this act in such city.'

Question:

May the board of education legally make payment from its treasury for a portion of the salaries and expense of the civil service commission of a city?"

Section 19 of the civil service law from which you quote, contains all the statutory provision there is upon the subject of the above inquiry. That section creates the municipal civil service commission. It is primarily and principally what its name indicates. As incidental, however, to its municipal duties, it is given the additional authority as to civil service in the city school district. The legislature evidently had in view that these latter duties would be minor in character and of infrequent occurrence, and the city school district itself being always necessarily composed of the territory of the city, and sometimes including outside territory, in which latter case, and in all cases while the city school district is not exactly a municipal activity, yet it is so essentially composed of the city population and supported by its property, that it is looked upon as a branch of municipal activity.

This section seems to be enacted in this spirit, or with this idea. The pertinent portions of the section are as follows:

"The mayor or other chief appointing authority of each city in the state shall appoint three persons, one for a term of two years, one for four years and one for six years, who shall constitute the municipal civil service commission of such city and of the city school district in which such city is located; * * * * a vacancy shall be filled by the mayor or other chief appointing authority of a city for an unexpired term; * * * * such municipal commission shall prescribe rules, etc. * * * * For the classification of positions in the civil service of such city and city school district; * * * * said municipal commission shall have and exercise all powers and perform all other duties with respect to the civil service of such city and city school district as herein prescribed and conferred upon the state civil service commission with respect to the civil service of the state * * * *. The expense and salaries of any such municipal commission shall be determined by the council of such city and a sufficient sum of money shall be appropriated each year to carry out the provisions of the the act in such city. * * * * The chief executive authority of such city may at any time remove any such civil service commissioners for inefficiency, etc. * * *."

The section, a very long one, gives the whole scheme of municipal service. The portions above quoted is that part having possible application to the matter in hand.

The paragraph quoted by you really disposes of the whole subject, but the others quoted above are those which it is considered might have some bearing upon it. The provision is that the council shall determine the expense and salaries and appropriate money to carry out the provisions of the act. It is plain that the

council can appropriate no money from the treasury of the school board or from any other source than the funds of the city. There is no legal authority found in any statute for the board of education to contribute to this expense. Therefore, the city pays it alone, and the board of education receives the service gratis.

Very truly yours,

JOSEPH MCGHEE,
Attorney-General.

1125.

COUNTY COMMISSIONER MAY NOT SELL GRAVEL TO COUNTY FOR ROAD BUILDING UNDER SECTIONS 2420 and 12911 G. C.—INTEREST, AS USED IN SECTIONS 12910 AND 12911 G. C., REFERS TO PECUNIARY INTEREST AS SELLER.

1. *A county commissioner selling gravel to a county highway superintendent under the Cass highway law, for use on the public highways of the county, and accepting pay therefor, would violate the provisions of sections* 2420 *and* 12911 *G. C.*

2. *The interest referred to in sections* 12910 *and* 12911 *G. C. has reference to a pecuniary interest as seller, and not to the interest of an officer as buyer.*

COLUMBUS, OHIO, April 8, 1918.

HON. R. A. KERR, *Prosecuting Attorney, Troy, Ohio.*

DEAR SIR:—I have your communication of March 29, 1918, in which you state a matter has been brought to your attention concerning materials being furnished by a county commissioner to the county, and that the sections of the General Code involved are sections 2420, 12910, 12911 and 12920. You then state:

> "The question coming to my mind is whether or not the word 'contract' as used in the first three sections means a contract which is made by the commissioners, or whether it would apply in case of a road superintendent who purchased gravel from a pit owned by a commissioner, without any action having been taken by the board of commissioners to purchase gravel from that pit, payment being made to the commissioner by the road superintendent after the gravel was hauled from the pit. In other words, are the sections named broad enough to cover all cases in which a commissioner furnishes anything to the county in any method, or does it simply relate to contracts made by the board itself?
>
> In the report of the superintendent filed in the county auditor's office, it is shown that gravel was purchased in one instance, but does not give the name of the commissioner from whom it was purchased, and in another instance and in a different report the surname of the commissioner is used, but not the given name."

Section 2420 G. C. reads in part as follows:

> "No commissioner shall be concerned, directly or indirectly, in any contract for work to be done, or material to be furnished for the county * *."

Section 12910 G. C. provides:

"Whoever, holding an office of trust or profit by election or appointment, or as agent, servant or employe of such officer or of a board of such officers, is interested in a contract for the purchase of property, supplies, or fire insurance for the use of the county, township, city, village, board of education or a public institution with which he is connected, shall be imprisoned in the penitentiary not less than one year nor more than ten years."

Section 12911 G. C. provides:

"Whoever, holding an office of trust or profit, by election or appointment, or as agent, servant or employe of such officer or of a board of such officers, is interested in a contract for the purchase of property, supplies or fire insurance for the use of the county, township, city, village, board of education or a public institution with which he is not connected, and the amount of such contract exceeds the sum of fifty dollars, unless such contract is let on bids duly advertised as provided by law, shall be imprisoned in the penitentiary not less than one year nor more than ten years."

Section 12920 G. C. reads as follows:

"Whoever, being a county commissioner, is guilty of misconduct in office, shall be fined not more than four hundred dollars and forfeit his office."

The particular question which you ask is whether a county commissioner would be brought within the terms of the first three quoted sections of the General Code, providing he is merely interested in a contract as a seller and not as a buyer acting in his capacity as county commissioner and as agent for the county.

We will note particularly the provisions of sections 12910 and 12911 G. C., which would bring him within the terms of the statute, or would not so bring him within said terms.

Section 12910, leaving out all unimportant parts and making it apply merely to the question being considered, reads as follows:

"Whoever, holding an office of trust or profit by election * * is interested in a contract for the purchase of property * * for the use of the county * * with which he is connected, shall be imprisoned * *."

With the same idea, section 12911 G. C. would read as follows:

"Whoever, holding an office of trust or profit, by election * * is interested in a contract for the purchase of property, * * for the use of the county * * with which he is not connected * * shall be imprisoned * *."

Inasmuch as a county commissioner is connected with the county which elected him to the office, we can eliminate from further consideration the provisions of section 12911 G. C., because this section has to do with those officers who are not connected with the subdivision in reference to which the contract was entered into and in which contract the officer had an interest.

The important parts of section 12910, supra, under which the county commissioners would be brought within the provisions of said section, are as follows:

(1) Whoever holding the office of county commissioner;
(2) Is interested in a contract;
(3) For the purchase of property;
(4) For the use of the county with which he is connected.

Of course, a number of these conditions are admitted as being fulfilled in the matter submitted by you. That he is a county commissioner connected with the county is admitted. That the property was purchased for the use of the county, there is no question. That the county commissioner was interested in the contract as seller, there could be no question.

Hence the only question that remains open is as to whether a county commissioner would have to be interested in the contract as a buyer as well as a seller, before he would come within the terms and conditions of said section 12910. The section makes the provision "is interested in *a* contract;" that is, in any contract for the purchase of property for the use of the county. There is nothing to indicate that the county commissioner must be interested as a buyer.

The fact is that the general object and purport of the statute has to do with the other part of the contract, viz., a pecuniary interest as seller. The interest spoken of in these two sections has reference to a pecuniary interest and not merely an interest as county commissioner in the capacity of a buyer. A county commissioner is interested in every contract for the purchase of material for the use of the county, from the standpoint of a buyer. This is so even though the material is purchased by the county highway superintendent, as we shall note later.

So in answering your question the important thing to consider is whether the county commissioner, to whom you refer, had a pecuniary interest as seller and not as to whether he was directly interested, in his capacity of county commissioner, as a buyer. Under the facts stated by you, as said before, he undoubtedly had a pecuniary interest as seller of material for the use of the county on its public highways, inasmuch as he was paid by the county highway superintendent for the gravel which was used upon the highways of the county and which was furnished by the county commissioners. This brings him clearly within the provisions of section 12910 G. C., irrespective of the fact as to whether he assisted in the purchase of the material from himself or not.

That this is the clear intendment of this section will be seen from the provisions of section 12911 above quoted, which reads the same as section 12910, with the exception of one phrase, viz., in section 12910 he must be connected with the county, while in section 12911 he is not connected with the county. Under section 12911 G. C. a county commissioner would never be interested in the contract as purchaser, because the material is purchased by a subdivision such as a township, city or village, with which he is not connected. Hence he could not be interested as a purchaser, but under section 12911 he would be merely interested as a seller. This same principle undoubtedly would apply to section 12910.

In passing I also desire to call your attention to a fact which makes the county commissioner at least indirectly interested as purchaser of said material. The acts set forth in your communication undoubtedly took place under the Cass highway law. I gather this from the fact that you refer to the county highway superintendent, which is a term no longer used under the White-Mulcahy law.

Section 7198 G. C., as it stood in the Cass law, read as follows:

> "The county highway superintendent may, with the approval of the county commissioners or township trustees, employ such laborers, teams, implements and tools, and purchase such material as may be necessary in the performance of his duties."

The county highway superintendent was evidently acting under the provisions of the above quoted section, in the purchase of the gravel from the county commissioner. There was no other provision of the Cass highway law, with which I am familiar, that gave the county highway superintendent authority to purchase material to be used upon the public highways. From the provisions of this section it is clear that the county highway superintendent could not act without the approval of the county commissioners.

In an opinion heretofore rendered by me to the bureau of inspection and supervision of public offices, under date of April 19, 1917, found in Vol. I of the Opinions of the Attorney-General for 1917, p. 520, I held that this approval should be given before the county highway superintendent acted in the matter of a purchase; but I further held in said opinion that if such authority had not been granted before the county highway superintendent acted in reference to a purchase, the county commissioners might approve his act after the purchase was made.

From your communication I infer that the county commissioners neither gave their approval before the purchase nor afterwards. Notwithstanding this fact, it is my opinion that under the provisions of this section the county commissioners would at least be indirectly interested in the purchase of said gravel. This is immaterial, because as I view it the interest referred to in sections 12910 and 12911 G. C. is a pecuniary one as seller, and not an interest in the contract as buyer. This same reasoning, as I view it, would also apply to section 2420 G. C.

Hence answering your question specifically, it is my opinion that a county commissioner would violate sections 2420 and 12910 G. C. in the event he sold gravel to the county highway superintendent, to be used upon the public highways of the county, for which gravel he received payment from said county highway superintendent, all of which being done under the Cass highway law.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1126.

LIMITATION ON THE AMOUNT OF ACTIVE AND INACTIVE DEPOSITS TO BE MADE IN BANKS BY STATE TREASURER.

Section 330-1 *imposes a double limitation on the amount of inactive deposits to be made in banks by the state treasurer. Such inactive deposits can be no more than the capital stock of a bank in question, and in no event more than* $300,000.

The amount of the active deposits is limited to the amount of the capital stock of the bank in which it is made.

COLUMBUS, OHIO, April 8, 1918.

HON. CHESTER E. BRYAN, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—On March 22, 1918, you preferred the following request for an opinion to this office:

"I would ask your opinion regarding the construction which should be placed by this department upon the following sections of 'An act to provide a depository for state funds.'

'Reference is hereby made to sections 321 to 330-11, inclusive, of the General Code, and, specifically, to 330-1, thereof, which reads as follows:

Section 330-1. No bank or trust company shall have on deposit at any one time more than its paid in capital stock and in no event more than three hundred thousand dollars ($300,000.00) as an inactive deposit. (102 v. 33 Sec. 12.)'

QUESTION:

1. Does this section above quoted apply to inactive deposits or depositories only, and

2. If so, what limitations as to amounts that may be deposited are placed on active depositories?"

The section you quote is capable of two constructions, by one of which a limitation is placed upon the amount of deposits as to all banks; that is, as to those receiving both active and inactive deposits to the amount of the capital stock of any such bank, and an additional limitation of the flat sum of $300,000 to all banks receiving inactive deposits.

The other construction, making the whole section apply to inactive deposits, creates a double limitation as to the amount of such inactive deposits as may be placed in any bank, and entirely relieves the active deposit of any limitation whatsoever.

You are advised that the first construction is correct.

It is the most natural meaning to attach to the language.

It is a most natural requirement for the legislature to have imposed.

It is supported by the legislative history.

The words " as an inactive deposit" are immediately connected with the $300,000 limitation. Had it been the idea to create two limitations upon the inactive deposits and none upon the other, a more natural place to have found the character of the deposit ascertained would have been the beginning of the sentence rather than the end, and if the $300,000 limitation had been intended to apply to all banks, it could have been made perfectly clear by repeating the words "No bank or trust company." If you take the first part of the sentence it is an absolute requirement as to all banks and all deposits.

"No bank or trust company shall have on deposit at any one time more than its paid in capital stock."

If this stood alone no doubt could arise as to its meaning. The question is whether it is modified in any manner by what follows it. Let us look at that alone.

"and in no event more than three hundred thousand dollars ($300,000) as an inactive deposit."

These two clauses are not connected or disconnected by any punctuation; neither should they be according to the well known rules. They are simply two separate requirements connected by the conjunction "and," and there is no necessity for holding that either one in any manner limits or affects the other. Of course, by the use of the "and" it became unnecessary to repeat "No bank or trust company shall have on deposit at any one time." This makes the limitation to the amount

of the capital stock apply to all banks and all deposits, and the $300,000 limitation to all banks as to inactive deposits.

Let us look now to the law as it stood before this enactment. If this were a remedial statute, the rule of construction is that you look to the old law for the mischief and remedy, and without it being strictly a remedial law, a similar process is applicable. The section is an amendment of one of the sections of a former act governing the subject of deposits which was enacted April 25, 1904, and consisted of eight sections. Volume 97, page 536, section 4 of which is as follows:

> "The treasurer of state may deposit any portion of the public moneys in his possession, in any such national banks within the state, or any banks or trust companies incorporated under the laws of and doing business within this state, as shall have been approved under the provisions of this act by the board of deposit as herein provided; but no bank shall have on deposit more than its paid in capital stock at any one time, and in no event more than $500,000."

Here is a single limitation of $500,000 applying to all banks and both kinds of deposits. That it had application to both kinds of deposits appears from the fact that section 7 of the act first created the distinction between the active and inactive depositories; that is, it provided that two banks in Columbus should be selected as active depositories, and since that time the distinction has been preserved. So that the law as it formerly stood, immediately preceding the section now under contemplation did place a limitation on the amount of active deposits. No reason is apparent for supposing that it was the legislative intent to remove that safeguard. Active deposits were subject to a limitation. The language of the first part of the section changed the amount of the limitation, or rather fixes a method of arriving at an amount. As inactive deposits are more permanent in their nature there appeared to be some reason for a farther limitation as to the amount, which is carried out by the last of the two classes.

1. Your two questions are therefore answered. Both these limitations apply to inactive deposits.

2. The amount of the active deposits is limited to the amount of the capital stock of the bank.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

1127.

APPROVAL OF BOND ISSUE OF WILLIAMS COUNTY—$22,500.00.

COLUMBUS, OHIO, April 8, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of Williams county, Ohio, in the sum of $22,500.00, for the purpose of meeting the cost and expense of constructing certain road improvements in **Center** township, said **county, petitioned** for by F. L. Doughton et al.

I have carefully examined the corrected transcript of the original and supplemental proceedings of the board of county commissioners and other officers of Williams county, Ohio, relating to said bond issue, and find said proceedings to be in accord with the provisions of the General Code of Ohio relative to bond issues of this kind.

I am therefore of the opinion that properly prepared bonds covering the above issue will, when the same are properly executed and delivered, constitute valid and subsisting obligations of said county, to be paid in accordance with the terms thereof.

No bond form of the bonds to be printed covering said issue was submitted with the transcript, and I am for this reason holding said transcript until receipt of bond form, which I have directed the officials of said county to forward to me for approval.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1128.

APPROVAL OF BOND ISSUE OF MONTGOMERY COUNTY—$10,000.00.

COLUMBUS, OHIO, April 8, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of Montgomery county, Ohio, in the sum of $10,000.00, for the purpose of paying the shares of said county, Butler township, and the owners of abutting property specially assessed for the construction of the Dayton-Troy road, I. C. H. No. 61, Section "R."

I have carefully examined the corrected transcript of the proceedings of the board of county commissioners and other officers of Montgomery county, Ohio, relating to the above bond issue and find said proceedings to be in conformity to the provisions of the General Code of Ohio relative to bond issues of this kind.

I am therefore of the opinion that bonds properly prepared according to the bond form submitted will, when executed by the proper officers of the county and delivered, constitute valid and subsisting obligations of Montgomery county, Ohio, to be paid in accordance with the terms thereof.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1129.

APPROVAL OF BOND ISSUE OF SUMMIT COUNTY—$45,000.00.

COLUMBUS, OHIO, April 8, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of Summit county, Ohio, in the sum of $45,000.00, for the purpose of erecting additional buildings and making improvements in and about the children's home of said county.

I am herewith returning, with my approval, corrected transcript of the proceedings of the board of county commissioners and other officers of Summit county, Ohio, relating to the above bond issue.

An examination of said transcript discloses that the proceedings of said officers have been in conformity to the provisions of the General Code relative to bond issues of this kind, and I am therefore of the opinion that bonds of said county properly prepared and executed according to bond form submitted will, when the same are delivered, constitute valid and subsisting obligations of Summit county, Ohio, to be paid in accordance with the terms thereof.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1130.

APPROVAL OF BOND ISSUE OF MONTGOMERY COUNTY—$18,000.00.

COLUMBUS, OHIO, April 8, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of Montgomery county, Ohio, in the sum of $18,000.00, for the construction and repair of certain small but necessary bridges in said county.

I have carefully examined the transcript of the proceedings of the board of county commissioners of Montgomery county, Ohio, relating to the above bond issue and find said proceedings to be in conformity to the provisions of the General Code of Ohio relative to bond issues of this kind.

I am therefore of the opinion that bonds properly prepared according to the bond form submitted will, when executed by the proper officers of the county and delivered, constitute valid and subsisting obligations of Montgomery county, Ohio, to be paid in accordance with the terms thereof.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1131.

APPROVAL OF BOND ISSUE OF MONTGOMERY COUNTY—$21,000.00.

COLUMBUS, OHIO, April 8, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of Montgomery county, Ohio, in the sum of $21,000.00, for the purpose of paying the shares of said county, Van Buren township, and the owners of abutting property specially assessed for the construction of the Dayton-Lebanon road, I. C. H. No. 64, section "A-1."

I have carefully examined the corrected transcript of the proceedings of the board of county commissioners and other officers of Montgomery county, Ohio, relating to the above bond issue and find said proceedings to be in conformity to the provisions of the General Code of Ohio relative to bond issues of this kind.

I am therefore of the opinion that bonds properly prepared according to the bond form submitted will, when executed by the proper officers of the county and delivered, constitute valid and subsisting obligations of Montgomery county, Ohio, to be paid in accordance with the terms thereof.

Very truly yours,
Attorney-General.

1132.

APPROVAL OF BOND ISSUE OF MONTGOMERY COUNTY—$34,000.00.

COLUMBUS, OHIO, April 8, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of Montgomery county, Ohio, in the sum of $34,000.00, for the purpose of paying the shares of said county, Harrison and Randolph townships and the owners of abutting property specially assessed for the construction of the Dayton-Covington road, I. C. H. No. 63, section "K."

I have carefully examined the corrected transcript of the proceedings of the board of county commissioners and other officers of Montgomery county, Ohio, relating to the above bond issue and find said proceedings to be in conformity to the provisions of the General Code of Ohio relative to bond issues of this kind.

I am therefore of the opinion that bonds properly prepared according to the bond form submitted will, when executed by the proper officers of the county and delivered, constitute valid and subsisting obligations of Montgomery county, Ohio, to be paid in accordance with the terms thereof.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1133.

APPROVAL OF BOND ISSUE OF MONTGOMERY COUNTY—$40,000.00.

COLUMBUS, OHIO, April 8, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of Montgomery county, Ohio, in the sum of $40,000.00, for the purpose of paying the shares of said county, Madison township, and the owners of abutting property specially assessed for the construction of the Dayton-Greenville road, I. C. H. No. 62, section "P."

I have carefully examined the corrected transcript of the proceedings of the board of county commissioners and other officers of Montgomery county, Ohio, relating to the above bond issue and find said proceedings to be in conformity to the provisions of the General Code of Ohio relative to bond issues of this kind.

I am therefore of the opinion that bonds properly prepared according to the bond form submitted will, when executed by the proper officers of the county and delivered, constitute valid and subsisting obligations of Montgomery county, Ohio, to be paid in accordance with the terms thereof.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1134.

APPROVAL OF BOND ISSUE OF MONTGOMERY COUNTY—$18,000.00.

COLUMBUS, OHIO, April 8, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of Montgomery county, Ohio, in the sum of $18,000.00, for the purpose of paying the shares of said county, Mad River township, and the owners of abutting property specially assessed for the construction of the Dayton-Chillicothe road, I. C. H. No. 29, section "D."

I have carefully examined the corrected transcript of the proceedings of the board of county commissioners and other officers of Montgomery county, Ohio, relating to the above bond issue and find said proceedings to be in conformity to the the provisions of the General Code of Ohio relative to bond issues of this kind.

I am therefore of the opinion that bonds properly prepared according to the bond form submitted will, when executed by the proper officers of the county and delivered, constitute valid and subsisting obligations of Montgomery county, Ohio, to be paid in accordance with the terms thereof.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1135.

APPROVAL OF BOND ISSUE OF MONTGOMERY COUNTY—$22,000.00.

COLUMBUS, OHIO, April 8, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of Montgomery county, Ohio, in the sum of $22,000.00, for the purpose of paying the shares of said county, Madison and Jefferson townships and the owners of abutting property specially assessed for the construction of the Dayton-Indianapolis road, I. C. H. No. 28, section "O."

I have carefully examined the corrected transcript of the proceedings of the board of county commissioners and other officers of Montgomery county, Ohio, relating to the above bond issue and find said proceedings to be in conformity to the provisions of the General Code of Ohio relative to bond issues of this knd.

I am therefore of the opinion that bonds properly prepared according to the bond form submitted will, when executed by the proper officers of the county and delivered, constitute valid and subsisting obligations of Montgomery county, Ohio, to be paid in accordance with the terms thereof.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

1136.

APPROVAL OF LEASE OF CERTAIN LANDS TO AARON McGRATH.

COLUMBUS, OHIO, April 13, 1918.

HON. A. V. DONAHEY, *State Supervisor of School and Ministerial Lands, Columbus, Ohio.*

DEAR SIR:—I have your communication of March 18, 1918, in which you enclose a lease, in triplicate, dated November 1, 1917, in which certain lands are leased to Aaron McGrath for coal mining purposes.

I have carefully examined this lease, find the same correct in form and legal, and am therefore endorsing my approval thereon and forwarding it to Hon. James M. Cox, governor of Ohio, for his consideration.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

1137.

SECRETARY OF STATE MUST DECIDE WHETHER THE NAME OF A PROPOSED COMPANY IS LIKELY TO MISLEAD THE PUBLIC AS TO THE PURPOSE OF ITS CHARTER—CORPORATION AUTHORIZED TO DEAL IN SECURITIES AND MAKE LOANS ON REAL ESTATE MAY BE ORGANIZED UNDER THE GENERAL LAWS OF THE STATE—BUYING AND SELLING MORTGAGES AND MAKING LOANS ON REAL ESTATE NOT SEPARATE AND DISTINCT OBJECTS, AND CORPORATION MAY BE AUTHORIZED TO PURSUE BOTH—CORPORATION MAY NOT BE ORGANIZED TO DEAL ON ITS OWN ACCOUNT IN THE STOCK OF OTHER COMPANIES.

The secretary of state has full administrative authority to decide the question as to whether or not the name chosen by the incorporators of a proposed company is likely to mislead the public as to the purpose or object of its charter. The attorney-general will not advise the secretary of state upon this question as a matter of law in a particular case.

A corporation authorized to deal in securities and make loans upon real estate may be organized under the general laws of the state, such a corporation not being a banking company within the meaning of the statutes relative to such corporations, nor a real estate company within the meaning of the statutes relating to such corporations.

Buying and selling mortgages and making loans on real estate security are not such distinct objects and purposes as that a corporation may not be authorized to pursue both of them; they are rather different means to a single end, which may be defined as investing in evidences of indebtedness and other securities.

The purpose last described, however, is entirely separate and distinct from the conducting of similar activities on behalf of others and both may not be joined in one purpose clause.

A corporation may not be organized under the laws of Ohio for the purpose of dealing on its own account in the stocks of other corporations.

COLUMBUS, OHIO, April 13, 1918.

HON. W. D. FULTON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of March 28th, enclosing proposed articles of incorporation of The Banker's Exchange & Discount Company, of Cleveland, Ohio, and requesting my opinion upon the following points:

> "1st. The name, whether it is liable to mislead the public in any respect.
>
> 2nd. The objects set forth in the purpose clause, whether they are such as to exceed the single purpose requirement of the code, and further whether they are such powers as can be granted to a corporation formed under the general corporation laws of the state and whether they infringe upon certain special provisions of the code governing real estate corporations, banking corporations, etc."

I must decline to express any opinion upon the first question. Full administrative discretion in this matter is reposed by statute, section 8628 General Code, in the secretary of state to decide the question, which is a mixed one of fact and law.

The law of the question is fully expressed in the formula that the corporate name shall not be "likely to mislead the public as to the nature or purpose of the business its charter authorizes." The facts of the case consist of the nature of the business actually authorized by the charter and the misleading character of the name as descriptive of such business. The name must not describe a business which the company is not authorized to undertake; on the other hand, it is not required to point out that business. So a name like "The John Church Company" is beyond criticism regardless of what business the company proposes to engage in; but the name "The John Church Contracting Company" would be misleading if the corporation were not authorized to engage in the business of contracting.

It is for you to say whether the name "The Banker's Exchange and Discount Company" is misleading in connection with the business which the company proposes to do or may lawfully be authorized to transact. That business is described in the purpose clause of the coporation as follows:

> "Said corporation is formed for the purpose of buying, selling and dealing in mortgages upon real estate, stocks, bonds, promissory notes, choses in action, personal and collateral securities, and other evidences of debt; and discounting the same.
>
> To make and obtain loans upon real estate, and to supervise, manage and protect such property and loans, and all interests and claims affecting the same, to have the same insured against loss by fire and other casualties.
>
> To purchase, lease, hold and convey such real estate as may be necessary or convenient for the transaction of its business, or for the carrying out of its corporate purposes; and such as is mortgaged or conveyed to it in good faith by way of security for loans made or money due, or such as may be purchased by it at sales upon foreclosure of mortgages owned by it, or on judgments and decrees obtained or rendered for debts due it, or in settlements effected to secure such debts.
>
> To do all things incidental to the carrying out of the purposes herein expressly stated."

Without further considering the first question I pass to a consideration of your second question, which involves an examination of the above quoted purpose clause.

One of your questions is as to whether the general powers attempted to be assumed by this corporation are such as may be granted to a corporation formed under the general corporation laws of the state, or as to whether they infringe upon the special provisions of the code governing real estate corporations, banking corporations, etc.

The corporation clearly is not formed to deal in real estate, though the first paragraph of the purpose clause is a little ambiguous in this respect. I take it that the incorporators intended to form a company authorized to deal in "mortgages upon real estate" and not "in real estate." The later recital of the power to purchase, lease, hold and convey real estate is limited to such as is necessary and convenient for the transaction of its business and such as is mortgaged or conveyed to it in good faith by way of security for loans. While this clause is open to criticism in that it is the mere statement of an incidental power that the company would possess without the recital, giving rise to a question which I shall hereafter consider in connection with the other branch of your second general inquiry, it shows at least that the interpretation which I have placed upon the first paragraph of the purpose clause is correct, and that the incorporators did not intend to assume the power to deal generally in real estate.

Nor, in my opinion, are the powers of this proposed corporation those of a

banking company. Without discussing this question exhaustively suffice it to say that the essential characteristic of a banking company organized under the laws of Ohio is the power to receive money on deposit. This power is not sought to be appropriated by the incorporators of this company. They propose that the corporation shall lend money upon the securities upon which banks are accustomed to lend money, but the money lending business is not the banking business as it is known in Ohio. The vital distinction between the two may be understood by drawing a line between lending one's own capital and inviting deposits for the purpose of lending money thus obtained.

For these reasons I am of the opinion that the general character of the objects of this company is not such as to disenable its promoters from organizing under the general corporation laws of the state.

The other part of your second question raises the issue as to whether or not a plurality of purposes is stated in the articles of incorporation, so as to make them subject to the principle laid down in State ex rel. v. Taylor, 55 O. S. 67.

In this connection I repeat the remark which I have made respecting the third paragraph of the purpose clause. This paragraph is, in my judgment, perfectly innocuous, in that it does not purport to authorize the pursuit of an independent object, but merely to define a group of powers which would flow by implication or by direct authority of law from the recital of the purpose or purposes previously mentioned in the clause. As a matter of strict Ohio law a recital of the powers of a corporation has no place in its articles. They should be confined to mentioning the object or purpose for which the corporation is formed. When this is done the powers result by operation of law. It follows therefore that language like that of the third paragraph of the purpose clause has no appropriate place in the articles of incorporation; nevertheless, its inclusion therein does not violate the rule of singleness of purpose, because it does not define a purpose at all.

For these reasons I advise that the third paragraph of the purpose clause of the articles of incorporation under examination does not work a violation of the principle which has been referred to.

These remarks are also, of course, applicable to the fourth paragraph of the purpose clause of the articles of incorporation.

These conclusions bring me to the consideration of the first and second paragraphs of the purpose clause, which are the only ones that need be considered in connection with the particular inquiry now under investigation.

Briefly abstracted, the first of these paragraphs authorizes the company to deal in evidences of indebtedness, choses in action, certificates of interest and securities for indebtedness; the second of them authorizes the company to lend money upon real estate security and to "obtain loans" thereon. The last phrase is vague and at the very least should be amplified. If it is intended to authorize the company to act as agent for others in securing loans on real estate, I would be of the opinion that it would state a distinct purpose and would render the purpose clause objectionable upon the ground now under consideration. Lending money on one's own account and lending money as agent for others are two very distinct businesses. While neither of them constitutes the banking business, yet they are separate from each other and constitute objects which cannot be pursued by a single company. At this moment I am unable to think of any other meaning which can be given to this somewhat ambiguous phrase than that which I have condemned. On the whole, it is my opinion that the articles of incorporation cannot be accepted with this phrase therein.

Are the objects of dealing in mortgages and other evidences of indebtedness and lending money on real estate mortgage so distinct and separate as to constitute two purposes? In this connection I call attention to the decision in Picard v.

Hughey, 58 O. S., 577. It was there held that the lighting of public streets by means of gas and and the lighting of public streets by means of electricity were not separate and distinct objects. In fact the court found but one object, viz., the lighting of public streets. The generation and distribution of gas and the generation and distribution of electricity were regarded by the court as being, respectively, means to this single end.

Can these principles be applied to the present articles of incorporation? It seems to me that the answer to this question is in the affirmative. The incorporators have really mentioned in their articles but one main object or purpose, viz., the investment of capital in "securities" of various kinds. Whether this investment shall be made by buying securities which are already in existence and selling them or by originating the security itself by lending money is, it seems to me, merely a question of means to an end. It is true that different equipment and business organization might be necessary to make original loans upon real estate security than would be necessary to purchase mortgages; yet after all, a careful investor will make the same kind of an investigation in the one case as in the other.

On the whole, therefore, I do not find that the inclusion of the phrase "to make loans upon real estate" in articles previously authorizing a general dealing in such and similar securities is violative of the principle of singleness of purpose enunciated in State ex rel. v. Taylor, supra.

In point of fact the promoters of this company have stopped short of what they might have assumed. In my opinion, it would not have been a violation of the principle of State ex rel. v. Taylor, supra, to have authorized the lending of money generally in connection with the business of buying and selling securities.

In passing I should say that what I have said about the third and fourth paragraphs of the purpose clause of the articles is applicable to the last part of the second paragraph. It is obvious that the power of supervision, management and protection therein referred to is limited to the property which is the security for the loans which the company may have made or obtained.

On the whole, then, I do not find that the articles of incorporation which have been submitted to me are objectionable on either of the grounds suggested in your second question except as to the words "to obtain."

What I have said answers your second question, but it would not be right for me to pass over in silence a very objectionable phrase which I find in the purpose clause, though that phrase does not constitute an additional purpose or object, and though it does not affect the question as to whether a corporation of this character can be formed under the general incorporation laws. I refer to the phrase "buying, selling and dealing in * * stocks."

Assuming, as I have assumed, that this corporation is formed for the purpose of using its own funds and not that of acting as agent for others in making such investments, this phrase has no proper place in the articles of incorporation. The holding of stocks in other corporations generally as an investor is not a lawful purpose for which a corporation can be formed in Ohio. All corporations have incidental power to acquire the stock of kindred but not competing corporations; but a corporation of this sort could scarcely avail itself of this power while the position of the word "stocks" in the articles of incorporation shows that the purchase and sale of said securities is regarded as a principal business and not as an incidental power. I advise you not to file and record these articles of incorporation unless the word "stocks" is expunged therefrom.

Of course, if the idea of the promoters is to form a company which shall conduct the activities described in the articles of incorporation for others as brokers or agents, then the word "stocks" would not be objectionable, nor would the word "obtain" be open to question, but the whole purpose clause would have to be

reframed so as to make it clear that the dealings which the company proposes to engage in are not on its own account, but for others.

I note a general request from you to the effect that I make use of these particular articles to prepare an opinion that may be a guide for your department in consideration of similar questions arising upon other articles of incorporation of the same general character. I do not feel able to do this. I hope that what I have said about these articles may be of service to you in determining your action in other like cases, but I have purposely refrained from attempting to lay down principles that will necessarily apply to any other particular articles of incorporation.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1138.

A JUDGMENT DEBTOR MAY PAY JUDGMENT DIRECT; IN SUCH CASE SHERIFF AND CLERK OF COURTS NOT ENTITLED TO FEES UNDER SECTIONS 2845 AND 2901 G. C.

A judgment debtor may pay a judgment creditor direct and when he does so neither the sheriff nor the clerk of courts is entitled to any fees under sections 2845 or 2901 G. C.

COLUMBUS, OHIO, April 13, 1918.

The Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I have your letter of March 13, 1918, as follows:

> "We respectfully request your opinion upon the following matter:
> *Question*: Can a judgment debtor pay a judgment creditor direct or must this be paid to the sheriff or clerk of courts for disbursement?
> We will call your attention to the fact that section 2845 G. C. provides a poundage fee to the sheriff on all moneys actually made and paid to him on execution, decree, or sale of real estate, and section 2901 G. C., the fee section of the clerk, provides that he may tax a commission of one per centum on the first one thousand dollars, and one-fourth of one per centum on all in excess of one thousand dollars for receiving and disbursing moneys other than costs and fees paid to such clerks in pursuance of an order of court or on judgments, etc., and section 2978 G. C. provides that each clerk of courts and sheriff shall charge and collect the fees, costs, percentages, allowances and compensation allowed by law and section 2977 G. C. provides that they shall be for the sole use of the treasury of the county."

Section 2845 G. C. provides in part:

> "* * *; poundage on all moneys actually made and paid to the sheriff on execution, decree or sale of real estate, on the first ten thousand dollars, one per centum; on all sums over ten thousand dollars, one-half of one per centum, * * *."

Section 2901 G. C. provides that the clerk of courts shall be entitled to fees as follows:

"* * *; for receiving and disbursing money, other than costs and fees, paid to such clerks in pursuance of an order of court or on judgments, and which has not been collected by the sheriff or other proper officer on order of execution to be taxed against the party charged with the payment of such money, a commission of one per centum on the first one thousand dollars and one-fourth of one per centum on all exceeding one thousand dollars; * * *."

Section 2977 provides that all fees received by the sheriff and clerk of courts shall be received and collected for the sole use of the treasury of the county. The judgment of the court is an order requiring the judgment debtor to pay the judgment creditor the sum awarded and to pay the costs in the case to the officers entitled to them. The purpose of levying execution on judgments is to enforce their payment. Nothing is said in our statutes concerning when the execution must issue. As is stated in Kinkead's Practice, section 907, page 568, the statutes are silent as to when an execution may issue upon a judgment. The statutes in some states regulate this matter. In Ohio the execution may issue at any time after the rendition of the judgment and before appeal has been perfected by the giving of a bond or a bond has been given for the stay of execution in error proceedings. The purpose of the execution being to enforce the judgment, the issuing of an execution is clearly unnecessary when the judgment is paid. If the judgment debtor pays the amount awarded to the judgment creditor and pays the costs in the case to the clerk of the courts, there is no money to be paid on execution to the sheriff or any money to be paid to the clerk of the courts other than costs and fees. Therefore neither of these officers have any reason to charge or collect any fees. There is no necessity of their rendering any service nor do they render any.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1139.

PROBATE JUDGE—FEES FOR APPOINTMENT OR REMOVAL OF A TRUSTEE.

The provisions of section 1601 *G. C., to the effect that the probate judge is to receive a fee of* $5.50 *for appointment of a trustee and a fee of* $5.00 *for petition for removal of the trustee, repeals the provisions of section* 11145, *allowing the probate judge a fee of* $2.00 *for hearing and deciding each application for appointment of a trustee and the fee of* $1.00 *for appointing or removing a trustee.*

The other provisions of section 11145 *remain in force, so that the fees of the probate judge in the administration of the insolvent debtors' law, under authority of sections* 1601 *and* 11145 *together, are as follows:*

For appointment of assignee or trustee	$5.50
For petition for removal of assignee or trustee	5.00
For filing assignment, inventory and schedule, each	.10
For filing other papers, each	.05
For other services, the same compensation as for like services, in the settlement of the estates of deceased persons.	

COLUMBUS, OHIO, April 13, 1918.

The Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I have your letter as follows:

> "Do the flat rate fees mentioned in section 1601 G. C. take the place of the fees mentioned in section 11145 G. C.? In other words, did the enactment of section 1601 G. C. impliedly repeal the provisions of section 11145, General Code?"

Section 11145 of the General Code, found in the chapter on Insolvent Debtors, reads:

> "The probate judge shall be entitled to the following fees for services performed under the preceding sections of this chapter: for hearing and deciding each application, two dollars; for appointing or removing an assignee or trustee, one dollar; for filing assignment, inventory and schedule, each, ten cents; for filing other papers, each five cents; and for other services, the same compensation as for like services, in the settlement of the estates of deceased persons."

Section 1601 of the General Code provides in part:

> "The fees enumerated in this section shall be charged and collected by the probate judge and shall be in full for all services rendered in the respective proceedings: For appointment of administrator, executor, guardian for minor, except guardian ad litem, assignee or trustee, five dollars and fifty cents; * * * for petition for removal of administrator, executor, guardian, assignee or trustee, five dollars; * * *"

Section 1601 was enacted in 102 O. L., and is a later enactment than section 11145 G. C.

In the case of Goff et al., v. Gates, 87 O. S. 142, it was held:

> "An act of the legislature that fails to repeal in terms an existing statute on the same subject matter, must be held to repeal the former statute by implication if the later act is in direct conflict with the former, or if the subsequent act revises the whole subject-matter of the former act and is evidently intended as a substitute for it."

It will be seen from a reading of the sections quoted that only part of the subject matter of section 11145 is covered in section 1601. Section 11145 provides a fee of $2.00 for hearing and deciding each application and a fee of $1.00 for appointing or removing an assignee or trustee. Section 1601 provides a fee of $5.50 for the appointment of an assignee or trustee and $5.00 for petition for removal of assignee or trustee. Inasmuch as section 1601 provides that the fees enumerated in that section shall be "in full for all services rendered in the respective proceedings," it is clear that the fee of $5.50 allowed for appointing an assignee or trustee, and the fee of $5.00 for petition for removal of an assignee or trustee, are all that can be allowed in connection with the appointment or removal of assignees or trustees. These fees so provided are now allowed probate judges in place of the fee of $2.00 for hearing and deciding an application and the fee of $1.00 for appointing or removing an assignee or trustee under section 11145.

Section 1601 G. C., to this extent, covers the subject matter of section 11145, and repeals that section in so far as these provisions are concerned.

However, the balance of section 11145 is not covered by section 1601 G. C. and is, therefore, not affected by that section. The remainder of section 11145, to which reference is made, reads as follows:

> "* * * For filing assignment, inventory and schedule, each, ten cents; for filing other papers, each five cents; and for other services, the same compensation as for like services, in the settlement of the estates of deceased persons."

It is therefore my opinion that the probate judge may charge and receive, in the administration of the insolvent debtors' law, the following fees:

For appointment of assignee or trustee	$.5.50
For petition for removal of assignee or trustee	5.00
For filing assignment, inventory and schedule, each	.10
For filing other papers, each	.05
For other services, the same compensation as for like services, in the settlement of the estates of deceased persons.	

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1140.

CHILD WHO RESIDES PERMANENTLY IN HOME OF AN UNCLE MAY ATTEND SCHOOLS OF SAID DISTRICT FREE OF TUITION—THE WORD "WARD" AS USED IN SECTION 7681 G. C. SHOULD BE LIBERALLY CONSTRUED.

Where a child resides permanently in the home of her uncle, who has an actual residence in a school district, such child may attend the public schools of such district free of tuition, even though the parents of such child live in another state.

The term "ward" should be liberally construed when used in relation to the education of the youth of school age of this state.

COLUMBUS, OHIO, April 13, 1918.

HON. FRANK B. PEARSON, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—A request is before me for my opinion, which is of sufficient general interest, I think, that my reply thereto should be directed to you, and I will send the inquirer a copy. The request is in substance as follows:

> V. S., late a pupil of the Ludlow, Ky., public schools, having passed the seventh grade therein, was by her parents turned over to J. G., who from that time on was to be the legal guardian of V. S. This occurred in March, 1917. At the beginning of the fall term of school (September, 1917) V. S. was sent to the Columbian school in Cincinnati, where she continued her studies until October 26, 1917, when she was discharged on account of non-residence. She is now and will continue a resident permanently at the home of J. G., 3202 Reding Road, Avondale, Cincinnati.

The question, in short, which concerns the writer is, can a pupil reside separate and apart from its parents, that is, can it establish a permanent residence in the home of others than its parents, and be permitted to attend the public schools where it so resides, free of tuition?

Section 7681 G. C. provides in part:

> "The schools of each district shall be free to all youth between six and twenty-one years of age, who are * * * wards or apprentices of actual residents of the district * * *, but all youth of school age living apart from their parents or guardians, and who work to support themselves by their own labor, shall be entitled to attend school free in the district in which they are employed."

The child, V. S., who is a girl fifteen years of age, would have to be considered as a ward, for it must be admitted that she is residing separate and apart from her parents; and she could not be considered as an apprentice working to support herself by her own labor. It must be conceded that her guardianship is one not provided by statute, that is, under the child adoption statutes or by an order of court. All that can be gathered from the statement is, that the parents of the child, V. S., have turned over the care, custody and control of such child to her uncle, J. G., and that said J. G.'s home has been since said time, and will be, the permanent home of said child. If the term "ward" would be as strictly construed in relation to school matters as it is in most other matters, I should say at the outset that the child would not be entitled to attend the public schools in Cincinnati free of tuition, but I find the courts are inclined to construe this word with much liberality in school matters.

It is held in Yale vs. Middle West School District, 59 Conn. 489, and where the statutes provided, that "the public schools of the districts shall be open to all children over four years of age in the respective districts"; that under the construction given to such language it is not necessary that a child be domiciled in the district, but it is enough if it is residing in the district in the ordinary sense of that term; and that a child of school age whose parents resided in another state, but who had lived for several years, and expected to continue to live, in the family of a domiciled resident of the district, was entitled to the privileges of the district schools. On page 492 of said report, Andrews, C. J., uses the following language:

> "A construction so narrow and technical as is claimed by the defendant would seriously impair the usefulness of the school laws and would defeat various provisions of the statutes. The state is interested to have all the children educated in order that they may become good citizens. Experience has demonstrated that it costs the public much more to support one ignorant or vicious person than to educate many children. On the simple ground of economy the state cannot afford to permit any child to grow up without being sent to school. The school laws recognize this fact and their provisions are framed accordingly. *If any child is actually dwelling in any school district, so that some person there has the care of it, and is within the school age, * * * then that child must go to the public school.*"

The facts in the above case are very similar to the facts in the one under consideration. In each instance the parents lived in another state. In each instance

the care, custody and control of the child was given to a relative, but not following any legal form therefor. In each instance tuition was demanded of the actual resident of the district in whose home the child lived.

It was held in Board of Education v. Powell, 130 S. W. 67, (Ky.) that where a child was given over to her aunt with whom she was to make a permanent home, she was entitled to all the school privileges of other children of the district. Hobson, C. J., in delivering the opinion of the court, said:

> "The arrangement was made in good faith to give the child a home. It is her home and she is as fully entitled to the privileges of the school as other children whose homes are within the boundary of the district."

In opinion No. 1434, Opinions of the Attorney-General, 1916, Vol. 1, page 576, the question of residence of a child for school purposes was under consideration. In that case a child was under the jurisdiction of the juvenile court and the court ordered the custody of such child to a person whose place of residence was in a district other than the district of the residence of the parents of such child, and the question was as to whether or not such child must pay tuition for attending the schools of the district in which the person lived with whom the child was living under the order of the court. I quote from said opinion as follows:

> "Where a minor child of the age of thirteen years is taken from the care and custody of its parents, who are non-residents of a school district within the county, by order of the judge of the juvenile court of such county, and by the further order of said court is placed under the care and control of a person who is an actual resident of such school district, unless otherwise ordered by the court, said child becomes the ward of said person, resident of such school district, under provision of section 1672 G. C. 103 O. L. 876, and as such is entitled to attend the public schools of said district without charge for tuition under provision of section 7681 G. C."

If, then, a court, who by law is made the guardian of children coming under its jurisdiction, can award the care and control of such child to a person and thus establish a wardship of such child for school purposes, can it not also be said that a parent, who has the undisputed, natural care, custody and control of a child, may grant the care, custody and control of such child so as to establish a guardianship and make a ward of such child for school purposes?

From a consideration of all the above matters, I am inclined to the view that a liberal construction should be given to the term "ward" as the same is used in relation to the education of the youth of school age in this state, and, in answer to your question, I am of the opinion that V. S. should be permitted to attend school in the district in which she resides with J. G., without being compelled to pay tuition therefor.

It will be understood, however, that the above conclusion is reached only upon the facts as stated in the request, showing the permanency of the residence of said child and should not be construed to include any child who lives in a district temporarily or simply to establish a school residence, or who resides in the district only during the time the school is in session.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1141.

REFUNDING BONDS—AUTHORITY OF MUNICIPALITY TO ISSUE—INTEREST—SINKING FUND TRUSTEES NOT AUTHORIZED TO MAKE TEMPORARY LOANS—MUNICIPAL CORPORATION MAY NOT BORROW MONEY IN ANTICIPATION OF SINKING FUND LEVIES OR TO MEET DEFICIENCIES THEREIN.

1. *Refunding bonds may be issued by a municipality under authority of section* 3916 *General Code to extend the time of payment of bonds issued twenty years previously which are about to mature, when it can be ascertained with reasonable certainty that the municipality from its limits of taxation will be unable to pay the same at maturity.*

2. *Such refunding bonds so issued may bear a higher rate of interest, not exceeding six per cent, than the original bonds.*

3. *The trustees of the sinking fund are without authority to make temporary loans for sinking fund requirements.*

4. *A municipal corporation may not borrow money under section* 3913 *G. C. in anticipation of sinking fund levies, nor for the purpose of meeting a deficiency in the sinking fund.*

COLUMBUS, OHIO, April 15, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your letter of recent date requesting my opinion upon certain inquiries received by you from the sinking fund trustees of the city of St. Marys, Ohio, which inquiries are as follows:

> "(1) Can refunding bonds be issued by a municiality under authority of section 3916 G. C., to extend the time of payment of bonds issued twenty years ago which are about to mature?
>
> (2) If so, can such refunding bonds bear a higher rate of interest than the original bonds?
>
> (3) Can the trustees of the sinking fund in any manner whatsoever make a temporary loan for sinking fund requirements?
>
> (4) Can a municipality under authority of section 3913 G. C., make a temporary loan for sinking fund requirements?
>
> (5) If so, and a certificate of indebtedness issued under section 3913 G. C. is paid as it must be from the next semi-annual tax settlement, could such payment be made from the sinking fund's portion?"

A conditional answer to the first question which is submitted is clear; that is to say, if at maturity the city will be unable to pay the outstanding bonds because of its limits of taxation, then under the plain provisions of sections 3916 and 3917 of the General Code they may be refunded. I assume the statement that the bonds are about to mature which is made in the letter is to be interpreted as meaning that the date of maturity is now so imminent that muniicpal funds available for the payment of the bonds at that date can be estimated to a certainty. If that is the case, I see no objection to the action which is contemplated being taken at any time and predicated upon the finding which the council must make that the city is unable to pay the bonds as its valid and subsisting obligation at their maturity because of its limits of taxation.

If the question were as to whether during the life of the bonds, but substantially prior to their maturity, other bonds could be issued for the purpose of ex-

tending the time of payment of the indebtedness it would be a more difficult one. Section 3916 G. C. provides that refunding bonds may be issued not only when it is apparent that the corporation is unable to pay the previous indebtedness "at maturity," but also "when it appears to the council for the best interest of the corporation." On the other hand, however, section 39255 of the General Code provides as follows:

> "When it appears to the council of a municipal corporation, to be for the best interest thereof to renew or refund any bonded indebtedness of such corporation which has not matured, and thereby reduce the rate of interest thereon, such council may issue for that purpose new bonds, with semi-annual interest coupons attached, and exchange them with the holder or holders of such outstanding bonds, if they consent to make such exchange and to such reduction of interest. When new bonds are issued they shall not in any case exceed in amount the outstanding bonded indebtedness to be renewed or refunded."

And section 4520 G. C. provides, in part, that

> "For the purpose of refunding, renewing or extending the bonded debt at a lower rate of interest, * * * the trustees of the sinking fund may issue the coupon or registered bonds of the corporation * * *. The aggregate amount of such refunding, renewing or extending bonds so issued shall not exceed that of the bonds so refunded, renewed or extended."

These sections, however, are not mutually inconsistent. Section 3925 provides for an exchange with the holders of the bonds, and with their consent. Section 4520 authorizes the sinking fund trustees to issue bonds without the participation of council in the procedure. Both of them require that the rate of interest shall be lower than that of the original indebtedness. Section 3916, however, apparently authorizes council to sell bonds and with the proceeds thereof to take up outstanding bonds, instead of exchanging them for such outstanding bonds. It is by no means certain that the council may not under this section issue bonds for this purpose. I make no holding on this point, however, because the questions as submitted do not seem to call for any such holding.

Answering the second question I advise that bonds issued under section 3916 G. C. may bear any rate of interest which does not exceed six per cent per annum, regardless of the rate of interest carried by the bonds which are refunded. In this respect the section is different from the other two which have been quoted.

Answering your third question I beg to state that the sole power of the trustees of the sinking fund to make loans of any kind is that provided for in section 4520 G. C., which has been quoted in part. This section does not authorize a "temporary loan for sinking fund requirements," but only a refunding or renewal of the bonded debt. For the temporary exigencies arising in the administration of the sinking fund the trustees are authorized to "sell or use any of the securities or money in their possession" (section 4517 G. C.), but they are not authorized to borrow money.

The third question must therefore be answered in the negative.

Section 3913 G. C., referred to in the fourth and fifth questions, provides as follows:

> "In anticipation of the general revenue fund in any fiscal year, such corporations may borrow money and issue certificates of indebtedness

therefor, signed as municipal bonds are signed, but no loans shall be made to exceed the amount estimated to be received from taxes and revenues at the next semi-annual settlement of tax collections for such fund, after deducting all advances. The sums so anticipated shall be deemed appropriated for the payment of such certificates at maturity. The certificates shall not run for a longer period than six months, nor bear a greater rate of interest than six per cent, and shall not be sold for less than par with accrued interest."

In my opinion, this section is not available to make a temporary loan for sinking fund requirements. The authorization is to borrow in anticipation of the "general revenue fund," and the loans to be made must not exceed the amount estimated to be received from taxes and revenues at the next semi-annual settlement of tax collections "for such fund." Without passing upon what the phrase "the general revenue fund" means, I am clearly of the opinion that it does not mean the sinking fund. That the sinking fund levies are entirely separate and distinct is apparent from section 4513 of the General Code, which provides as follows:

"On or before the first Monday in May of each year, the trustees of the sinking fund shall certify to council the rate of tax necessary to provide a sinking fund for the future payment of bonds issued by the corporation, for the payment of final judgments, except in condemnation of property cases, for the payment of interest on bonded indebtedness, and the rents due on perpetual leaseholds of the corporation not payable from a special fund, and the expenses incident to the management of the sinking fund. The council shall place the several amounts so certified in the tax ordinance before and in preference to any other item and for the full amount certified. Such taxes shall be in addition to all other taxes authorized by law."

This distinction is observed throughout the Smith one per cent law, so-called (sections 5649-1 et seq General Code), to which I refer you generally.

I note that my predecessor, Honorable E. C. Turner, in an opinion under date of June 24, 1915, to the bureau of inspection and supervision of public offices (Vol. 2, Opinions of Attorney-General, page 1082), held as follows:

"The general revenue fund of a municipality (within the meaning of section 3913) is not defined in statutory terms but as here used is deemed to include the aggregate revenues of such municipality from whatever source derived other than those funds specifically set apart by law as for instance interest and sinking fund * * *."

Without being prepared to agree with this statement in its entirety, I do agree, as I have already inferred, with the exclusion of interest and sinking fund levies from the meaning of the phrase "the general revenue fund" as used in section 3913.

The question remains as to whether the general revenue fund may be anticipated for the purpose of obtaining money for the use of the sinking fund. Section 3913 G. C. does not prescribe expressly the purposes for which money may be borrowed thereunder. The phrase "in anticipation of the general revenue fund" implies, however, in my opinion that the only purposes for which money may be borrowed are those properly chargeable against the general revenue fund. I think

it may be safely laid down as a general principle that when taxes or tax collections are authorized to be "anticipated" by the issuance of negotiable paper, the purpose for which the loan may be made must be one within the purview of the revenues anticipated. The general revenues of the municipality would not be directly available to pay the bonded debt. This is made clear when it is considered that if the certificates were issued under this section (conceding the legality of such issuance) the proceeds of the loan would automatically constitute a part of the general revenue fund, and it would then be necessary to transfer them to the sinking fund before they would be subject to be used for the purpose in question.

The above statements make necessary a negative answer to the fourth question, and render unnecessary any answer to the fifth question.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1142.

BOND OF SANITARY POLICE AND PLUMBING INSPECTOR SHOULD BE FIXED BY COUNCIL.

If a municipality is desirous of placing the sanitary police and plumbing inspector under the bond, the amount of such bond should be fixed by the council thereof.

COLUMBUS, OHIO, April 15, 1918.

The Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I have your inquiry as follows:

> "If a municipality is desirous of having the positions of sanitary police and plumbing inspector, which are under the board of health or the health officer, placed under bond, who shall fix the amount of such bond, the council, the board of health or the health officer?"

Section 4411 G. C. reads:

> "The board may also appoint as many persons for sanitary duty as in its opinion the public health and sanitary condition of the corporation require, and such persons shall have general police powers, and be known as the sanitary police, but the council may determine the maximum number of the employes so to be appointed."

Section 4411-1 G. C. reads:

> "The board shall determine the duties and fix the salaries of its employes; but no member of the board of health shall be appointed as health officer or ward physician."

Section 4420 G. C. gives the board of health power to regulate plumbing. The duties and salary of any plumbing inspectors appointed by the board of health under this authority are fixed by the board under section 4411-1, above quoted. The sanitary police are appointed by the board under section 4411 G. C., and

while council may determine the maximum number of such sanitary policemen by virtue of section 4411, the board of health determines the duties and fixes the salaries of such sanitary policemen by virtue of section 4411-1 G. C.

Section 4214 G. C. provides:

> "Except as otherwise provided in this title, council, by ordinance or resolution, shall determine the number of officers, clerks and employes in each department of the city government and shall fix by ordinance or resolution their respective salaries and compensation, and the amount of bond to be given for each officer, clerk or employe in each department of the government, if any be required. Such bond shall be made by such officer, clerk or employe, with surety subject to the approval of the mayor."

It will be noted from this section that council shall determine the amount of bond to be given by each officer, clerk and employe in each department of the government, if any be required, while the power to fix the compensation of the sanitary policemen and plumbing inspectors has been conferred upon the board of health by statute. Nothing is said in these sections, above quoted, concerning any bond for such positions or any power to fix the amount of same. This being true, it would seem that the provisions of section 4214 G. C., above quoted, would still control in so far as the question of bonds for these positions is concerned, and I am therefore of the opinion that if a municipality is desirous of placing the sanitary police and plumbing inspector under bond, the amount of such bond should be fixed by the council thereof.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1143.

COUNTY COMMISSIONERS MAY NOT EMPLOY EXPERT REAL ESTATE MEN FOR TAKING OPTIONS AND FIXING VALUE OF PROPERTY FOR COUNTY BRIDGES AND COUNTY BUILDINGS.

Boards of county commissioners cannot legally employ and pay out of the county treasury so-called "expert real estate men" for their services in taking options and fixing the value of property to be purchased by the county to be used for sites for county bridges, county buildings, etc.

COLUMBUS, OHIO, April 15, 1918.

The Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Your request for my opinion reads as follows:

> "May the county commissioners legally employ and pay out of the county treasury so-called 'expert real estate men' for their services in taking options and fixing the value of property to be purchased by the county to be used as sites for county bridges, county buildings, etc."

There are a number of sections which confer authority upon county commissioners to purchase real estate. To illustrate:

Section 2433 of the General Code reads:

> "When in their opinion it is necessary, the county commissioners may *purchase* a site for a court house or jail, or public comfort station, or land for an infirmary, or a detention home, or additional land for an infirmary or county children's home at such price and upon such terms of payment, as are agreed upon between them and the owner or owners of the property, the title to such real estate shall be conveyed in fee simple to the county."

Section 2448 G. C. provides:

> "The board of commissioners of a county owning, or wholly or partly maintaining a hospital for the care of the insane, may *purchase or acquire* additional real estate which in the judgment of the directors or trustees in charge of such hospital is necessary for its use."

In section 2434 G. C., as amended in 107 O. L. 502, it is provided that the county commissioners may *purchase* land for the erection of a place to be known as a detention home, and in section 3063-3 G. C. it is provided that the county commissioners may *purchase* a memorial building which has been abandoned as an armory. In section 7566 it is provided that the commissioners may purchase a toll-bridge. In fact, wherever provision is made for the acquiring of any property by the board of county commissioners, the word "purchase" is used in the statute, and I find no provision of law which permits or makes provision that the county commissioners may take options upon any property that the board is about or desires to purchase for any particular purpose whatever. If, then, the board of county commissioners has any authority to employ any one to take options, it must first have such authority to take options itself and if there is no specific authority given the board by statute to take options, then the only authority it might have would be that authority which is incidental to the purchase of property for the several purposes mentioned in the statute. A board of county commissioners is a creature of statute and the act establishing boards of county commissioners and prescribing their duties, conferred upon them power to perform only "such duties as now are or hereafter may be required of them by law." S. and C. 243.

In Treadwell v. Commissioners, 11 O. S. 183-190, the court had under consideration the authority of a board of county commissioners to subscribe to the capital stock of a railroad company which might be located in such county. Gholson J., delivering the opinion of the court, says:

> "The board of commissioners of a county is a quasi corporation, 'a local organization which, for purposes of civil administration, is vested with a few of the functions characteristic of a corporate existence.' Commissioners of Hamilton County v. Mighels, 7 Ohio St. 109, 115. *A grant of power to such a corporation must be strictly construed.* When acting under a special power it must act strictly on the conditions under which it is given."

In Commissioners of Delaware County v. Andrews, 18 O. S. 50, the court had under consideration the question as to whether or not a board of county commissioners could purchase $15,000 worth of railroad securities, which railroad was being built through the county, and after calling attention to the case of Treadwell v. Commissioners, supra, Day, C. J., delivering the opinion of the court says, on page 64:

"We do not find among the powers conferred or duties imposed upon the commissioners, anything that would authorize them to purchase railroad bonds with the county funds, or to loan the credit or money of the county to aid railroad corporations to build their roads, however desirable it may be to do so."

In Law et al., v. Leighty et al., 1 C. C. (n. s.) 431, the court says:

"County commissioners are restricted to the exercise of powers expressly conferred upon them by statute, and they have no authority to bring an action to restrain persons from obstructing township roads under sections 845 and 863, R. S., the former authorizing them to bring actions to prevent injury to 'public, state and county roads' and the latter to bring suits in certain cases for injuries to 'bridges, roads and buildings.'"

Winch, J., delivering the opinion of the court, which was concurred in by Hale, J., and Marvin, J., quotes from Commissioners of Mahoning County v. Railway Co., 45 O. S., 401, as follows:

"That boards of county commissioners in Ohio have such powers and such only as are by statute, and may maintain such actions, and such only as are by statute authorized, is too well established to admit of controversy."

In State ex rel., v. Menning, 95 O. S., page 97, the supreme court had under consideration the question as to whether or not a board of county commissioners had a right to purchase a passenger automobile for officials to use in supervising the construction, improvement, maintenance and repair of the county highways, and on page 99, in a *per curiam* opinion, the following language is used:

"The legal principle is settled in this state that county commissioners, in their financial transactions, are invested only with limited powers, and that they represent the county only in such transactions *as they may be expressly authorized so to do by statute.* The authority to act in financial transactions must be clear and distinctly granted, and, if such authority is of doubtful import, the doubt is resolved against its exercise in all cases where a financial obligation is sought to be imposed upon the county."

Numerious other authorities might be cited along the above line, but the above should be sufficient from which the conclusion may be drawn that, as far as the law in Ohio is concerned, it is settled that where no authority is conferred upon a board of county commissioners to act by law, such commissioners may not act when there is an expenditure of public funds in relation thereto. That the county commissioners have a right to build bridges and the approaches thereto is conceded, and it was held in State ex rel., v. Commissioners, 14 O. C. C. (n. s.) 577, affirmed without report in 84 O. S. 503, that the board of commissioners may appropriate whatever property is necessary for the site of a bridge. The appropriation would be made under section 2449 G. C., which reads:

"If the board of commissioners are unable to agree with the owner or owners of the land for the purchase thereof, it may appropriate such land. For that purpose, the board shall cause an accurate survey and description thereof to be made and filed together with a petition for such appropria-

tion with the probate judge of the county. Thereupon like proceedings shall be had in the name of the board as in case of the appropriation of private property by municipal corporations."

Having the powers granted under the above quoted section, the board of county commissioners is relieved of the sharp business practices which frequently occur in real estate transactions among individuals, and the reasons ordinarily given why the taking of an option is considered incidental to and advantageous in real estate purchases do not attach.

In an opinion to your bureau, in which a similar question was asked in relation to boards of education, the same conclusion that I have reached here was therein reached. Said opinion is No. 1103 and was rendered March 26, 1918. In that opinion I held that a board of education has no right to employ a man to secure options at a per cent thereof commission on the purchase price of a site for a school house, and that if such action were taken the same would be illegal.

Holding these views, then, and following the above citations, I advise you that the board of county commissioners cannot legally employ so-called expert real estate men and pay for their services out of the county treasury and money for the purpose of taking options and fixing the value of property to be purchased by the county to be used as sites for county buildings, etc.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

1144.

INDUSTRIAL DIRECTORY, PUBLICATION BY INDUSTRIAL COMMISSION NOT IN CONFLICT WITH SECTION 1465-46.

Publication of an industrial directory by the industrial commission would not be in conflict with section 1465-46 *G. C.*

COLUMBUS, OHIO, April 15, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Under date of April 10 you addressed a communication to me as follows:

"I submit for your information a letter from Mr. Malcolm Jennings of the Ohio Manufacturers' Association, together with the recommendation of our chief statistician in connection with the compilation of an industrial directory.

The industrial commission desires your opinion as to whether or not the publication of such directory would be in conflict with section 1465-46 of the General Code."

The letter of Mr. Jennings, referred to in your letter, is as follows:

"We beg to call your attention to the great need in this state for the publication of a classified list of the industries here operating, together with such data as to product, employment, etc., as would be of interest and value in mobilizing the industrial resources of the state, providing for the allocation and dilution of labor, facilitating the placing and allotment of orders by the government, and assisting in the securing of new enter-

prises, etc., etc. There has been a demand for a publication of this sort from many sources and notably from the United States government in connection with war needs. Many states already have such publications and they have been found of great value and interest. The law authorizes your department to make such publication and you have at hand, I assume, through the reports made to you, all the data necessary and which merely needs compilation.

I believe a ready sale would be found at a margin above cost for any excess number of this publication which could be secured by you and there is no place else from which this information can be obtained, except upon the expenditure of a great deal of time and money and with great difficulty in securing responses to requests from unofficial sources."

The recommendation of your chief statistician is as follows:

"This letter from the Ohio Manufacturers' Association to the Industrial commission of Ohio, and referred to this department, is one of several hundred similar requests, as well as personal visits, from boards of trade, commercial organizations and the general public, both within and without the state, for a list in convenient form of the manufacturers of Ohio.

This list being based upon the names of manufacturers filing annual reports to this department in accordance with the law, could be compiled from the records available in our files without increased cost.

In order, therefore, to lay the foundation for a report which shall present the most complete statistical information of the progress of the manufacturing industry of the state, I recommend that this commission grant permission for the printing of an industrial directory."

Section 1465-45 G. C. provides in part as follows:

"Every employer shall furnish the board (industrial commission), upon request, all information required by it to carry out the purposes of this act. * * * In the month of January of each year, every employer of the state, employing five or more employes regularly in the same business, or in or about the same establishment, shall prepare and mail to the board, at its main office in the city of Columbus, Ohio, a statement containing the following information, viz.: the number of employes employed during the preceding year from January 1 to December 31 inclusive; the number of such employes employed at each kind of employment; and, the aggregate amount of wages paid to such employes, which information shall be furnished on a blank or blanks to be prepared by the board; and it shall be the duty of the board to furnish such blanks to employers free of charge, upon request therefor. Every employer receiving from the board any blank, with directions to fill out the same, shall cause the same to be properly filled out so as to answer fully and correctly all questions therein propounded, and to give all the information therein sought, or if unable to do so, he shall give to the board in writing good and sufficient reasons for such failure. * * *"

Section 1465-46 G. C. provides in part as follows:

"The information contained in the annual report provided for in the

preceding section, and such other information as may be furnished to the board of employers in pursuance of the provisions of said section, shall be for the exclusive use and information of said board in the discharge of its official duties, and shall not be open to the public nor be used in any court in any action or proceeding pending therein unless the board is a party to such action or proceeding; *but the information contained in said report may be tabulated and published by the department, in statistical form, for the use and information of other state departments and public.* * * *"

From the letters which you submit with your inquiry, it appears that the only thing which is sought to be published is a classified list of the industries "together with such data as to product, employment, etc., as would be of interest and value in mobilizing the industrial resources of the state." Such a list, as I view it, would be the publication of information contained in the annual reports filed by employers "in statistical form" and could therefore readily be brought within the provisions of that part of section 1465-46 G. C., which authorizes the board to publish such information "in statistical form" for the information of state departments and the public.

However, section 173-2 G. C. (106 O. L. 514) provides as follows:

"No officer, board or commission, shall print or cause to be printed at the public expense, any report, bulletin or pamphlet, unless such report, bulletin or pamphlet be first submitted to and the publication thereof approved by the commissioners of public printing. If such commission shall approve the publication thereof, it shall determine the form of such publication and the number of copies thereof, provided that in all cases the commissioners of public printing shall cause their action thereon to be entered upon the minutes of their proceedings.

If such approval is given, the commissioners shall cause the same to be printed, and may authorize such printing to be done at any penal, correctional or benevolent institution of the state having a printing department of sufficient equipment therefor; and when printed, such publications, other than the Ohio General Statistics, shall be delivered to such officer, board or commission for distribution by him or it."

This section restricts the power of an officer, board or commission to print or cause to be printed, at public expense, any report, etc., unless the same has first been submitted to the commissioners of public printing and received their approval. Therefore, before such a report could be printed under the provisions of section 1465-46 G. C., the approval of the commissioners of public printing under section 173-2 G. C. would be required.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1145.

COUNTY TREASURER'S SURPLUS FUND MUST BE CARED FOR BY REGULARLY APPOINTED ASSISTANTS.

The county treasurer's surplus fund must be cared for by himself or his regularly appointed assistants and such county treasurer may not legally employ a clerk and pay such clerk from the interest on the surplus fund for his services in caring for the same.

COLUMBUS, OHIO, April 15, 1918.

The Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I have your letter of March 1, 1918, as follows:

> "May a county treasurer legally employ and pay a clerk, whose duty it is to do the clerical work incidental to the handling of the 'surplus fund,' out of the interest of such 'surplus fund' for such services?
>
> The surplus fund in question is made up of over-payments, duplicate payments, etc., which were made by the taxpayers of a county in this state during the semi-annual tax collection period and were drafted into the county treasury in compliance with a ruling of the attorney-general's department, found in Vol. 1, page 517, report of 1916, the amount of said fund having been set apart in a separate fund and is now known as '———— County Treasurer's Surplus Fund.'"

In an opinion rendered by my predecessor, Hon. Edward C. Turner, referred to in your letter, I find the following:

> "It is apparent from your statement and from information gained from personal interviews with your examiners that the duplicate payment of taxes in many counties is becoming a matter of serious concern to county officials as well as to your department. It appears that said payments have reached such proportions in many counties as to imperatively require the adoption of some plan for the proper disposition of the same in the absence of any statutory regulations providing for their disposal.
>
> It is well to observe that no statutory provisions have been made for the disposition of these funds because under the plan or scheme of the statutory law it was not anticipated that such payments could occur. I refer in this connection to section 2594 G. C., which provides that when payment of either half of taxes is made the treasurer shall write in the blank space required to be left on each duplicate opposite such taxes the word 'paid.' This provision of said section does not mean that the entry of this word shall be made in this column the next day after such taxes are paid or at some future time. This provision means and requires that such entry shall be made when the taxes are paid. If this is done, as it was intended, it should be done, duplicate payment of taxes could not possibly occur because it would be discovered instantly. It seems, therefore, incredible that such payments, even if the provisions of this law were observed in a reasonable manner, could amount to many thousands of dollars each year in certain counties, as the examinations of your department show is the case.

Referring now to your inquiry in reference to section 286 G. C., as amended 103 O. L. 507, we find its provisions which are pertinent to said inquiry are as follows:

'The term "public money" as used herein shall include all money received or collected under color of office whether in accordance with or under authority of any law, ordinance or order, or otherwise, and all public officials, their deputies and employes, shall be liable therefor.'

Unquestionably money collected in any manner by a county treasurer for taxes, whether received and paid under a mistake of fact or law, is collected by said treasurer under color of office. I have no hesitancy, therefore, in saying that duplicate payment of taxes, paid and received under a mistake of fact, constitute public money within the meaning of this section. Such payments, therefore, are proper subjects for the attention of your examiners when making the annual examination required by law in the office of each county treasurer. But it must be understood that this statute does not thereby make such payments public money in the sense that the money received therefrom may be used by the county for public purposes or may be credited to any fund of the county to be used for public purposes. The money so received from duplicate payments of taxes becomes, is and must continue to be until exhausted a trust fund for the benefit of those who created it by mistake and who are entitled to be repaid from it upon proof of such mistake and their consequent right to such repayment. For this reason I am of the opinion, in answer to your second inquiry, that it would not be proper to report this money under the provisions of section 2642 G. C., nor should it be credited in any event to the undivided general tax fund. As before observed, there are no statutory provisions applicable to this situation, and I, therefore, advise that this money be held by the county treasurer until his semi-annual settlement with the county auditor. In the meantime each treasurer should make every possible effort to return all duplicate payments to those who are entitled to the same. At the time of making the semi-annual settlement whatever amount of such payments remains in the hands of the treasurer should be reported by him to the auditor and turned into the county treasury, to be credited to a special trust fund and thereafter all claims against such fund should be paid upon the allowance of the county commissioners; said allowance to be made upon the written request of the treasurer and upon proof that the party making the claim is rightfully entitled thereto."

Without passing upon the correctness of the view expressed in the above opinion, I desire to call your attention to the application of section 286 G. C., quoted and referred to in the opinion of Mr. Turner. That section provides in part:

"The term 'public money' as used herein, shall include all money received or collected under color of office whether in accordance with or under authority of any law, ordinance or order, or otherwise, and all public officials, their deputies and employes, shall be liable therefor."

Undoubtedly, the monies constituting the surplus fund are received by the county treasurer under color of his office and are public monies within the definition of the statute above quoted and the county treasurer is made liable therefor. Inasmuch as he is liable therefor as county treasurer, the monies must be cared

for by him as county treasurer in the same manner as all the other public monies. This is to be done, if not by himself, by deputies and assistants provided for by statute to assist him in discharging his duties as county treasurer.

I am therefore of the opinion that the monies in the surplus fund must be cared for by the county treasurer himself or by deputies or clerks connected with the county treasurer's office, and that the interest on the surplus fund may not be used to employ a clerk to perform the clerical work incidental to the handling of such fund.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1146.

DELINQUENCY PROCEEDINGS—JURISDICTION—FEES.

An affidavit is filed charging the child with delinquency and because of lack of evidence the case is continued. In the meantime another affidavit is filed against the child, setting forth another offense and a hearing is had. Held, the court had jurisdiction of the child after the filing of the first affidavit and the filing of the second affidavit is not a new "case" against the child within the meaning of section 1602 and the probate judge is therefore not entitled to receive a fee under the section for the filing of the second affidavit.

The child is found to be delinquent and is placed on probation and later a second affidavit is filed setting forth some other evidence and a hearing had thereon. Held, that since after the child was declared delinquent the juvenile court had jurisdiction over it and the filing of the second affidavit was not the filing of a new "case" under section 1602 G. C., the probate judge is not entitled to receive a fee under this section for the same.

COLUMBUS, OHIO, April 15, 1918.

The Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I have your letter of March 18, 1918, enclosing a communication from Hon. Charles E. Capple, probate judge of Ross county, Ohio, and asking my opinion upon the questions he presents therein. Judge Capple's letter is as follows:

> "In looking over the various opinions of Attorney-General McGhee which you were kind enough to send me some few days ago I noticed one opinion which, if I place the correct interpretation upon the same, was to the effect that only one charge by way of probate court costs could be made in a juvenile case or cases, no matter how many different complaints were filed against the same child at different times. Of course, I keep in mind that portion of the opinion which provided that a new complaint should be styled a new case and charged for, providing the delinquent child was committed to the boys' industrial school and thereafter discharged, and thereafter a new complaint filed.
>
> Now if I am correct in the foregoing, does your department go so far as to say that if on March 11, 1918, an affidavit is filed charging John Jones with being guilty of immoral conduct and therefore a delinquent child, and thereafter on hearing of said case for reasons which seem sufficient to the court, lack of evidence at the time of hearing or other

cause, said hearing is continued; and then, thereafter, say on June 29, 1918, another affidavit is filed against John Jones charging him with petit larceny and therefore a delinquent child, and notices, etc., and hearing are had on said second affidavit, that this court cannot make a charge for each separate proceeding; or, say John Jones at one time is found to be a delinquent child and placed on probation and thereafter a second affidavit is filed charging some other offense, and hearing is had thereon, that this court cannot charge for said second case or proceeding?

Certainly I have in mind that the charge in juvenile matters is delinquency, and not some specific criminal offense; but, it seems to me on a second affidavit being filed that notices, hearing, etc., should be had. In other words, to come to the point, the statute says the probate court shall tax the sum of $2.50 for each case filed against a delinquent child; I am afraid I have in mind a different construction of when said fee should be taxed, or what the procedure of the court should be than the attorney-general has, if I read and interpret his opinion correctly."

In opinion No. 791, rendered November 20, 1917, to which reference is made by Judge Capple, the following statement is found:

"A 'case' is filed within the meaning of section 1602 G. C., supra, when the original affidavit charging delinquency, dependency or neglect is filed with the court and that as long as the jurisdiction acquired upon that charge continues, the filing of any additional affidavits or charges, or the making of any new orders by the court, does not constitute a new 'case' within the meaning of section 1602 G. C."

In the first situation, to which Judge Capple calls attention, the affidavit was filed charging a child with being delinquent. Because of lack of evidence the hearing was postponed. In the meantime another affidavit was filed charging the child with being a delinquent, based upon another violation of law, and a hearing was had.

Section 1647 G. C. provides as follows:

"Until the time for the hearing arrives, the court shall make such temporary disposition of such child as it may deem best."

The affidavit, as will be noted from a reading of section 1647, above quoted, need only charge delinquency. It is not necessary to set out all the facts upon which the charge of delinquency is based nor is it necessary at the time of the hearing to confine the evidence to the allegations laid in the affidavit. The affidavit is simply filed for the purpose of charging delinquency and then the court may hear whatever evidence it may see fit to entertain in connection with the charge. In the first case referred to by you the child was charged with being a delinquent upon the filing of the first affidavit and it was at that time that a "case" was filed against the child within the meaning of section 1602 G. C. The court had jurisdiction of the child prior to the filing of a second affidavit and although the court may have allowed the second affidavit to be filed, it received it not as a new "case" against the child, but simply as additional evidence in support of the charge of delinquency made in the first affidavit. No fees, therefore, could be charged by the probate judge for the filing of this second affidavit.

The second situation presented by Judge Capple shows the child to be a delinquent child and placed on probation. Thereafter a second affidavit was filed

"charging some other offense" and a hearing was had thereon. The only charge that can be placed against a minor for a violation of law is that the child is a delinquent minor and that charge is based upon any offense that may have been committed. After the court has once found the child to be a delinquent child upon an affidavit setting forth some violation of law, the child remains in the custody of the court for the necessary purposes of discipline and protection until he or she attains the age of twenty-one years and the power over such child continues until the child attains such age. If a child has been declared to be a delinquent and is placed upon probation, and further evidence of improper conduct or violation of law is discovered, the court's attention may be called to such fact by affidavit, or otherwise, but no hearing can be held by the court to determine whether or not the child was delinquent for the reason that that matter has already been passed upon. The only thing the court has before it is whether or not the probation should remain in effect, or whether the child should be committed to an institution or disposed of in some other proper manner according to law. The court is simply exercising a continuing jurisdiction founded upon the finding on the original affidavit and the filing of the evidence of further delinquency, whether it be by affidavit or otherwise, is certainly not the filing of a new case against the child, and it is my opinion that the court may not charge or receive a fee under section 1602 G. C. for the second hearing as a new "case."

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1147.

WHEN ERRORS ON TAX DUPLICATE MAY BE CORRECTED.

Where a county auditor fails to place upon the duplicate additions directed to be made to mineral land valuations by the tax commission of Ohio under sections 5612 *and* 5613 *General Code, and no corrective action is taken until the final August settlement for the taxes assessed on such valuation, there is no way in which the error can be subsequently corrected.*

COLUMBUS, OHIO, April 17, 1918.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of recent date requesting my opinion upon the following:

> "Under the provisions of section 5612 the auditor of Hocking county in the year 1916 furnished to the commission an abstract of the real and personal property of each taxing district in his county and under the provisions of section 5613 the commission, after careful consideration of said abstract, added certain percentages to the value of oil royalties and mineral rights in said county and certified its action to the county auditor. The auditor had instructions from the commission that the value of all oil royalties must be included with the value of the land if the owner of the land and the royalty was one and the same person. The auditor did not comply with the commission's instructions in this regard but placed the value of said oil royalties upon the tax duplicate in a separate entry, designating the same 'Special Oil Tax.' One of the parties against whom

this tax was assessed brought injunction proceedings in the common pleas court and the court, as the commission understands it, enjoined the collection of the tax. The commission now desires to know whether the present auditor by instructions from this commission or otherwise, may correct the error of the former auditor in placing this value upon the tax duplicate as a special oil tax and increase the value of the land of the person securing this injunction to its true value in money for the year 1916."

It will not be necessary to quote sections 5612 and 5613 General Code as they were amended in 1915. Suffice it to say they imposed upon the county auditor the imperative duty of acting in the way in which your letter implies that he should have acted; that is to say, he should have added to the value of the land in each case the percentage specified in the order of the tax commission where the mineral rights and the land were owned by the same person. I understand from your letter that he did not do this, and that nothing in the decision of the court bears upon the legality of the assessment as it would have been had the auditor proceeded properly; that is to say, I do not understand that if present action is otherwise possible the auditor would place himself in contempt of court by taking such action. I have not the papers in the case referred to before me, and really should have in order to dispose of this point satisfactorily. I eliminate the point from consideration, however, with the caution that in so doing I have assumed that the auditor was merely enjoined from collecting any tax upon his duplicate entry of "Special Oil Tax."

With this point out of the way, the question which you put may be phrased thus:

Where an order of the tax commission under former section 5613 of the General Code was not complied with by the county auditor prior to the August settlement in the year for which the assessment was made, is there any authority to comply with it thereafter; or have the auditor by his default and the tax commission and all other administrative authorities who might be interested in the case by failing to proceed to remedy the default while the duplicate was still alive, as it were, cut off the right to comply with the commission's order? And if the auditor has no right without the initiation of further proceedings by the commission to take the step which he should have taken in 1916, may the commission by initiating other proceedings confer upon him such right or impose upon him such a duty?

Of course, at the time the commission had ample authority under section 74 of the Parrett-Whittemore law (106 O. L. 266), therein designated as section 5624-2 General Code, to institute appropriate proceedings to compel the auditor's compliance with its lawful order. This authority continued at least until the time of the August settlement in 1917, even though in the meantime the Parrett-Whittemore law was extensively amended, section 5624-2 G. C. not having been touched in the amendments of 1917. Section 5612 G. C. was, to be sure, repealed; but public rights had vested under it and indeed a proceeding had been initiated within the meaning of section 26 of the General Code; so that, in my opinion, the power of the commission to invoke section 5624-2 to compel compliance with its order under section 5613 (still in force), though predicated upon a report made by the county auditor under section 5612 G. C. (since repealed), continued to exist after the amendment of 1917. But the duty of the auditor which could have been

thus enforced is that specified in section 5615 of the General Code as enacted in in 106 O. L. 267, and may be described as being the making of certain additions upon the then existing duplicate. The commission could not do more under section 5624-2 G. C. than to compel the performance of a legal duty, and if after the August settlement, 1917, the duty no longer existed and the power of the auditor was gone section 5624-2 cannot, of course, help the situation.

We are thus brought back to the main question as I have above phrased it. The following group of statutes may be considered:

Section 2588 General Code:

> "From time to time the county auditor shall correct all errors which he discovers in the tax list and duplicate, either in the name of the person charged with taxes or assessments, the description of lands or other property or when property exempt from taxation has been charged with tax, or in the amount of such taxes or assessment. If the correction is made after the duplicate is delivered to the treasurer, it shall be made on the margin of such list and duplicate without changing any name, description or figure in the duplicate as delivered, or in the original tax list, which shall always correspond exactly with each other."

Section 2588-1 General Code (106 O. L. 263):

> "The county auditor from time to time shall correct any clerical errors which he discovers in the tax list, in the name of the person charged with taxes, the valuation, description or quantity of any tract, lot or parcel of land or improvements thereon, or minerals or mineral rights therein, or in the valuation of any personal property, or when property exempt from taxation has been listed therein, and enter such corrections upon the tax list and duplicate."

Section 2589 General Code:

> "After having delivered the duplicate to the county treasurer for collection, if the auditor is satisfied that any tax or assessment thereon or any part thereof has been erroneously charged, he may give the person so charged a certificate to that effect to be presented to the treasurer, who shall deduct the amount from such tax or assessment. If at any time the auditor discovers that erroneous taxes or assessments have been charged and collected in previous years, he shall call the attention of the county commissioners thereto at a regular or special session of the board. If the commissioners find that taxes or assessments have been so erroneously charged and collected, they shall order the auditor to draw his warrant on the county treasurer in favor of the person paying them for the full amount of the taxes or assessments so erroneously charged and collected. The county treasurer shall pay such warrant from any surplus or unexpended funds in the county treasury."

On the face of these sections it appears that a correction of the duplicate which constitutes an addition thereto cannot be made after the collection is closed at the August settlement. The explanation for the repetition involved in sections 2588 and 2588-1 as they are above quoted lies in the fact that what is now section 2588-1 is an amendment of a provision found in the Warnes law of 1913, being

section 64 thereof, therein designated as section 5624-17 G. C. (103 O. L. 802), conferring upon the district assessor power, in addition to that possessed by the county auditor under section 2588, to correct clerical errors in the tax list and duplicate. While this section was in force both officers had this power. When the Warnes Law was repealed and the position of district assessor was abolished by the legislation of 1916, the general assembly in the effort to cast upon the county auditor all the duties of the district assessor enacted a section word for word like section 64 of the Warnes law, except that the phrase "district assessor" was changed to "county auditor." Such amendment was absolutely unnecessary because the county auditor already had the same power under section 2588 G. C. (except perhaps as to the correction of valuation of mineral rights and improvements.)

As I have stated, it is clear from section 2589 G. C. that this machinery can be applied to corrections of errors occurring in "previous years" only when the error has injured the taxpayer. There is no authority to collect taxes on a duplicate that is closed; a new or special duplicate must be made up or the charge must be made upon the then current duplicate for the past omitted taxes (see section 5399 General Code).

Of course, the current or 1917 duplicate is correct; there are no errors in it; and the 1916 duplicate being closed I am of the opinion that the authority conferred by sections 2588 and 2589 General Code is no longer available to permit the county auditor to take appropriate action nor to authorize the commission to order him to do so. (See also section 2592 G. C., further governing the procedure of making "additions and deductions," in which it is made very clear that the whole procedure consists of the correction of the living duplicate.)

Section 2593 of the General Code as at present in force provides as follows: (107 O. L. 30.)

> "When the county auditor is satisfied that lots or lands on the tax list or duplicate have not been charged with either the county, township, village, city, or school district tax, he shall charge against it all such omitted tax for the preceding years, not exceeding five years unless in the meantime such lands or lots have changed ownership, in which case only the taxes chargeable since the last change of ownership shall be so charged."

I think it is obvious that this section can afford no relief to the public. The action of the commission consisted of an addition to the valuation. Section 2593 authorizes the collection of omitted levies for particular purposes in subsequent years.

Section 5604 General Code provides as follows: (107 O. L. 42.)

> "When the county board of revision discovers or has its attention called to the fact that, in a current year or in any year during the five years next preceding, any taxable land, building, structure, improvement, minerals, mineral rights, personal property or other taxable property in the county, has escaped taxation or been listed for taxation at less than its true value in money, the board may investigate the same and report to the county auditor all facts and information in its possession relating to the same. The county auditor shall make such inquiries and corrections as he is authorized and required by law to make in other cases in which real and personal property has escaped taxation, or has been improperly listed or valued for taxation.

In connection with this section I refer you to the previous opinion of this department given to the commission under date of May 1, 1917, (Opinions of Attorney-General, Vol. 1, page 574), and to an opinion addressed to Hon. John V. Campbell, prosecuting attorney, Cincinnati, Ohio, under date of June 16, 1917, (Opinions of Attorney General, Vol. 2, page 1009). The latter of these opinions is peculiarly in point. The head-note of the opinion sums up the holding thereof as follows:

> "When the board of revision acting under section 5604 G. C., as amended in 1917, calls to the attention of the county auditor the fact that a parcel of real estate, as such, has for a number of years been assessed upon the tax duplicate at very much less than its true value in money, the county auditor is without power to act in any respect directly upon such information; the provisions of section 5604, which assumes that he has power to take such action, not being effective in themselves to give him such power, and there being no such power under other sections of the General Code.
>
> The county auditor has power to act upon information transmitted to him under section 5604 in the revaluation of improvements and betterments on lands, in which event his action affects only the current duplicate; and in case taxable land has been entirely omitted from the duplicate, in which event his action may affect not only the current duplicate but also any of the five preceding years unless during that time the property has changed ownership."

In brief, this conclusion was predicted upon the fact that although section 5604 G. C., as I have quoted it, seems to assume that the county auditor has authority to make inquiries and corrections so as to affect previous years, there is no such other statute as the section seems to refer to authorizing him to do this thing. This holding disposes of section 5604 G. C. as an available remedy in the matter.

I know of no other statutes which could have application to the matter at hand. The gist of the situation is that it is now too late to correct the duplicate for the year in question. Of course, this result is to be regretted inasmuch as you inform me verbally that other taxpayers have paid taxes on what was intended to be the increased valuation without protest. This fact, however, cannot change the result. I advise you therefore that the present county auditor has no legal right to correct the duplicate for the previous year so as to place the proper valuation against the property in question and to collect taxes on the increased amount accordingly; that the board of revision and county auditor acting together under section 5604 and related sections have no such power; and that inasmuch as the tax commission's power is limited to directing the auditor to perform his duties, and does not extend to the creation of any independent duties, the commission is not authorized to take any action which will afford a remedy.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1148.

APPROVAL OF BOND ISSUE OF TRUMBULL COUNTY—$21,000.00.

COLUMBUS, OHIO, April 17, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of Trumbull county, Ohio, in the sum of $21,000.00, in anticipation of taxes and assessments to pay the respective shares of said county, Weathersfield township and of the owners of abutting property of the cost and expense of constructing the Salt Springs-Youngstown road improvement in said county and township.

I have carefully examined the corrected transcript of the proceedings of the board of county commissioners and other officers of Trumbull county, Ohio, relating to the above bond issue, and find said proceedings to be in conformity to the provisions of the General Code of Ohio relative to bond issues of this kind.

I am therefore of the opinion that bonds properly prepared according to the bond form submitted will, when executed by the proper officers of the county and delivered, constitute valid and subsisting obligations of Trumbull county, Ohio, to be paid in accordance with the terms thereof.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1149.

CLAIMS FOR SHEEP KILLED OR INJURED BY DOGS PRIOR TO DECEMBER 1, 1917, MAY BE ALLOWED BY COMMISSIONERS AT THEIR JUNE, 1918, SESSION FROM SHEEP FUND—SURPLUS IN SHEEP FUND MAY BE TRANSFERRED TO DOG AND KENNEL FUND.

The board of county commissioners, at its June session in the year 1918, *may allow claims for sheep killed or injured by dogs prior to December* 1, 1917, *and order the payment of such claims out of the "sheep fund" created by the levy of the per capita tax on dogs provided for in section* 5652 *General Code before its amendment in the act of March* 21, 1917 (107 *O. L.* 534).

Any surplus in said "sheep fund" after the payment of all claims for sheep killed or injured before December 1, 1917, *may then be transferred to the "dog and kennel fund" created by said act; and moneys thereafter collected as the proceeds of the special tax on dogs under said section* 5652 *General Code before amendment may then be covered into the "dog and kennel fund" for the purposes of said act.*

COLUMBUS, OHIO, April 17, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—This department is in receipt of a communication from you under date of March 8, 1918, in which opinion is asked upon certain questions therein stated. Your communication is as follows:

"We respectfully request your written opinion upon the following matter:

Section 5652 G. C., before being amended and supplemented in 107 O. L. 534, provided for additional tax on dogs, the section concluding as follows:

'* * * The receipts from such tax shall constitute a special fund to be disposed of in the payment of sheep claims, as provided by law.'

The net collections of said dog taxes were credited upon the ledgers of county auditors and county treasurers to funds variously designated as 'Dog Fund,' 'Sheep Fund' or 'Wool Grower's Fund.' These taxes, or levies, were charged on the general tax duplicate and were collected by the county treasurer, and were handled as other funds during the regular process of settlement. Many such charges became delinquent and were and are collected afterward, along with other delinquent personal property tax and we presume such delinquencies will be collected for several years in the future, and it is a question how long the old fund must be kept up to receive such collections.

The amendment of section 5652 G. C., 107 O. L. 534, does away with the levy or tax, and substitutes a registration fee to be paid to the county auditor along with the application for registration, which fees, as required by section 5652-13 G. C. (107 O. L. 537), must be deposited by the auditor in the county treasury and which shall constitute a special fund known as the dog and kennel fund.

Section 5653 G. C., before amendment, provided:

'After paying all such sheep claims, *at the June session* of the county commissioners, if there remain more than one thousand dollars of such fund, the excess, *at such June session,* shall be transferred and disposed of as follows: * * *'

Said section 5653 G. C., as amended 107 O. L. 537, and effective December 1, 1917, provides:

'After paying all horses, sheep, cattle, swine, mule and goat claims *at the December session* of the county commissioners, if there remain more than one thousand dollars of the dog and kennel fund arising from the registration of dogs and dog kennels for such year the excess *at such December session* shall be transferred and disposed of as follows: * * *'

The disposition of the surplus in both instances is the same, hence would it not be practicable, after paying sheep claims for sheep killed or injured before December 1, 1917, next June only out of the old fund in accordance with the provisions of section 5846 G. C., before amendment, to merge these funds under the new designation of 'Dog and Kennel' fund, by transferring any balance in the old to the new fund? Would such merger require authority so to do from the court of common pleas under section 2296? If such merger be made or ordered by court can future collection of delinquent dog taxes on the delinquent personal tax duplicate be credited to the new dog and kennel fund?"

The per capita tax on dogs provided for by section 5652 General Code prior to its amendment in the act referred to by you was levied primarily for the purpose of paying claims for sheep killed or injured by dogs, after such claims had been allowed by the board of county commissioners under section 5846 General Code.

Applicable to the consideration of the questions submitted by you, section 5 of article XII of the State Constitution 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."

In view of these provisions of the Constitution and the fact that section 5846 General Code, as amended in said act, still provides, among other things, that the board of county commissioners at its June and December sessions may allow and order the payment of claims arising from the killing or injuring of sheep by dogs, I am of the opinion in answer to your first question that the board of county commissioners, at its June session in the year 1918, may allow claims for sheep killed or injured by dogs prior to December 1, 1917, and order the payment of such claims out of the "sheep fund" created by the levy of the per capita tax on dogs provided for in section 5652 General Code as it read before its recent amendment.

State ex rel. v. Benham, 17 C. C., n. s. 179.

I am further of the opinion that any surplus in said "sheep fund" after the payment of all claims for sheep killed or injured before December 1, 1917, may then be transferred to the "dog and kennel fund" created by the act of March 21, 1917, referred to in your communication.

State ex rel. v. Benham, supra.

Some doubt as to the correctness of the conclusion just noted with respect to the transfer of such surplus is created by the provisions of section 5654 General Code, which, among other things, provides that when there is in the treasury of any county a surplus of the proceeds of a special tax which is not needed for the purpose for which the tax was levied such surplus shall be transferred immediately by the board having charge of such surplus to the sinking fund of the county, and shall thereafter be subject to the uses of such sinking fund. Inasmuch, however, as moneys in the "dog and kennel fund" created by said act are, generally speaking, to be used for a purpose correlative to that for which moneys in the "sheep fund" are to be used, and inasmuch as claims for killed and injured sheep are hereafter required to be paid out of said "dog and kennel fund," I do not think that any surplus which may be in the sheep fund after the payment of claims for sheep killed and injured before December 1, 1917, can be said to be a surplus not needed for the purpose for which the tax was levied within the meaning of section 5654 General Code, and for this reason I do not think this section has any application to the matter at hand.

In view of the fact that the "dog and kennel fund" created by the recent act is correlative and to some extent related in purpose to the "sheep fund" created by the collection of taxes levied under section 5652 General Code before amendment, I doubt very much whether the county commissioners in making such transfer are required to secure an order of court therefor by proceedings under sections 2296 et seq. General Code, but as a matter of precaution I suggest that this be done.

Moneys thereafter collected as the proceeds of the special tax on dogs under section 5652 General Code, before amendment, may, I think, be properly covered into the "dog and kennel fund" without offending either the letter or spirit of the constitutional provisions above noted; and this for the reason, as above pointed out, that the purposes for which the moneys in the "dog and kennel fund" are to

be used are correlative and related to, and in some respects identical with, the purpose for which moneys in the "sheep fund" may be expended.

See Township of Northfield v. Village of Macedonia, 22 C. C., n. s. 50.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1150.

DIRECTORS OF MUNICIPAL UNIVERSITY MUST SUBMIT AN ESTIMATE OF NEEDS OF SAID INSTITUTION TO MAYOR—WHEN AND BY WHOM SAID ESTIMATE MAY BE REDUCED.

The directors of a municipal university must submit an estimate of the needs of their institution just as the heads of other departments in the city government must submit them, to the mayor, as a part of the process of making up the municipal budget. The mayor may reduce any item therein; the council when it makes the levy may, if necessary, reduce such item; and the budget commission in adjusting the levies may likewise reduce any item in the budget of such university, if necessary to enforce the fifteen mill limitation which alone applies to such levy.

COLUMBUS, OHIO, April 18, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your letter of April 5 requesting my opinion upon the following:

> "We are referring you to the provisions of section 7908 G. C., as amended 103 O. L. 472, and section 3791 G. C., also to the budgetary provisions of the Smith one per cent tax law.
>
> *Question:* Is the budgetary request of the board of trustees of the university of the city of Cincinnati if within the limitations of section 7908 G. C., mandatory to be made in full or has council or the budget commission, or both, the power to cut down and reduce same as they have on all other municipal levies with the exception of the sinking fund?"

The sections referred to by you are as follows:

Section 7908:

> "The council annually may assess and levy taxes on all the taxable property of such municipal corporation to the amount of five-tenths of one mill on the dollar valuation thereof, less the amount necessary to be levied to pay the interest and sinking fund on all bonds issued for the university subsequent to June 1, 1910, to be applied by such board to the support of such university, * * * and also levy * * * five-one-hundredths of one mill * * * for the establishment and maintenance of an astronomical observatory, or for other scientific purposes, * * *
>
> The above tax levies shall not be subject to any limitations of rates of taxation or maximum rates provided by law, except the limitations

herein provided, and the further exception that the combined maximum rate for all taxes levied in any year in any city or other tax district shall not exceed fifteen mills."

Section 3791:

"On the first day of April of each year the mayor shall submit to council the annual budget of current expenses of the municipality, any item of which may be reduced or omitted by council, but the council shall not increase the total of such budget. In the making of the annual budget, the mayor may revise and change any and all items in the annual estimates furnished to him by the directors and officers as herein prescribed, but he shall not increase the total of any such estimate * * *."

This section must be read in connection with section 3790 G. C., which provides as follows:

"To enable the mayor to make up his annual budget, each director or board and each officer, provided for in this title, on or before the last Monday in March of each year, shall make and file with the mayor, and also with the auditor, a carefully prepared and itemized estimate of the amount of money needed in such department or office for all purposes for the ensuing fiscal year, such estimate to be given for each month."

Section 4001:

"In any municipal corporation having a university supported in whole or in part by municipal taxation all the authority, powers and control vested in or belonging to such corporation with respect to the management of the estate, property and funds, given, * * * for such university, as well as the government, conduct and control of such university shall be vested in and exercised by a board of directors consisting of nine electors of the municipal corporation."

This section is a part of "this title" as referred to in section 3790 G. C.
Section 7902:

"As to all matters not herein or otherwise provided by law, the board of directors of a municipal university, * * * shall have all the authority, power and control vested in or belonging to such municipal corporation as to the sale, lease, management and control of the estate, property, and funds, given, * * * to such corporation for the trusts and purposes relating thereto and the government, conduct and control of such university, * * *."

Section 7909: (Immediately following section 7908, referring back to it and left unrepealed by the amendment of section 7908, 103 O. L. 472.)

*"Such levies shall be made by the council at the time, and in like manner as other levies for other municipal purposes, and must be certified by it and placed upon the tax duplicate as other municipal levies. * * *"*

Section 5649-3a: (See Smith one per cent law, so-called.)

"On or before the first Monday in June, each year, the county commissioners of each county, *the council of each municipal corporation,* the trustees of each township, each board of education and all other boards or officers *authorized by law to levy taxes* within the county, * * * shall submit or cause to be submitted to the county auditor an annual budget, setting forth in itemized form an estimate stating the amount of money needed for their wants for the incoming year, and for each month thereof. Such annual budgets shall specifically set forth:"

(Here follow specific directions as to the form of the annual budget; and certain "interior limitations" upon the aggregate of taxes that may be levied by the county, municipal corporation, the township and the school district, respectively, for their several purposes.)

"Such budget shall be made up annually at the time or times now fixed by law when such boards or officers are required to determine the amount in money to be raised or the rate or taxes to be levied in their respective taxing districts. * * *"

Section 5649-3b:

"There is hereby created in each county a board for the annual adjustment of the rates of taxation and fixing the amount of taxes to be levied therein, to be known as the budget commissioners. * * *"

Section 5649-3c:

"The auditor shall lay before the budget commissioners the annual budgets submitted to him * * *. The budget commissioners shall examine such budgets and estimates prepared by the county auditor, and ascertain the total amount proposed to be raised in each taxing district * * *. If the budget commissioners find that the total amount of taxes to be raised therein does not exceed the amount authorized to be raised in any * * * taxing district in the county, the fact shall be certified to the county auditor. If such total is found to exceed such authorized amount in any * * * taxing district in the county, the budget commissioners shall adjust the various amounts to be raised so that the total amount thereof shall not exceed in any taxing district the sum authorized to be levied therein. In making such adjustment the budget commissioners may revise and change the annual estimates contained in such budgets, and may reduce any or all the items in any such budget, but shall not increase the total of any such budget, or any item therein. The budget commissioners shall reduce the estimates contained in any or all such budgets by such amount or amounts as will bring the total for each * * * taxing district within the limits provided by law. * * *"

Section 5649-5b:

"* * * in no case shall the combined maximum rate for all taxes levied in any year in any county, city, village, school district, or other taxing district, under the provisions of this and the two preceding sections and sections 5649-1, 5649-2 and 5649-3 of the General Code * * * exceed fifteen mills."

Section 5649-1:

"In any taxing district, the taxing authority shall, within the limitations now prescribed by law, levy a tax sufficient to provide for sinking

fund and interest purposes for all bonds issued by any political subdivision, which tax shall be placed before and in preference to all other items, and for the full amount thereof."

Section 5649-4:

"For the emergencies mentioned in sections forty-four hundred and fifty * * * (and other sections which are not involved in your inquiry) the taxing authorities of any district may levy a tax * * * irrespective of any of the limitations of this act."

It seems to me that the mere quotation of the above sections answers your question. The directors of the University of Cincinnati are not immune from the requirements of section 3790, but must file their estimates with the mayor of the city; he may reduce any item of such estimate; the council may reduce any such item; the budget commissioners may reduce any such item if necessary to enforce the limitation of the Smith one per cent law that applies to the levy which the council may make for this purpose, viz.: the fifteen mill limitation provided for by section 5649-5b. Section 7908 G. C. in nowise operates to exempt the levy which it authorizes from budgetary revision. In fact, section 7908 gives the directors of the municipal university no power whatever. It merely vests power in the council to make a tax levy for a given purpose. The very next section has the effect of making the machinery of levying taxes generally applicable to the levying of this tax. I can think of no reason why it should be asserted that the council or the budget commissioners are without power to reduce the request of the directors of the university, and in fact, as I have indicated, I believe the mayor also has the power to do this.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1151.

LEGALITY OF ADJOURNED MEETING OF BOARD OF EDUCATION WHEN REGULAR MEETING ADJOURNED BY LESS THAN QUORUM —APPROVAL OF BOND ISSUE OF NORWICH TOWNSHIP RURAL SCHOOL DISTRICT.

A rule of a board of education, adopted pursuant to the authority of section 4747 G. C., provided that the regular meetings of the board should be on the first Monday of each month at 7:30 p. m. The first Monday in the month of April, 1917, fell on the second day of the month. At this meeting but two members of the board of education were in attendance and the meeting was adjourned by them to April 3, 1917, a quorum of the board being present at this meeting. The board, after the transaction of current business, adjourned the meeting to April 9, 1917. At this meeting all of the members of the board were present. Thereafter, as shown by the minutes, by adjournments from time to time meetings were held by the board "in adjourned session" on the 16th and 28th of April and the 1st and 3rd of May, 1917. At each of these meetings a quorum of the board were present, but at none of them were all of the members present. HELD, that the meeting of the board under date of May 3, 1917, was a legal meeting at which the board

could lawfully adopt a resolution providing for the submission to the electors of the school district the proposition of a bond issue under section 7625 G. C.

COLUMBUS, OHIO, April 18, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In re bonds of Norwich township rural school district, Franklin county, Ohio, issued by the board of education of said school district on a vote of the electors thereof for the purpose of completing and furnishing an elementary school building in said school district.

I have carefully examined the corrected transcript of the proceedings of the board of education and other officers of Norwich township rural school district relating to the above bond issue and in the consideration of said transcript I have encountered but one question which in any vital way touches on the validity of the bond issue in question. This question is one with respect to the legality of the meeting of the board of education under date of May 3, 1917, at which the board adopted the resolution submitting to the electors of the school district the proposition of said bond issue. Only four of the five members of the board of education attended this meeting, and unless the legality of the meeting can be sustained according to rules of law applicable to the consideration of this particular question the bonds must be deemed invalid. Kattman v. Board of Education, 15 C. C., n. s., 232.

Section 4750 of the General Code provides that no meeting of a board of education shall be legal unless it is a meeting provided for by law or is a regular meeting provided for by rules of the board or is a special meeting called in the manner provided for in section 4751 G. C.

It is not contended that said meeting was one fixed by law or that the same was a special meeting called in the manner provided by section 4751 G. C., and the first underlying question to be considered is whether or not the meeting here in question was a regular meeting of the board consistent with the rules of law applicable to the consideration of questions of this kind. The transcript shows that the regular meetings of the board of education of this school district during the year 1917 as fixed by its rules were to be held on the first Monday of each month at 7:30 o'clock p. m. The first Monday in the month of April, 1917, fell on the second day of the month. At this meeting but two members of the board of education were in attendance and the minutes of said meeting, duly signed by the president and clerk, as set out in the transcript, read as follows:

"Hillards, Ohio, April 2, 1917.

"Regular meeting time of board but no meeting for lack of a quorum. Members adjourned to meet in regular session Tuesday evening, April 3."

The minutes of the meeting of April 3, 1917, show that the board of education met "in regular session" in Dr. Reason's office with four members present. After the transaction of current business of the board at this meeting the same was adjourned to Monday evening, April 9, 1917.

The minutes of the meeting of April 9, 1917, recite that the board of education met in special session with all five of the members of the board present. Thereafter by adjournments from time to time meetings were held by the board "in adjourned session" on the 16th and the 28th of April, and the 1st and 3rd days

of May, 1917. At each of these meetings a quorum of the board was present, but at none of them were all of the members present.

On the 7th day of May, 1917, the board met in regular session pursuant to its rules with four of the five members of the board present and at this meeting the minutes of all of the meetings above noted were read and approved. It is obvious that the legal character of the meeting of the board of education under date of May 3, 1917, as a regular meeting depends upon the question whether or not the meeting of the board under date of April 3, 1917, was a regular meeting, for if the meeting of April 3, 1917, was a regular meeting of the board all subsequent meetings of the board up to and including the meeting under date of May 3, 1917, being adjourned sessions from said meeting of April 3, 1917, would partake of the character of regular meetings of the board, at which the board could competently transact any business that it might have transacted at the meeting from which the adjournment was taken.

> "If not prohibited by law adjournment can be taken from time to time and the power of the legislative body at the adjourned meetings will be full and ample to accomplish the work or transact the business which could legally have been done at the meeting from which the adjournment was taken." Abbott Pub. Securities, Sec. 436.
>
> "An adjourned meeting of a regular meeting is nothing more than a continuance of the regular meeting, and is not a new and independent meeting." Dockett v. Old Forage Borough, 240 Pa. 98.

The court in its opinion in this case says:

> "A regular meeting, unless special provision is made to the contrary, may be adjourned to a future fixed day, and at such meeting it will be lawful to transact any business which might have been transacted at the stated time, of which it is, indeed, but the continuation."

See also to this point:

> State v. Smith, 22 Minn. 218;
> State v. Rogers, 107 Ala. 444;
> Magneu v. Fremont, 30 Nebr. 843;
> Carter v. McFarland, 75 Iowa 196.

And this I might add would be true of the meeting of the board under date of April 9, 1917, notwithstanding the fact that the same is denominated a special meeting in the minutes of the board for this meeting, it not appearing that this meeting was called in the manner provided by law for special meetings of the board.

The further and more fundamental question is therefore presented with respect to the power of the two members of the board present at the regular meeting under date of April 2, 1917, to adjourn said meeting to a date certain as was done in this case. This question with respect to the authority of members less than a quorum of a deliberative body controlling the affairs of a public corporation to adjourn meetings to a day certain is one upon which the authorities are in conflict. There is nothing in the provisions of our statutes governing boards of education which touches this question, section 4752 G. C., merely providing in this connection that a majority of the members of a board of education shall constitute a quorum for the transaction of business. I think it may be safely

said as a general proposition that although a quorum of a deliberative body, consisting in the absence of statutory provisions to the contrary of a majority of all the members of such body, is necessary for the transaction of the business of such body, members of such body less than a quorum may adjourn the meeting from time to time.

Abbott, Municipal Corporations, Sec. 507;
McQuillan, Municipal Corporations, Sec. 594.

Under statutory provision authorizing a less number than a quorum of a deliberative body to adjourn from time to time, it has been held that such number less than a quorum may adjourn meetings to a day certain.

Rackliffe & Gibson v. Duncan, 130 Mo. App., 695.
Duniway v. Portland, 47 Oregon 103.

And in the absence of statutory provision touching the question it has likewise been held that a number less than a quorum may adjourn to a day certain.

O'Neill v. Tyler, 3 N. D. 47;
Kimball v. Marshall, 44 N. H. 465;
People v. Nelson, 252 Ill. 514.

In the case of O'Neil v. Tyler, supra, the question at issue was with respect to the legality of certain meetings of the county board of equalization of Cass county, in said state, held on the 12th and 13th of July in the year 1886. The statute governing the meetings of said board provided that the same should meet on the first Monday of July, but that year it happened that the first Monday in July fell on the fourth day of the month and this being a legal holiday by a general statutory provision applying to the situation, the board of equalization met for the first time on the Tuesday next following the first Monday of July. There was a quorum present at the first meeting of the board on July 5th at which the board adjourned to meet the next day, July 6th. The minutes of this meeting showed that two members less than a quorum being present the board adjourned to meet July 7th. This meeting of July 7th and meetings of the board under date of July 8th, 9th and 11th were each and all adjourned by members of the board less than a quorum thereof. At the meetings under date of July 12th and 13th a quorum was present and transacted the business which gave rise to the litigation in the case cited. The court in the opinion in this case says:

"Taking up the questions in their order, it is manifestly true that the board of equalization did meet on the day designated by law for their meeting. The statute names the first Monday of July, but that year it happened that Monday was July 4th. This day being a legal holiday, the statute expressly authorizes the postponement of secular business to be done on such day until the next business day. Comp. Laws, Sec. 4752. The board met for the first time on the Tuesday next following the first Monday of July, and this, as we have seen, was strictly regular, under the statute. There was a quorum present at the first meeting, and hence the adjournment until 10 a. m. the next day was also strictly regular. But the successive adjournments from day to day, which were made by only two members,—less than a quorum—are challenged as illegal and void. If such adjournments had no validity, it follows, logically and legally, that the

board was not lawfully assembled when it did actually meet and discharge its functions on Tuesday and Wednesday, July 13th and 14th, and hence, on this supposition, there was no session of 'not less than two days' that year, as the statute required. Comp. Laws, Sec. 1584.

We have been unable to find a decided case in point upon the question presented, i. e., as to the validity of no quorum adjournments when such adjournments are made from day to day as a means of preserving the life of meetings required by law to be held by the governing officials of public corporations. But this court will take notice judicially that the practice of making such adjournments extensively pervades in the United States, and that it is not limited to such bodies as congress and state legislatures, where it has the express sanction of organic law but obtains in city councils and in town, county, and school district boards, where there is no express provision of law authorizing it. Cush. Leg. Law & Pr. Assem. (2d Ed.) Sec. 254, 255. We think so valuable a rule, as applied to public corporations, at least should be preserved, particularly as its denial would operate disastrously to the public interests in many cases, as would be true with respect to meetings of the only board before which the taxpayer can be heard upon the matter of the valuation of his property for taxation. Our conclusion is that the board met at the proper time, and held a session of not less than two days in the year 1886."

The case of Kimball v. Marshall, supra, was a contest for the office of city clerk of the city of Nashua, N. H., and the point was made that the meeting of the city councilmen and aldermen at which Kimball was elected to the office as the successor of Marshall was illegal for the reason that said meeting was held as an adjournment from a meeting at which less than a quorum were present. The court in its opinion in this case upholding the legality of the meeting at which Kimball was elected says:

"The rule, as we understand, applicable to all deliberative bodies, is that any number have power to adjourn, though they may not be a quorum for the transaction of business.

In general the chair is not to be taken till a quorum for business is present; unless, after due waiting, such a quorum is despaired of, when the chair may be taken and the house adjourned. And whenever, during business, it is observed that a quorum is not present, any member may call for the house to be counted; and, being found deficient, business is suspended. Jefferson's Manual, Sec. 6, citing 2 Hats., 125, 126. And Cushing (Manual 19) says: 'If at any time in the course of the proceedings notice is taken that a quorum is not present, and such appears to be the fact, the assembly must be immediately adjourned.'

If this were not so it must often happen that a small minority might have it in their power to defeat not only the business in hand, but to dissolve and terminate the meeting.

If this were not so generally, yet we think this must be held to be the rule in a case like this, where the law prescribes that a certain duty shall be performed on a particular day. It must either be held that the body once assembled cannot adjourn till the business is done, or that so many as are ready to perform their legal duty shall be held competent to continue the meeting until the object is accomplished. Of these consequences both may be held to follow under circumstances;—the majority could make no legal adjournment to such a time as would defeat the per-

formance of the prescribed duty, and a minority might keep the meeting in existence until the duty was done, by adjournments."

In the case of The People ex rel. v. Nelson, supra, the contention was made that certain action of the school trustees of a certain surveyed township in DeWitt county, Ill., transferring territory from certain school districts under their control in the formation of a new school district was invalid for the reason that the meeting at which such action was taken was not legal. The statutes governing said school trustees fixed the first Mondays of April and October in each year as the times of the regular meetings of the board and authorized the transaction of the particular business in question only at the April meeting of the board. The first Monday of April, 1910, fell on April 4th, but at this meeting of the board but one trustee and the clerk were present. The meeting was adjourned until April 11th when two trustees and the clerk were present, it appearing that one trustee had some time previously removed from the township and his successor had not been chosen. At this meeting of April 11th the trustees transacted the business which gave rise to the action. The court in its opinion says:

"There is no dispute that the law had been complied with in filing the petitions and giving notice that the adjournment to April 11th was on account of there not being a quorum present. The appellant insists that this was fatal to the validity of the district.

* * * * * * *

If appellant's position is correct, then, notwithstanding the petitioners had complied with the law so as to authorize the trustees of township 21, north, range 1, east, to act on the petition, by the failure of a quorum of the board to attend at the date of the regular meeting jurisdiction to act upon the petition thereafter was lost. We do not believe this is a reasonable construction of the provisions of the statute above set out in substance. It was essential that the petition be presented at the regular meeting of the board in April, and this was done. There being no quorum present at that meeting the petition could not be acted upon but the meeting could be kept alive by adjournment to a later date. If there had been a quorum present April 4 and the board had not completed the hearing 'of legal voters of the district or districts affected by the proposed change who might appear to oppose the petition,' we see no valid reason why the board could not adjourn to a later date to complete the hearing before final action. It certainly is not the purpose of the statute that a petition should be acted upon on the day of the regular meeting if a reasonable opportunity to the opponents of the petition of being heard required an adjournment. Like all other similar bodies, the board of trustees had power to adjourn a regular meeting when not restricted by the statute, and unless such adjournment is an abuse of the power it is not the subject of review. (I Ency. of Pl. & Pr. 248; Magenau & Brunner v. City of Fremont, (Neb.) 9 L. R. A. 786). The adjournment under consideration, we think, was not in violation of the statute and it was clearly no abuse of power. There being no quorum present, according to parliamentary law the only business that could be transacted was to adjourn. If the adjournment had been without day it might have ended the power of the board to act upon the petition upon its own initiative, but by adjourning to a day fixed one week later the regular meeting was kept alive for the purpose of transacting the business, including action upon the petition."

A decision directly to the contrary on this point is presented in the case of Pennsylvania Co. v. Cole et al., 132 Fed. Rep. 668. This was an action to enjoin the collection of certain assessments for sewer improvements in the city of Ft. Wayne on the ground, among others, that the meeting of the city council, at which the contract with Cole for the construction of the sewers was made, was illegal for the reason that the same was an adjournment from a previous regular meeting of the council by less than a quorum. In this case it appears that the regular meeting of council was held November 8, 1892. The council consisted of twenty members and only eight were present. The minutes of the meeting recited that there being no quorum present a recess was taken until the following evening when the contract with Cole was made, fourteen of the twenty councilmen being then present. The court in finding said contract invalid on the grounds stated held that where it is provided by statute that a majority of the members composing a common council of a city shall constitute a quorum, less than a quorum have no power to adjourn a regular meeting of the council to a later date and a contract entered into at such an adjourned meeting was void and cannot be validated by way of ratification by an approval of the minutes of such meeting at the next regular meeting of the council. None of the authorities cited by the court support the conclusion reached by the court on this question. With a single exception all of the authorities cited in the opinion are to the point only that the business of a deliberative body cannot be transacted by less than a quorum of the members. The single exception among the authorities cited in the opinion in this case is the case of State ex rel. v. Smith, 22 Minn. 218, where the point was made but not decided. This action was a contest between the relator and the defendant for the office of assessor of the city of Duluth. The relator was elected April 15, 1873, and the defendant April 29, 1874, but on behalf of the relator it was claimed that the latter election was invalid by reason of the illegality of the meeting of the common council of said city at which the election was held. The charter then governing the city of Duluth provided that "the common council shall meet at such time and place as they by resolution may direct. A majority of the aldermen shall constitute a quorum." By resolution of the council their regular and stated meetings were directed and fixed to be held on the first and third Tuesdays of each and every month. The annual charter election for 1874 was held on the first Tuesday of April, which was the same day fixed for the holding of one of the regular meetings of council as prescribed by resolution, but no meeting was held on this date. On the 14th, the second Tuesday of the month, a meeting was held at which the new aldermen took their seats and a reorganization was had and business pertaining to the city was transacted. Whereupon, without taking any action on the question of electing a successor to succeed the relator, whose term of office expired on the next day, the council adjourned without naming any day. The next meeting was on the 21st, the third Tuesday of April, the regular time of meeting as fixed by said resolution. At this meeting the council balloted for an assessor, but being unable to elect one adjourned until April 25th, when it again convened but no quorum being present adjourned again until April 29th at which latter meeting the council elected the defendant as city assessor. There was no showing as to the number of members attending this latter meeting and the court disposed of the contention of the relator with respect to the illegality of the meeting at which the defendant was elected as follows:

> "Assuming, as is claimed by appellants, that the adjournment from the 25th to the 29th of April was irregular because of the want of a quorum, it does not appear, either from the findings of the court below or otherwise, but that the adjourned meeting was fully attended by all

the members of the council, and that they all participated in its proceedings and in the election which was then had. In the absence of such finding the presumption is that they all did so attend, and acquiesced in the irregular adjournment. 'Illegality will not be presumed, but the contrary. The maxim of law in such cases is, *omnia rite acta presumuntur.*' Citizens' M. F. Ins. Co. v. Sortwell, 8 Allen, 219, 223; Sargent v. Webster, 13 Met. 497, 504."

The question here under consideration was presented but not decided in the case of Moore v. City Council of Perry, 119 Iowa 423. In this case the validity of a resolution adopted by the city council submitting to the electors the question of an extension of the city limits was challenged on the ground, among others, that the meeting of the council at which the resolution was adopted was illegal. In this case it appeared that at a regular meeting of the council held on September 3, 1900, the council adjourned until September 5th. On that day the following record was made:

"Council met pursuant to adjournment of September 3, 1900. Present: Mayor Breed, Councilmen Ginn and Heaton. No quorum being present, on motion of Heaton, and seconded by Ginn, council adjourned to meet September 8, 1900, at 8 o'clock p. m. Carried . H. A. Nash, clerk."

On the 8th the council met and adjourned until September 10th, and on the 10th it again met and at this meeting the resolution in question was adopted. The court in its opinion says:

"The regularity of the meeting held on September 10th is challenged for the reason that less than a quorum of the members at the meeting of September 5th had no power or authority to direct an adjournment until September 8th. The contention is that, while less than a quorum of the members of a deliberative body may adjourn from day to day, they have no power to adjourn to a future day certain. A sufficient answer to this contention, conceding it to be sound, is that it affirmatively appears that the council held a meeting on the 8th, at which we must presume all the members were present, participating in the proceedings. This meeting could no doubt be adjourned, and the adjourned session should be treated as a continuation of the original meeting.

There is no provision in our law in any manner limiting the business which may be considered at a special meeting. Such a meeting may, under our code, section 688, be called by the mayor or any three members of the council, and at such called meeting any legitimate business may be considered. If all the members attend such meeting, failure to give notice thereof is entirely immaterial. Hanna v. Wright, 116 Iowa 275. Treating the adjournment on September 5th as irregular, the pleadings nevertheless show a meeting of the council on September 8th, which we must presume, in the absence of allegations to the contrary, was attended by all the members of the council. This meeting although special, could be adjourned to a fixed date by a quorum, and, when so adjourned, the adjourned meeting will be treated as a continuation of the one which was adjourned. Any business which might properly have been brought before the meeting on September 8th could properly be considered at the adjourned session on the 10th. This conclusion is supported by authority, and, in view of our statute, is clearly correct on principle. See

State v. Smith, 22 Minn. 218; Carter v. McFarland, 75 Iowa 196; Supervisors v. Horton, 75 Iowa 271; Magneau v. City of Fremont, 30 Neb. 843; Lawrence v. Trainer, 136 Ill. 474, (27 N. E. Rep. 197); Beaver Creek v. Hastings, 52 Mich. 528 (18 N. W. Rep. 250).

Of course, if these parties had a right to be heard—as, for instance, on a question of taxation—a different rule might obtain under the doctrine announced in Gentle v. Board, 73 Mich. 40 (40 N. W. Rep. 928). The resolution in this case was simply one of the preparatory steps to an election, at which all who were interested were entitled to express themselves, and the citizens generally had no more right to be heard on the question of the adoption of this resolution than any other. The law does not contemplate either petitions or remonstrances before the city council, and no burdens are imposed on the taxpayer without an opportunity to be heard by casting his vote at the election called for the purpose of ultimately determining the question of extension of boundaries. There was no such irregularity in the proceedings of the meeting on September 10 as to invalidate the proceedings."

Likewise in the case of C. B. Nash Co. v. City of Council Bluffs et al., 174 Fed. Rep. 182, the question here under consideration was presented, but by reason of the fact that the adjourned meeting was attended by all of the members of council the court did not consider itself required to pass upon the question of the power of members of the city council less than a quorum to adjourn the previous meeting. The court in its opinion noting the conflict in the authorities with respect to this question, held that the legality of an adjournment of the meeting of a city council by less than a quorum to a certain time could not be questioned by the courts where at the adjourned meeting all members were present and participated in the transaction of business.

As recognized by the court in the case of People ex rel. v. Nelson, supra, I think that clearly the policy of the law is to permit members of a board of education less than a quorum thereof to adjourn the meeting to a day certain rather than to require such members to adjourn the meeting without day. As is well known, there are some proceedings of a board of education in this state which can only be taken at a regular meeting of the board and it is apparent that if members of a board of education in attendance at a regular meeting of the board, at which there is no quorum, were required to adjourn the meeting without day, such action might be attended with disastrous consequences with respect to some required action of the board which could only be taken at a regular meeting and which in such case would have to be deferred until the next regular meeting of the board. On the whole I am inclined to the view that the better considered authorities support the view that members of a deliberative body such as the board of education in attendance at a regular meeting of the board may adjourn the same to a day certain. This conclusion, on considerations before noted herein, disposes of the question here made with respect to the legality of the action of the board of education of Norwich township rural school district at its meeting under date of May 13, 1917, in favor of the validity of such action and of this bond issue, it appearing that no other questions with respect to the legality or regularity of the proceedings of said board of education is presented by the transcript.

Wholly aside from the question just considered and as to which my opinion has been indicated, it is obvious that the legal principle upon which the cases of State ex rel. v. Smith, Moore v. City Council of Perry and Nash Co. v. City of Council Bluffs, supra, were decided is likewise conclusive with respect to the legality of the meeting of the board of education of Norwich township rural school dis-

trict under date of May 3, 1917, at which time the resolution providing for the submission of this bond issue to the electors of said school district was adopted.

As before noted herein, the meeting of said board of education under date of April 9, 1917, held apparently by way of adjournment from the meeting of the board under date of April 3, 1917, was attended by all of the members. If this meeting of the board had been called on written notice by the president or clerk of the board, or by two members thereof, in the manner provided by section 4751 G. C., there could have been no question as to the legality of this meeting irrespective of the legality of the first adjournment of the board under date of April 2, 1917. All the members of the board having been present at this meeting under date of April 9, 1917, failure to give notice thereof became entirely immaterial with respect to the character of said meeting as a legal meeting for the transaction of the business of the school district. As said by the court in the case of Moore v. City Council of Perry, this meeting could no doubt be adjourned and the adjourned session should in legal contemplation be treated as a continuation of the original meeting.

In addition to the authorities above cited I note the cases of Butler v. Joint School District, 155 Wis. 626, Clay County School District No. 68 v. Allen, 83 Ark. 491.

The meeting of the board under date of May 3, 1917, being a continuation of the meeting of April 9, 1917, by adjournment from time to time, was a continuation of said meeting and therefore legal without respect to the question whether, on considerations before noted herein, said meeting was a regular meeting or not.

In this connection it may be noted that the adoption of the resolution providing for the submission of the question of this bond issue to the electors of the school district was not such business as was required to be done at a regular meeting.

I am therefore of opinion that the proceedings of the board of education of Norwich township rural school district relating to this bond issue have been in conformity to law and that bonds, properly prepared, covering said issue will, when the same are signed by the proper officers and delivered, constitute valid, binding and subsisting obligations of said school district, to be paid in accordance with the terms thereof.

The bond form submitted by the board of education does not meet the requirements of this department and I am, for this reason, holding the transcript until a proper bond form is submitted for my approval.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1152.

APPROVAL OF BOND ISSUE OF DELAWARE COUNTY—$5,200.00.

COLUMBUS, OHIO, April 20, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of Delaware county, Ohio, in the sum of $5,200.00, in anticipation of taxes and assessments to pay the respective shares of Liberty and Delaware townships and the owners of benefited property assessed

for the construction of the Donovan road improvement in said townships and in said county.

I have carefully examined the corrected transcript of the proceedings of the board of county commissioners of Delaware county, Ohio, relating to the above bond issue and find said proceedings to be in conformity to the provisions of the General Code of Ohio relative to bond issues of this kind.

I am therefore of the opinion that properly prepared bonds covering the above issue will, when executed by the proper officers of the county and delivered, constitute valid and subsisting obligations of Delaware county, Ohio, to be paid in accordance with the terms thereof.

No bond form covering said issue was submitted with the transcript, and I am therefore retaining said transcript until receipt of bond form.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

1153.

APROVAL OF BOND ISSUE OF DELAWARE COUNTY—$7,000.00.

COLUMBUS, OHIO, April 20, 1918.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

IN RE: Bonds of Delaware county, Ohio, in the sum of $7,000.00, in anticipation of taxes and assessments to pay the respective shares of Berlin and Brown townships and the owners of benefited property assessed for the construction of the Cowgill road improvement in said townships and in said county.

I have carefully examined the corrected transcript of the proceedings of the board of county commissioners of Delaware county, Ohio, relating to the above bond issue and find said proceedings to be in conformity to the provisions of the General Code of Ohio relative to bond issues of this kind.

I am therefore of the opinion that properly prepared bonds covering the above issue will, when executed by the proper officers of the county and delivered, constitute valid and subsisting obligations of Delaware county, Ohio, to be paid in accordance with the terms thereof.

No bond form covering said issue was submitted with the transcript and I am therefore retaining said transcript until receipt of bond form.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

1154.

APPROVAL OF BOND ISSUE OF DELAWARE COUNTY—$24,000.00.

COLUMBUS, OHIO, April 20, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of Delaware county, Ohio, in the sum of $24,000.00, in anticipation of taxes and assessments to pay the respective shares of Genoa township and the owners of benefited property assessed for the construction of the Red Bank road improvement in said township and said county.

I have carefully examined the corrected transcript of the proceedings of the board of county commissioners of Delaware county, Ohio, relating to the above bond issue and find said proceedings to be in conformity to the provisions of the General Code of Ohio relative to bond issues of this kind.

I am therefore of the opinion that properly prepared bonds covering the above issue will, when executed by the proper officers of the county and delivered, constitute valid and subsisting obligations of Delaware county, Ohio, to be paid in accordance with the terms thereof.

No bond form covering said issue was submitted with the transcript and I am therefore retaining said transcript until receipt of bond form.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1155.

APPROVAL OF BOND ISSUE OF DELAWARE COUNTY—$14,600.00.

COLUMBUS, OHIO, April 20, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of Delaware county, Ohio, in the sum of $14,600.00, in anticipation of taxes and assessments to pay the respective shares of Orange and Genoa townships and the owners of benefited property assessed for the construction of the Africa-Franklin road improvement in said townships and in said county.

I have carefully examined the corrected transcript of the proceedings of the board of county commissioners of Delaware county, Ohio, relating to the above bond issue and find said proceedings to be in conformity to the provisions of the General Code of Ohio relative to bond issues of this kind.

I am therefore of the opinion that properly prepared bonds covering the above issue will, when executed by the proper officers of the county and delivered,

constitute valid and subsisting obligations of Delaware county, Ohio, to be paid in accordance with the terms thereof.

No bond form covering said issue was submitted with the transcript and I am therefore retaining said transcript until receipt of bond form.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1156.

APPROVAL OF BOND ISSUE OF DELAWARE COUNTY—$3,200.00.

COLUMBUS, OHIO, April 20, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of Delaware county, Ohio, in the sum of $3,200.00, in anticipation of taxes and assessments to pay the respective shares of Scioto township and the owners of benefited property assessed for the construction of the Eddy road improvement in said township and in said county.

I have carefully examined the corrected transcript of the proceedings of the board of county commissioners of Delaware county, Ohio, relating to the above bond issue and find said proceedings to be in conformity to the provisions of the General Code of Ohio relative to bond issues of this kind.

I am therefore of the opinion that properly prepared bonds covering the above issue will, when executed by the proper officers of the county and delivered, constitute valid and subsisting obligations of Delaware county, Ohio, to be paid in accordance with the terms thereof.

No bond form covering said issue was submitted with the transcript and I am therefore retaining said transcript until receipt of bond form.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1157.

APPROVAL OF BOND ISSUE OF DELAWARE COUNTY—$4,600.00.

COLUMBUS, OHIO, April 20, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of Delaware county, Ohio, in the sum of $4,600.00, in anticipation of taxes and assessments to pay the respective shares of Delaware township and the owners of benefited property assessed for the construction of the Brown-Miller road improvement in said township and county.

I have carefully examined the corrected transcript of the proceedings of the board of county commissioners of Delaware county, Ohio, relating to the above bond issue and find said proceedings to be in conformity to the provisions of the General Code of Ohio relative to bond issues of this kind.

I am therefore of the opinion that properly prepared bonds covering the above issue will, when executed by the proper officers of the county and delivered, constitute valid and subsisting obligations of Delaware county, Ohio, to be paid in accordance with the terms thereof.

No bond form covering said issue was submitted with the transcript and I am therefore retaining said transcript until receipt of bond form.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1158.

APPROVAL OF BOND ISSUE OF DELAWARE COUNTY—$11,400.00.

COLUMBUS, OHIO, April 20, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of Delaware county, Ohio, in the sum of $11,400.00, in anticipation of taxes and assessments to pay the respective shares of Berlin township and the owners of benefited property assessed for the construction of the Piatt-Johnson road improvement in said township and in said county.

I have carefully examined the corrected transcript of the proceedings of the board of county commissioners of Delaware county, Ohio, relating to the above bond issue and find said proceedings to be in conformity to the provisions of the General Code of Ohio relative to bond issues of this kind.

I am therefore of the opinion that properly prepared bonds covering the above issue will, when executed by the proper officers of the county and delivered, constitute valid and subsisting obligations of Delaware county, Ohio, to be paid in accordance with the terms thereof.

No bond form covering said issue was submitted with the transcript and I am therefore retaining said transcript until receipt of bond form.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1159.

ROAD IMPROVEMENT—PRELIMINARY ENGINEERING WORK—SUPERVISION—PREPARATION OF PRELIMINARY PLANS—HOW COST AND EXPENSE PAID—COMPENSATION OF PERSONS EMPLOYED BY STATE HIGHWAY COMMISSIONER IN COUNTY SURVEYOR'S OFFICE AS ASSISTANTS.

1. *The cost and expense of engineering work done preliminary to the con-*

struction, improvement, maintenance or repair of highways by the state highway commissioner are paid half by the county or township making application for state aid and half by the state. If the improvement is made under the preliminary plans, the expenses of the same may be added to the total cost and expense of the improvement.

2. *The cost and expense of supervision and inspection done during the progress of the construction, improvement, maintenance or repair of said highways, form a part of the total cost and expense of the improvement and are to be apportioned and paid as are other costs incident to the improvement.*

3. *The work performed by the county surveyor in the matter of preparing preliminary plans is covered by his regular salary under the provision of section* 7181 *G. C. If any engineering work is required during the course of the improvement, the county surveyor would perform the same under section* 7192 *G. C. However, the state highway commissioner employs all superintendents and inspectors for the improvement and they are paid as set out in syllabus No.* 2.

4. *If the state highway commissioner employs persons in the county surveyor's office as assistants, the matter of their compensation will be taken care of as set forth in opinion No.* 1648, *Vol.* 1, *page* 965 *of the* 1916 *reports.*

COLUMBUS, OHIO, April 20, 1918.

HON. PERRY SMITH, *Prosecuting Attorney, Zanesville, Ohio.*

DEAR SIR:—I have your communication of March 27, 1918, which is as follows:

> "I desire an answer to the following question which has been submitted to me by our engineer;
>
> Is the county's share of the engineering expense on state aid road chargeable against the surveyor's annual allowance, or is it a direct charge against the bond issue by the county covering their share of the total cost and expense of the construction of the road, (a) preliminary engineering work, (b) engineering work while the job is under contract?
>
> This question is asked in reference to the force account on the east pike, I presume."

Your communication embodies two propositions: (1) as to how the preliminary engineering work is paid as it applies to those roads in which the counties make application for state aid and receive the same; and (2) as to how payment should be made for engineering work done while the improvement is being made.

Section 1193 G. C. (107 O. L. 123) reads in part as follows:

> "* * * Each application for state aid shall also contain an agreement on the part of the county commissioners or township trustees to pay one-half of the cost and expense of surveys and other expenses preliminary to the construction, improvement, maintenance or repair of said highway."

Section 1196 G. C. reads as follows:

> "If the state highway commissioner approves the application or part thereof, he shall, if necessary, cause a map of the highway in outline and profile to be made and indicate thereon any change of existing lines if he deems it of advantage to make such change. He shall cause to be made plans, specifications, profiles and estimates for said improvement."

Section 1219 G. C. (107 O. L. 131) reads as follows:

> "The state highway commissioner may direct the county surveyor to make the necessary surveys and plans for the proposed highway improvement. The expense of such surveys and plans shall be equally divided between the state and county except in cases where the improvement is being made on application of the township trustees, in which case the expense of such plans and surveys shall be equally divided between the state and township. The state highway commisioner may employ such assistants as are necessary to prepare such plans and surveys and also such superintendents and inspectors as may be necessary in the construction of said improvement. Each of said assistants, superintendents and inspectors shall receive such pay as the state highway commissioner may determine, and their compensation shall be regarded as a part of the cost and expense of the improvement and paid accordingly. All work in connection with such improvement shall be done under the direction of the state highway commissioner."

From the provisions of these three sections it is clear as to how the costs for making the preliminary surveys are paid. Whenever a county or township makes application for state aid, it must agree to pay half the cost and expense of all preliminary surveys.

Section 1196, supra, provides that the state highway commissioner shall cause to be made plans specifications, profiles and estimates for said improvement, and section 1219, supra, provides that the state highway commissioner may designate the county surveyor to make the necessary surveys and plans for the proposed highway improvement, and that the state highway commissioner may employ such assistants as are necessary to prepare such plans and surveys. In this same section we find a provision carrying out the agreement entered into by the county commissioners under the provisions of section 1193, supra, to this effect (section 1219 G. C.):

> "The expense of such surveys and plans shall be equally divided between the state and county except in cases where the improvement is being made on application of the township trustees, in which case the expense of such plans and surveys shall be equally divided between the state and township."

Hence in all preliminary engineering work the cost and expense of the same are to be borne half by the county or township and half by the state. So that none of the costs thereof would be borne by the county surveyor, out of his annual allowance.

Half of the cost and expense is an obligation of the county, assumed under the provisions of section 1193, supra, and it is my opinion that this half would be paid from the general county fund, as it is a general obligation entered into by the county. Of course, if the proposed improvement is undertaken and proceeds to a completion, then under section 1219 G. C. the cost and expense of the preliminary survey would be regarded as a part of the cost and expense of the improvement and paid accordingly. But if the improvement should not be made, the question of the preliminary cost would be a general obligation against the county and paid out of the general county fund.

We now come to a consideration of your second question. In your communication you speak of engineering work done during the course of the improve-

ment as distinguished from that done preliminary to the letting of the contract and entering upon the work. I assume by engineering work that you have reference more particularly to the matter of supervision and inspection. In reference to this matter, let us turn to the provisions of section 1219 G. C. which reads in part as follows:

> "* * * The state highway commissioner may employ such assistants as are necessary to prepare such plans and surveys (the preliminary plans and surveys) and also such superintendents and inspectors as may be necessary in the construction of said improvement. * * *"

From the provisions of this section the legislature seems to have inferred that all engineering work ends with the letting of the contract, and that after the work begins the particular thing required is not engineering work ,but supervision and inspection. Strictly speaking, this is practically correct; after the plans, specifications, profiles and estimates are made and the bids are submitted, based upon these plans, and the contract let under the plans and the bids, the engineering work, in the main at least, is at an end, and the matter more particularly to be looked after is that of supervision and inspection.

Section 1219 G. C. is quite clear as to the cost and expense of supervision and inspection. This is to be regarded as a part of the cost and expense of the improvement and paid accordingly. As said in answer to your first question, if the state highway commissioner employs assistants in the matter of preparing the plans, specifications, etc., the cost and expense of the same becomes a part of the cost and expense of the improvement and paid accordingly. But as said before, this section makes no provision authorizing the state highway commissioner to select assistants after the contract is let, but merely provides for the selection of supervisors and inspectors.

It might be well to suggest in this connection that the work done by the county surveyor himself in preparing the preliminary plans is a part of his duties under the law, and this same statement can be made in reference to the work which he performs during the time that the work is carried on under the contract. This proposition is borne out by the provisions of section 7192 G. C. (107 O. L. 115), which reads in part as follows:

> "* * * When the county surveyor has charge of the highways, bridges and culverts within his county, and under the control of the state, he shall also supervise the construction, reconstruction, improvement and repair of the same."

Under section 7182 G. C. (107 O. L. 110), when the county surveyor has such charge of the highways, bridges and culverts within his county and under the control of the state, the state assumes one-fifth of his salary and under the provisions of section 7181 G. C. (107 O. L. 110) the county surveyor is entitled to no fees of any kind other than his regular salary. Hence he is entitled to no pay whatever for his personal services rendered in the improvement of intercounty highways and main market roads under the jurisdiction of the state highway commissioner.

And, in this connection, I will say that in my opinion, if there is any engineering work other than supervision and inspection to be done during the course of the work under the contract, this engineering work would have to be done by the county surveyor under section 7192, supra, or by the regular supervising engineers of the state highway department. In other words, there seems to be no

authority given the state highway commissioner to employ persons to perform strictly engineering work during the performance of the work under the contract, but his authority is limited to employing supervisors and inspectors; hence, strictly engineering work to be performed during the progress of the work under the contract would have to be performed as above set out.

Let me further suggest that in the matter of selecting assistants, inspectors or superintendents by the state highway commissioner under the provisions of section 1219 G. C., if the state highway commissioner should select persons already employed by the county surveyor in his office, then the matter of the compensation of said assistants, superintendents and inspectors so selected by the state highway commissioner would be taken care of as set forth in opinion No. 1648, Annual Reports of Attorney-General, 1916, Vol. 1, page 965.

Let us now recapitulate the findings made herein:

1. The total cost and expense of all engineering work preliminary to entering into the contract for the construction of a highway under the jurisdiction of the state highway commissioner is borne half by the county, providing the county makes application for state aid, and half by the state. If no contract is entered into and the work therefore is not done, then the county's share of the cost and expense would be paid out of the general county fund. However, if the contract is entered into and the work is done thereunder, then these costs of the preliminary plans and surveys become a part of the total cost of the improvement, and is paid in the same manner as the other costs and expenses of the improvement.

2. The work done by the county surveyor in preparing said preliminary plans is a part of the duties of his office, and he therefore receives no compensation for the services so rendered. This same rule would obtain in reference to any duties that he might perform during the progress of the work under the contract. If the state highway commissioner employs assistants to help in the preparation of said preliminary plans, the cost and expense becomes a part of the total cost and expense of the improvement, and is paid accordingly.

3. The state highway commissioner employs the necessary superintendents and inspectors to take charge of the work during the course of the improvement, and their compensation shall be regarded as a part of the cost and expense of the improvement and paid accordingly.

4. The county surveyor exercises a general supervision over the construction of the highway for which he receives no additional compensation over and above his salary, for the reason that this is a part of the duties of his office as provided in section 7192.

5. There seems to be no provision authorizing the state highway commissioner to employ engineers, using the term in its strict sense, during the course of the improvement of the work under the contract, hence it is my opinion that any engineering work necessary to be performed during the course of the construction of the road must be done either by the county surveyor under the provisions of section 7192, or must be done by the proper employes of the state highway department, for which, of course, they would receive no compensation. This does not apply, however, to superintendents and inspectors.

In passing, I desire to say that this opinion is rendered entirely in reference to improvements over which the state highway commissioner assumes jurisdiction, and has no reference to improvements over which the county commissioners or the township trustees assume jurisdiction.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1160.

OFFICIAL TIME FOR STATE OF OHIO.

The act "to save daylight and to provide standard time for the United States," recently enacted by congress, does not affect the official time for this state fixed by section 5979 of the General Code.

COLUMBUS, OHIO, April 20, 1918.

HON. SAMUEL DOERFLER, *Prosecuting Attorney, Cleveland, Ohio.*

DEAR SIR:—You have submitted for my opinion the following request:

> "I am in receipt of a letter from the county recorder of this county, asking me whether or not his office should be governed as to time by the Ohio Code or by the recent act of congress.
>
> Inasmuch as there ought to be a uniformity in matters of time throughout the state, I am submitting this question to you for your opinion."

The recent legislation of congress entitled "An act to save daylight and to provide standard time for the United States" (Public—No. 106—65th Congress. S. 1854) provides as follows:

> "Be it enacted by the senate and house of representatives of the United States of America in congress assembled, That, for the purpose of establishing the standard time of the United States, the territory of continental United States shall be divided into five zones in the manner hereinafter provided. The standard time of the first zone shall be based on the mean astronomical time of the seventy-fifth degree of longtitude west from Greenwich; that of the second zone on the ninetieth degree; that of the third zone on the one hundred and fifth degree; that of the fourth zone on the one hundred and twentieth degree; and that of the fifth zone, which shall include only Alaska, on the one hundred and fiftieth degree. That the limits of each zone shall be defined by an order of the interstate commerce commission, having regard for the convenience of commerce and the existing junction points and division points of common carriers engaged in commerce between the several states and with foreign nations, and such order may be modified from time to time.
>
> Sec. 2. That within the respective zones created under the authority hereof the standard time of the zone shall govern the movement of all common carriers engaged in commerce between the several states or between a state and any of the territories of the United States, or between a state or the territory of Alaska and any of the insular possessions of the United States or any foreign country. In all statutes, orders, rules, and regulations relating to the time of performance of any act by any officer or department of the United States, whether in the legislative, executive, or judicial branches of the government, or relating to the time within which any rights shall accrue or determine, or within which any act shall or shall not be performed by any person subject to the jurisdiction of the United States, it shall be understood and intended that the time shall be the United States standard time of the zone within which the act is to be performed.
>
> Sec. 3. That at two o'clock antemeridian of the last Sunday in March

of each year the standard time of each zone shall be advanced one hour, and at two o'clock antemeridian of the last Sunday in October in each year the standard time of each zone shall, by the retarding of one hour, be returned to the mean astronomical time of the degree of longitude governing said zone, so that between the last Sunday in March at two o'clock antemeridian and the last Sunday in October at two o'clock antemeridian in each year the standard time in each zone shall be one hour in advance of the mean astronomical time of the degree of longitude governing each zone, respectively.

Sec. 4. That the standard time of the first zone shall be known and designated as United States standard eastern time; that of the second zone shall be known and designated as United States standard central time; that of the third zone shall be known and designated as United States standard mountain time; that of the fourth zone shall be known and designated as United States standard Pacific time; and that of the fifth zone shall be known and designated as United States standard Alaska time.

Sec. 5. That all acts and parts of acts in conflict herewith are hereby repealed.

Approved March 19, 1918."

An examination of said act discloses that for the purpose of establishing standard time the United States is divided into five zones, the limits of such zones to be defined by order of the interstate commerce commission; that in section 2 of said act it is provided that such standard time shall govern the movement of all common carriers engaged in interstate commerce, and further provides that in all statutes, orders, rules and regulations relating to the *time of performance of any act by any officer or department of the United States,* or relating to the time within which any rights shall accrue or determine, or act be or not be performed by any person subject to the jurisdiction of the United States, the standard time of the particular zone shall govern.

In section 3 of the act it is provided that on the last Sunday in March of each year the standard time shall be advanced one hour and on the last Sunday in October the standard time shall be returned to the mean astronomical time.

Section 5979 of the General Code of Ohio provides:

"The standard of time throughout this state shall be that of the ninetieth meridian of longtitude west from Greenwich and shall be known as 'central standard time.' Courts, banks, public offices and legal or official proceedings shall be regulated thereby; and when, by a law, rule, order or process of any authority, created by or pursuant to law, an act must be performed at or within a prescribed time, it shall be so performed according to such standard of time."

Section 5980 provides:

"When a clock or other timepiece is in or upon a public building maintained at public expense, the board of county commissioners, board of education, or other persons having control and charge of such building, shall have such clock or other timepiece set and run according to the standard of time as provided in the next preceding section."

It is to be noted that the legislature of Ohio has provided that the standard time for this state shall be that of the ninetieth meridian of longitude west from

Greenwich, meaning thereby the mean astronomical time of the ninetieth degree of longitude west from Greenwich. It has fixed such time certain and there is no provision of the laws of Ohio which in any way provides for any other or different standard. Such being the fact, I am of the opinion that the time governing in Ohio is that fixed by section 5979 and cannot be in any way changed by the act of congress hereinbefore referred to.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1161.

CONSTRUCTION OF SCHOOL BUILDINGS—HOW CONTRACT LET—WHEN CONTRACT MAY EXCEED AMOUNT RAISED BY BOND ISSUE—FORCE ACCOUNT—URGENT NECESSITY DEFINED.

1. *A board of education may not enter into a contract for a new school building and ignore the provisions of law relating to the letting of contracts therefor.*

2. *"Urgent necessity" means "more than convenience and more than ordinary necessity. It is something which requires immediate action. Something which cannot wait. When pleaded as an excuse for a failure to comply with any statutory requirement it must be decided by the circumstances of the particular case in which it arises," and where a case of "urgent necessity" exists, the provisions of section 7623 G. C. do not apply.*

3. *A board of education may enter into a contract for a new school building at an amount in excess of the amount of money raised by the sale of bonds, provided there is sufficient money in the building fund of such district to make up the difference between the amount of the bond issue and the amount of the contract price.*

4. *A board of education is without authority to go into the open market and secure laborers, purchase materials and build a school house by force account and without advertising and letting the contract as is provided by law.*

COLUMBUS, OHIO, April 20, 1918.

HON. FRED W. MCCOY, *Prosecuting Attorney, Carrollton, Ohio.*

DEAR SIR:—Your request for my opinion reads:

> "The board of education of Orange township, this county, sold bonds to the amount of $8,000.00 for the purpose of building a new school house at Sherodsville, Ohio, and after a number of efforts on the part of said board they have received a bid of $13,000,00 to furnish material and erect said school house. In your opinion would it be proper for the board to contract for the building of the school house at a cost in excess of the amount of money raised by the sale of said bonds, or attempt to build said school house by securing laborers and materials in the open market without advertising in a statutory manner?"

Several questions are contained in your inquiry, which, for convenience, may be phrased as follows:

1. May a board of education ignore the provisions of law in relation to the letting of contracts for the building of public school buildings?

2. What is a case of urgent necessity as the term is used in section 7623 G. C.?

3. May a board of education enter into a contract for a new school building at an amount in excess of the amount of money raised by the sale of bonds?

4. May a board of education secure laborers and materials in the open market and build a school house without advertising and letting the contract in a statutory manner?

The plan of procedure to be followed by a board of education in the letting of a contract for a new school building is set forth in section 7623 G. C., which reads as follows:

"When a board of education determines to build * * * a school house or school houses * * *, the cost of which will exceed * * * in other (than city) districts five hundred dollars, except in cases of urgent necessity, or for the security and protection of school property, it must proceed as follows:

1. For the period of four weeks, the board shall advertise for bids in some newspaper of general circulation in the district, and two such papers, if there are so many. If no newspaper has a general circulation therein, then by posting such advertisement in three public places therein. Such advertisement shall be entered in full by the clerk, on the record of the proceedings of the board.

2. The bids, duly sealed up, must be filed with the clerk by twelve o'clock noon, of the last day stated in the advertisement.

3. The bids shall be opened at the next meeting of the board, be publicly read by the clerk, and entered in full on the records of the board.

4. Each bid must contain the name of every person interested therein, and shall be accompanied by a sufficient guarantee of some disinterested person, that if the bid be accepted, a contract will be entered into, and the performance of it properly secured.

5. When both labor and materials are embraced in the work bid for, each must be separately stated in the bid, with the price thereof.

6. None but the lowest responsible bid shall be accepted. The board in its discretion may reject all the bids, or accept any bid for both labor and material, for such improvement or repair, which is the lowest in the aggregate.

7. Any part of a bid which is lower than the same part of any other bid, shall be accepted, whether residue of the bid is higher or not; and if it is higher, such residue must be rejected.

8. The contract must be between the board of education and the bidders. The board shall pay the contract price for the work, when it is completed, in cash, and may pay monthly estimates as the work progresses.

9. When two or more bids are equal, in the whole, or in any part thereof, and are lower than any others, either may be accepted, but in no case shall the work be divided between such bidders.

10. When there is reason to believe that there is collusion or combination among bidders, or any number of them, the bids of those concerned therein shall be rejected."

That the provisions of said section are mandatory and not merely directory has been held by our courts. To illustrate, in State ex rel. Ross v. Board of Education, 42 O. S. 374, the relator brought suit to compel the respondents to award him a contract for the construction and completion of a high school building. McIlvaine, J., in delivering the opinion of the court, says on page 378:

> "In the first place, it is objected to the granting of relief to relator that the court would thereby control the discretion vested in the board by subdivision 6 of section 3988 of Revised Statutes (7623 G. C.) which reads as follows:
>
> 'None but the lowest responsible bid shall be accepted; but the board may, in its discretion, reject all the bids, or accept any bid for both labor and material, which is the lowest in the aggregate for such improvement or repairs.'
>
> "This objection is not well taken. *The discretion given by this clause is to reject all the bids. This is the only discretion given. If it is determined to accept a bid, there is no discretion as to which bid must be accepted. If the lowest responsible bid be rejected, and any other be accepted, the action of the board MAY BE CONTROLLED BY MANDAMUS, without violating the rule that a matter of discretion is not subject to control by proceedings in mandamus.*"

In Mueller v. Board of Education, 11 N. P. (n. s.) 113 the court uses the following language on page 117:

> *"The section of the code referred to* (7623) *is mandatory and unless the case comes within the exception or saving clause therein named, viz., that of 'urgent necessity,' the contract is void."*

So that, answering your first question, you are advised that a board of education may not enter into a contract for a new school building and ignore the provisions of law in relation to the letting of contracts therefor.

Your next question is, what is meant by the term "urgent necessity" as that term is used in section 7623 of the General Code?

The term "urgent necessity" is given consideration and definition in the last above mentioned case (Mueller v. Board of Education). On page 120 of said report is found the following language:

> "Urgent necessity is a very strong expression. It means more than convenience and more than ordinary necessity. It is something that requires immediate action. Something that cannot wait. When pleaded as an excuse for failure to comply with any statutory requirement it must be decided by the circumstances of the particular case in which it arises. An illustration of a case which might arise under the statute referred to would be where there is but a single school building of which a number of pupils would be prevented from occupancy for a considerable time, and left without any chance for instruction pending the construction or repair of such building."

In opinion No. 594, Opinions of the Attorney-General for 1917, Vol. 2 page 1672, I held that:

> "Urgent necessity means more than convenience and more than ordi-

nary necessity. It is something which requires immediate action. Something which cannot wait. When pleaded as an excuse for a failure to comply with any statutory requirement, it must be decided by the circumstances of the particular case in which it arises."

In that opinion I had under consideration a question as to whether or not there was a case of urgent necessity where a high school had been in operation for several years in a building wholly unfit for such purpose, and said request was presented to me for my opinion on August 28, 1917. Taking the view that provision would have to be made for the schools which would begin in September, 1917, anyway, that is, that no building could be completed for use during that school year, it was my opinion that there was sufficient time to advertise and complete the building before the next school year began and therefore no case of urgent necessity. So that, in your case if it is determined that a case of urgent necessity exists, then the provisions of said section 7623, in relation to the advertisement and the letting of the contract, need not be followed, but if a case of urgent necessity does not exist, then said provisions must be followed.

In opinion No. 1087, Annual Reports of the Attorney-General, 1914, Vol. 1, page 1077, it was held:

> "The interests of the schools themselves, that is, the use of the building by the pupils with safety and convenience, must be consulted in order to determine whether a case for dispensing with the statutory requirements exists, so that if it is anticipated that although the work cannot be completed before the building must be used for school purposes, the part remaining undone can be prosecuted without impairing the safety and usefulness of the schools, the statutory requirements may not be dispensed with; otherwise they may be disregarded."

Answering your second question you are advised that "urgent necessity" means "more than convenience and more than ordinary necessity." It is something which requires immediate action. Something which cannot wait. When pleaded as an excuse for a failure to comply with any statutory requirement, it must be decided by the circumstances of the particular case in which it arises.

When a case of urgent necessity exists, then the provisions of section 7623 G. C. do not apply and a contract may be let without complying with the provisions of said section.

You ask if it would be proper for the board to contract for a building at a cost in excess of the amount of money raised by the sale of bonds. Considering this question in a general way, I must advise you that it frequently happens that boards of education must contract for buildings in excess of the amounts raised from bond issue. That is, the board may have certain moneys in the building fund and only the balance of the estimate is necessary to be raised by a bond issue. Take for illustration your case, for which you say you have a bid of $13,000. $8,000 has been raised from the sale of bonds. If, now, there is $5,000 in the building fund of said district, then a contract may be let which not only covers the amount raised from the sale of bonds, but may also cover the amount in the building fund.

It was held in McAlexander v. Haviland Village School, 7 O. N. P. (n. s.) 590-594, that:

> "The statute does not require that the board must know, in advance, the exact amount of money that will be required. This would in many cases be impossible to ascertain. I have no doubt that the members of this board of education honestly believed that $8,000 would build and finish

this building, and equip it with a modern heating plant. In the light of subsequent events, it is now apparent they were mistaken. It was an error of judgment in estimating the probable costs of the proposed improvements."

There were many other questions considered in the last above mentioned case, but it seems clear to me that the court intended to make it plain that a board of education, which estimates the probable amount of money required for such purpose or purposes, is not required to ascertain the cost of such building to that exactness which will preclude them from spending other money in such contract available for that purpose, and outside of the amount raised by the bond issue.

It should be remembered that no board of education is permitted to enter into a contract unless the money is in the treasury to pay for the amount thereof. The certificate of the clerk, as provided by section 5660, must be obtained in all cases unless, perhaps, in a case where the entire amount has been raised by a bond issue for that particular purpose.

This department held in opinion No. 333, Opinions of the Attorney-General for 1917, Vol. 1, page 885, that:

> "In cases in which bonds have been sold and the proceeds placed in a special fund to be used for a specific work, and a contract is entered into for the construction of said work, the provisions of section 5660 G. C., that a certificate must first be made by the proper officer to the effect that the money is in the treasury to the credit of said fund, do not apply."

If, on the other hand, the entire amount was not raised by the bond issue, then the certificate required by section 5660 must be obtained and, as is provided by section 5661, the contract shall be void except for said certificate.

Answering your third question you are advised that a board of education may enter into a contract for a new school building for an amount in excess of the amount of money raised by the sale of bonds, provided there is sufficient money in the building fund of such district to make up the difference between the amount of the bond issue and the amount of the contract price.

Your fourth question is, may a board of education secure laborers and material in the open market and build a school house without advertising and letting the contract in a statutory manner? This question is really answered by my answer to your first question, wherein I advise you that the statute must be followed in the letting of contracts for the building of school buildings. There is no authority given by our school laws to boards of education to construct school buildings on what is commonly called "force account," that is, by going into the open market and securing laborers and materials without advertising and letting the contract as is provided by law. Boards of education can only act in pursuance of the authorized provisions of law and when there is no law provided for the doing or performing of the act by them, then the board is without power to act. So that you are advised that, the board of education being without authority to go into the open market and secure laborers and materials, and thus construct a school building, the same would be unlawful and cannot be done by such board.

To recapitulate, then, your questions would be answered as follows:

1. A board of education may not enter into a contract for a new school building and ignore the provisions of law relating to the letting of a contract therefor.

2. "Urgent necessity" means "more than convenience and more than ordinary necessity. It is something which requires immediate action. Something which cannot wait. When pleaded as an excuse for a failure to comply with any statutory requirement it must be decided by the circumstances of the particular case in which it arises," and where a case of "urgent necessity" exists, the provisions of section 7623 G. C. do not apply.

3. A board of education may enter into a contract for a new school building at an amount in excess of the amount of money raised by the sale of bonds, provided there is sufficient money in the building fund of such district to make up the difference between the amount of the bond issue and the amount of the contract price.

4. A board of education is without authority to go into the open market and secure laborers, purchase materials and build a school house by force account and without advertising and letting the contract as is provided by law.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1162.

OFFICES INCOMPATIBLE—VILLAGE CLERK AND CLERK OF SINKING FUND TRUSTEES.

The offices of clerk of a village and clerk of the sinking fund trustees, when such sinking fund trustees are authorized by council to have a clerk, are incompatible, and such clerk of a village cannot be employed by such sinking fund trustees or receive the compensation provided for by council in an ordinance authorizing a clerk for said trustees.

COLUMBUS, OHIO, April 23, 1918.

HON. E. E. LINDSAY, *Prosecuting Attorney, New Philadelphia, Ohio.*

DEAR SIR:—You have referred to the ruling of the bureau of inspection and supervision of public offices in its circular No. 374, page 4, holding that it is unlawful for a city auditor to receive compensation as clerk of the sinking fund trustees, and you desire to know, in view of that ruling, whether or not it is unlawful for the clerk of a *village* to be hired by the sinking fund trustees as their clerk and to receive the compensation provided for by council in an ordinance authorizing such clerk of said trustees.

In Opinions of the Attorney-General for 1917, Vol. II, page 1744, will be found an opinion rendered by this department to the bureau of inspection and supervision of public offices under date of September 19, 1917, which no doubt was the predicate of the ruling issued by the bureau, to which you refer. In the syllabus of said opinion it is stated:

"When council has authorized the trustees of the sinking fund of a city to elect a secretary, the person who holds the position of deputy auditor in said city may not be elected secretary of the board of trustees of the sinking fund of said city, qualify as such and receive separate compensation therefor and at the same time continue to act as deputy auditor since it would be incompatible with the latter position to do so."

That opinion followed an opinion previously rendered by one of my predecessors, Hon. Timothy S. Hogan, under date of March 16, 1912, and found in Vol. II of the Annual Report of the Attorney-General for 1912, page 1651, and also an opinion of my immediate predecessor, Hon. Edward C. Turner, as shown in Vol. I of Opinions of the Attorney-General for 1916, page 549, addressed to the Bureau of Inspection and Supervision of Public Offices on March 23, 1916. These opinions discuss and show the incompatibility necessarily existing between the offices of city auditor and the clerk of the sinking fund trustees.

Inasmuch as section 4283 G. C., found in Tit. II, Div. 5, Subdiv. 2, Ch. 4, subheading "Cities and Villages," provides that in the following provisions of the chapter the word "city" shall include "village," and the word "auditor" shall include "clerk," and inasmuch as the sections immediately succeeding provide for the auditing duties of the auditor, it is evident that the clerk of a village has more duties than those set out in section 4281 G. C. which provides the duties of village clerk, and that under the statute said village clerk now has all the duties that are applicable which are given to the auditor in the succeeding sections of the chapter following section 4283 G. C.

These opinions, as well as your inquiry, assume that council has provided by an ordinance for such clerk. You of course will recall that provision of section 4509 G. C. which makes the auditor of the city or clerk of the village secretary of the board where no clerk or secretary is authorized.

In direct answer to your question it is my opinion, therefore, that the clerk of a village cannot be employed by the sinking fund trustees as their clerk and receive compensation therefor.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1163.

TOWNSHIP TRUSTEES SHOULD LEVY TAX TO CREATE FUND UNDER CASS LAW, WHEN ROAD IMPROVEMENT WAS BEGUN UNDER SAID ACT—TOWNSHIP TREASURER ENTITLED TO COMMISSION.

1. *When a road improvement was begun under the Case highway act, the township trustees should levy the tax to create a fund as provided in section 1222 of the Cass act, even though the county commissioners had made application for state aid.*

2. *In such a case the township treasurer would be entitled to a commission upon the amount of money paid out by the township in reference to an improvement.*

COLUMBUS, OHIO, April 23, 1918.

HON. BENTON G. HAY, *Prosecuting Attorney, Wooster, Ohio.*

DEAR SIR:—I have your communication of April 1, 1918, which reads as follows:

> "In an opinion to me, being No. 827, of December 3, 1917, you hold that a township treasurer under the Cass highway act is entitled to two per cent. commission on money paid out by him on the order of the township trustees, on account of the improvement of an intercounty

highway; that as the levy for the township's share of the intercounty highway was, under the old law, made by the township trustees, and the money derived from the levy is paid over to the township by the county treasurer, the treasurer is entitled to his commission on such money.

I am asking your opinion whether the township treasurer is entitled to a commission of two per cent on such moneys if the improvement of the intercounty highway was begun under the Cass highway act, but the levy for the township's share of the improvement, as provided in section 1222, is made after the amendment by the legislature as found in 107 O. L. 132. Is such levy for such improvement, which was begun under the Cass highway act, made by the county commissioners or the township trustees, the improvement under the Cass highway act having been made upon the application of the county commissioners?"

In answering your question, I desire to call attention to the provisions of section 26 G. C., which provides in part as follows:

"Whenever a statute is repealed or amended, such repeal or amendment shall in no manner affect pending actions, prosecutions or proceedings, * * *"

The provisions of this section would apply to the matter you have in mind. However, I am aware that it might be held that this section would not apply, because of the fact that section 2 of the White-Mulcahy law embodies certain saving provisions which are more limited than those set out in section 26 G. C. Nevertheless, if this be true, section 3 of the White-Mulcahy law is broad enough to include the matter you have in mind. Section 3 of this law (107 O. L. 141) reads in part as follows:

"This act shall not affect or impair any contract entered into, any act done, any right acquired or any obligation incurred prior to the time when this act takes effect, under or by virtue of any statute hereby amended or repealed, but the same may be completed, asserted or enforced as fully and to the same extent as if such statute had not been amended or repealed. * * *"

In an opinion rendered to Hon. Clinton Cowen on July 16, 1917, and found in Vol. II, Opinions of Attorney-General for 1917, page 1231, I held that a matter having to do with a road improvement is such as would come under section 3 of the White-Mulcahy law.

If this be true, the next step for us to take is to ascertain whether the proceedings in reference to the road improvement about which you ask were begun under the Cass highway act and pending at the time of the taking effect of the White-Mulcahy law, viz., June 28, 1917.

The question is, at what stage may it be said that a road improvement has been commenced? In the opinion I rendered to Mr. Cowen, above referred to, I held as follows in reference to when the first step in a road improvement is taken, so that the proceeding may be held as a pending proceeding (p. 1236):

"The question now is as to when the first step in the matter of a road improvement is taken, because the law which is in force and effect at the time of the taking of said first step will control in the further steps

involved in the proceeding. It is my opinion that the first step is taken when the state highway commissioner approves the application of the county commissioners for the improvement of the intercounty highways or main market roads of the county, or when he approves any part of said highways for which application has been made, and orders the county surveyor to prepare plans, profiles, specifications, etc., for said improvement."

From your letter I infer that the proceedings about which you inquire was begun under the Cass highway act, under the principles set out in that part of my former opinion above quoted. If this be the case, the provisions of the Cass highway act would control in all further steps taken in the improvement.

In said opinion I also held on page 1236:

"Hence, if this approval of the state highway commissioner was made and his ordering the county surveyor to make plans, specifications., etc, for an improvement occurred before June 28, 1917, then your department would proceed under the provisions of the old law. But if these steps have been taken since the 28th day of June, 1917, the provisions of the new law would control in the matter of your further proceedings."

Assuming that the improvement about which you inquire had progressed to the stage at which it may be said that the proceedings were begun, it is evident that the provisions of section 1222 of the Cass act, and not those of section 1222 of the White-Mulcahy law, would control. If section 1222 of the Cass act controls, then it would be the duty of the township trustees to make the levy upon all the property located in the township, to create a fund to take care of the road improvement in question.

This virtually answers your second question, as to whether the township treasurer would be entitled to a commission on the amount of money which is paid out by the township for said improvement. If the entire proceedings are to be controlled by the Cass act, my holding in opinion rendered to you on December 3, 1917 (Vol. III, Opinions of the Attorney-General for 1917, p. 2218), would apply and the township treasurer would be entitled to his commission on the amount of money paid out by the township for said improvement.

This makes it unnecessary for me to decide the question as to whether the township treasurer would be entitled to a commission on moneys so paid out, in a case where the county commissioners made the levy under section 1222 of the White-Mulcahy law. I am therefore not passing upon that question.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1164.

TERRITORY CANNOT BE TRANSFERRED FROM A CITY OR AN EXEMPTED VILLAGE SCHOOL DISTRICT.

There is no authority contained in our school laws to transfer territory from a city or an exempted village school district.

COLUMBUS, OHIO, April 23, 1918.

HON. SAMUEL DOERFLER, *Prosecuting Attorney, Cleveland, Ohio.*

DEAR SIR:—I have your request for my opinion which reads:

> "A part of the village of Cleveland Heights was taken over by the city of East Cleveland some years ago as a part of their school district. It is now the desire of the Cleveland Heights village school district to take back said territory.
>
> It is our opinion that since the repeal of section 4693 G. C., the school laws do not provide for the transfer of territory for school purposes from city or exempted village districts to other school districts.
>
> Will you kindly give us your opinion on this matter?"

Your request calls for a consideration of those sections of the General Code which deal with or provide for the transfer of territory from one school district to another and that we may fully understand the true import of said sections, it might be well at the outset to note the kinds or classes of school districts in Ohio and the definition of each.

The school districts of Ohio are divided into four classes, viz., city, village, rural and county. (General Code Sec. 4679.) A city school district is defined by section 4680 G. C. as:

> "Each city, together with the territory attached to it for school purposes, and excluding the territory within its corporate limits detached for school purposes, shall constitute a city school district."

A village district is defined by General Code section 4681 as follows:

> "Each village, together with the territory attached to it for school purposes, and excluding the territory within its corporate limits detached for school purposes, and having in the district thus formed a total tax valuation of not less than five hundred thousand dollars, shall constitute a village school district."

A county school district is defined by section 4684 G. C. as follows:

> "Each county, exclusive of the territory embraced in any city school district and the territory in any village school district exempted from the supervision of the county board of education by the provisions of sections 4688 and 4688-1, and territory detached for school purposes, and including the territory attached to it for school purposes, shall constitute a county school district. In each case where any village or rural school district is situated in more than one county such district shall become a part of

the county school district in which the greatest part of the territory of such village or rural district is situated."

All other districts, that is, what were formerly known as township or special school districts, are, by section 4735 G. C., made rural school districts and this latter class includes any rural school districts which have been created since the enactment of said last mentioned section.

Certain village school districts are denominated exempted village districts, that is, they are that class of village school districts which are exempted from supervision by the county board of education. These are provided for by sections 4688 and 4688-1 G. C., which read:

"Sec. 4688: The board of education of any village school district containing a village which according to the last federal census had a population of three thousand or more, may decide by a majority vote of the full membership thereof not to become a part of the county school district. Such village district by notifying the county board of education of such decision before the third Saturday of July, 1914, shall be exempt from the supervision of the board."

"Sec. 4688-1: The board of education of a village school district shall upon the petition of one hundred or more electors of such district, or upon its own motion may at any time order a census to be taken of the population of such district. One or more persons may be appointed by the board to take such census. Each person so appointed shall take an oath or affirmation to take such census accurately and to the best of his ability. He shall make his return under oath to the clerk of the board, and certified copies of such return shall be sent to the county auditor and superintendent of public instruction. If the census shows a population of three thousand or more in the village school district, and such census is approved by the superintendent of public instruction, such district shall, upon notification by the board of education of such village school district, be exempted from the supervision of the county board of education."

That is to say, city school districts and those village districts which are exempted from county supervision, are considered no part of the county school district, and the county board of education has no control over said districts except, as will be hereinafter noted, to transfer territory to such districts, the same as to another county school district. Transfer of territory from one school district of the county school district to another school district of the county school district is provided for by section 4692 G. C., which reads:

"The county board of education may transfer a part or all of a school district of the county school district to an adjoining district or districts of the county school district. Such transfer shall not take effect until a map is filed with the auditor of the county in which the transferred territory is situated, showing the boundaries of the territory transferred, and a notice of such proposed transfer has been posted in three conspicuous places in the district or districts proposed to be transferred, or printed in a paper of general circulation in said county, for ten days; nor shall such transfer take effect if a majority of the qualified electors residing in the territory to be transferred, shall, within thirty days after the filing of such map, file with the county board of education a written remonstrance against such proposed transfer. If an entire district be

transferred the board of education of such district is thereby abolished, or if a member of the board of education lives in a part of a school district transferred the member becomes a non-resident of the school district from which he was transferred and ceases to be a member of such board of education. The legal title of the property of the board of education shall become vested in the board of education of the school district to which such territory is transferred. The county board of education is authorized to make an equitable division of the school funds of the transferred territory either in the treasury or in the course of collection. And also an equitable division of the indebtedness of the transferred territory."

Transfer of territory from a school district of the county school district to an adjoining exempted village school district or city school district, or to another county school district is provided for in section 4696 G. C., which reads as follows:

"A county board of education may transfer a part or all of a school district of the county school district to an adjoining exempted village school district or city school district, or to another county school district, provided at least fifty per centum of the electors of the territory to be transferred petition for such transfer. Provided, however, that if at least seventy-five per cent of the electors of the territory petition for such transfer, the county board of education shall make such transfer. No such transfer shall be in effect until the county board of education and the board of education to which the territory is to be transferred each pass resolutions by a majority vote of the full membership of each board and until an equitable division of the funds or indebtedness be decided upon by the boards of education acting in the transfer; also a map shall be filed with the auditor or auditors of the county or counties affected by such transfer."

But there is nothing in any of said sections which in any manner authorizes a transfer of territory from a city school district or an exempted village school district to any adjoining school district. Prior to the enactment of the new school code in 1914, there existed an entirely different scheme of legislation in reference to the transfer of territory from that which is provided by said new code. The new code provides that transfers shall be made by the county board of education and gives no authority to local boards or any other persons to transfer territory from one school district to another. Prior to the enactment of the new school code it was provided in section 4692 G. C. that any school district, or a part thereof, might be transferred to an adjoining district by the mutual consent of the boards of education having control of such districts, and when the board failed or refused to transfer such territory by mutual consent, it was provided by section 4693 that the petitioner for such transfer should file a map in the probate court of the county in which the territory was situated, or if it was situated in two or more counties, in the probate court of the county containing the largest proportionate share of the territory to be transferred, and thereupon the probate judge, as was provided in section 4694, was compelled to fix a day for the hearing of a petition, and as provided by section 4695, was authorized to hear and determine the case and render his judgment for or against such transfer. As noted above, those sections have all been repealed and new sections enacted in the place of some of them, carrying an entirely new and different scheme of legislation in relation to the transfer of territory. In other words, there is no authority now con-

tained in the General Code for a transfer of territory by the mutual consent of boards of education of city or village districts and a city district not being a part of a county district, the county board of education has no authority to transfer territory from such city district.

I must therefore advise you that there is no authority contained in our school laws for the transfer of territory from a city or an exempted village school district.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1165.

APPROVAL OF BOND ISSUE OF LICKING COUNTY—$4,500.00.

COLUMBUS, OHIO, April 24, 1918.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of Licking county in the sum of $4,500, in anticipation of taxes and assessments to pay in part the shares of said county, Mary Ann township, and abutting property owners, of the cost and expense of improving section "F," I. C. H. No. 479, in said county.

I have carefully examined the corrected transcript of the proceedings of the board of county commissioners of Licking county, Ohio, and of other officers, relating to the above bond issue, and find said proceedings to be in substantial conformity to the provisions of the General Code of Ohio relating to bond issues of this kind.

I am therefore of the opinion that bonds in proper form will, when the same are executed and delivered, constitute valid and subsisting obligations of said county, to be paid in accordance with the terms thereof. No bond form of the bonds covering this issue has been submitted to me and I am therefore holding the transcript of said proceedings until such bond form is submitted for approval.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1166.

DISAPPROVAL OF ARTICLES OF INCORPORATION OF THE BEND FIRE INSURANCE ASSOCIATION.

COLUMBUS, OHIO, April 24, 1918.

HON. WILLIAM D. FULTON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I am herewith returning without my approval thereon, articles of incorporation of the Bend Fire Insurance Association, submitted to me under date of April 20, 1918. The articles in question are governed by the provisions of sections 9593 et seq. The purpose clause of said articles reads in full as follows:

"Second. Said corporation is to be located at Cleveland, in Cuyahoga county, Ohio, and its principal business there transacted.

Third. Said corporation is formed for the purpose of enabling its members to insure each other against loss by fire and lightning, cyclones, tornadoes or wind storms, hail storms and explosions from gas, to enforce any contract by them entered into whereby the parties thereto agree to be assessed specifically for incidental purposes and for the payment of losses which occur to its members on property in this state, subject to the limitations of section 9593 of the General Code of Ohio."

It is evident that said articles are defective in not stating the kind of property proposed to be insured as required by section 9594 General Code, and the same are disapproved for this reason.

You are therefore advised not to file said articles until the same are corrected to meet the requirement above noted. Very truly yours,

JOSEPH MCGHEE,
Attorney-General.

1167.

WORKMEN'S COMPENSATION LAW—ELECTIVE FEATURE APPLYING TO EMPLOYERS OF LESS THAN FIVE WORKMEN DOES NOT APPLY TO EMPLOYERS OF DOMESTIC SERVANTS—PREMIUMS PAID INTO COMPENSATION FUND CANNOT BE REFUNDED.

1. *The elective feature of the workmen's compensation law, applying to employers of less than five workmen or operatives regularly in the same business, or in or about the same establishment, does not apply to employers of household or domestic servants in or about a private residence.*

2. *Such feature of the workmen's compensation law does not apply to employers of chauffeurs unless such chauffeur is directly employed in the usual course of the trade, business, profession or occupation of his employer.*

3. *There is no authority in law for the refunder of premiums paid into the workmen's compensation fund under a mistake of law or fact.*

COLUMBUS, OHIO, April 24, 1918.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—You have submitted the following request for my opinion:

"The inclosed letter is self-explanatory.

In Vol. I, Annual Report of the Attorney-General, 1914, p. 521, may be found an opinion which in effect holds that the compulsory features of the workmen's compensation act do not apply to domestic servants employed by private families. We should like to have your opinion on the following points:

1. May domestic employes be covered and receive compensation, if injured, if the employer has paid a premium covering them?

2. Is a chauffeur who drives his master to and from his place of business and in the course of his business a domestic employe?

3. Is Mr. ---------- entitled to a refund of premium paid on such domestic employes?"

The letter to which you refer is as follows:

"During the past four years I have paid into the industrial insurance fund, state of Ohio, various amounts as insurance on the employes at my home, namely, one chauffeur and one maid.

I have recently been informed that the benefits accruing from the industrial insurance fund are not applicable on the personal employes at my home upon which I have paid the insurance premiums as above mentioned. If such is the case I believe that I am entitled to a refunder of such premiums paid in error, and I would thank you to forward the forms for making a claim for such refunders."

Answering your first question, it has been held that the compulsory features of the workmen's compensation act did not apply to domestic employes. See Opinion of Attorney-General, 1914, Vol. I, p. 521, to which you refer, and also Opinion of the Industrial Commission of Ohio in the claim of Eisel vs. Rogers, No. 508, section 27, decided March 21, 1916, and reported in Vol. 4, No. 5, of the Bulletin of the Industrial Commission of Ohio at page 137.

These opinions are based upon the fact that domestic employes do not come within the classification of employes who are entitled to the benefits of the act as defined in sections 1465-60 and 1465-61 of the General Code, in that they are not employed in the usual course of trade, business, profession or occupation of the employer.

Section 1465-71 provides for payment into the fund by an employer of less than five workmen or operatives regularly in the same business or in or about the same establishment; while this section does not include the words "usual course of trade, business, profession or occupation," still the terms employe, workman and operative as defined in section 1465-61 define said terms for all the purposes of the act; and therefore the holding which has been definitely made that domestic servants are not included in said definition under the compulsory features of the act would also necessarily apply to the elective feature provided by section 1465-71. To hold otherwise would be a discrimination in favor of employes of an employer of less than five workmen or operatives who elects to comply with the act, and against all such employes of employers of five or more workmen or operatives. There is nothing in the act that would justify such holdings for the same reasoning that is relied on to sustain the former opinion of the attorney-general; and the opinion of the industrial commission, to which I have referred, applies equally to sections 1465-71 and 1465-74.

Therefore, there is no authority for the insurance under the act of domestic employes; nor for the receipt from an employer of a premium paid to cover such insurance.

Though your second question is very generally phrased, I assume that you intend to refer to the attached letter. The letter shows that the chauffeur in question was considered by the writer to be one of the employes "at my home." This being the case, the mere fact that he drives his employer to and from his place of business would not, in my opinion, make him an employe in the usual course of the business of the employer, as the primary purpose of the employment would be to serve the personal convenience and pleasure of his employer and the members of his family, and not to promote the employer's business. Accordingly I answer your second question in the affirmative.

Answering your third question: It appears that a certain employer employing less than five persons has paid premiums into the fund, which have been received by the commission and the employer carried as one who had complied with the act and was entitled to the protection afforded thereby. It now appears that under the act the employes were not within the class entitled to compensation.

Section 1465-55 General Code provides for refunders from the state insurance fund in certain cases, as follows:

> "The state liability board of awards shall adopt rules and regulations with respect to the collection, maintenance and disbursement of the state insurance fund; one of which rules shall provide that in the event the amount of premiums collected from any employer at the beginning of any period of six months is ascertained and calculated by using the estimated expenditure of wages for the period of time covered by such premium payments as a basis, that an adjustment of the amount of such premium shall be made at the end of such six months' period and the actual amount of such premium shall be determined in accordance with the amount of the actual expenditure of wages for said period; and, in the event such wage expenditure for said period is less than the amount on which such estimated premium was collected, then such employer shall be entitled to receive a refunder from the state insurance fund of the difference between the amount so paid by him and the amount so found to be actually due, or to have the amount of such difference credited on succeeding premium payments at his option, and should such actual premium, when ascertained as aforesaid exceed in amount the premium so paid by such employer at the beginning of such six months' period, such employer shall immediately upon being advised of the true amount of such premium due, forthwith pay to the treasurer of state an amount equal to the difference between the amount actually found to be due and the amount paid by him at the beginning of said six months' period."

This section does not in terms cover a case where an employer who was not subject to the law at all has paid premiums into the fund; it would certainly cover the case of an employer who, though subject to the law, had misinterpreted it so as to pay more than the required premium because of the inclusion in the payroll of the compensation of persons who are not "employes" within the meaning of the act; that is, it would cover such a case if the premium had been calculated on an estimated expenditure of wages and the mistake had been discovered and the adjustment made at the end of the six months' period. I suspect, however, that the case which you have in mind does not come within this category and that section 1465-55 does not cover it. The section does show that premium adjustments involving refunds are required under certain circumstances. The question now is as to whether the industrial commission by the adoption of a rule may disburse the state insurance fund in the adjustment of premium accounts or the refunder of entire premiums paid when there was no right to participate in the benefits of the fund. The question is not complicated by the application of the constitutional inhibition against the withdrawal of moneys from the state treasury; because the state insurance fund is not in the state treasury; the treasurer of state is merely the custodian of it and it is disbursed on vouchers (section 1465-56 General Code).

Section 1465-72 of the General Code directs the industrial commission to disburse the state insurance fund to employes on account of injuries and to their dependents in case death has ensued. Section 1465-89 authorizes the disbursement

and payment from the state insurance fund of medical, nurse and hospital expenses, etc.

No other disbursements are expressly authorized to be made from the state insurance fund, except, of course, the investment of any surplus or reserve in bonds of the United States, etc. (section 1465-58). In this state of the law I am of the opinion that the authority to make a refunder does not exist save in the case expressly provided for in section 1465-55 G. C.

In this connection I have considered also the authority of the commission to take the over-payment into account in adjusting premium rates, on the assumption that the person about whom inquiry is made is an "employer" within the meaning of the act and, on account of other employes than the ones specified, is and will continue to be liable for some premiums. I do not find authority for any such procedure save and except in section 1465-55 G. C.; and unless the circumstances of the case which you have in mind bring it within the operation of this section I do not believe that this expedient is available.

I have also considered the question as to whether a refunder could not be made by the commission on the theory that the money was paid under a mistake of facts, and therefore would be recoverable from the state, or from the industrial commission or its members. In order to support such a result I should have to hold that the industrial commission has the implied power to make restitution in a proper case, in addition to the express powers which are given to it to act in such manner in similar though not identical cases. I cannot bring myself to consider this interesting question, however, because, as I see it, no mistake of fact has occurred in the case which you state. The mistake which took place is one purely of law, and the doctrine that money paid under a mistake of law cannot be recovered back has become generally established in this state.

What I have said about adjusting the future premium rates so as to allow the employer credit for the over-payment constitutes the only suggestion which I feel able to make for the solution of the difficulty, providing the commission desires to take such action. As I have said, I do not believe the workmen's compensation act, strictly construed, authorizes such adjustment to be made; but as I am not thoroughly conversant with the practice of the commission in fixing premium rates I would not undertake to pass upon this matter as a question of law without a formal request from the commission directed to this point. Your letter asks about a refund and the positive holdings which I have made relate to that matter only.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1168.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN FAIRFIELD, WAYNE AND HANCOCK COUNTIES.

COLUMBUS, OHIO, April 24, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of April 20, 1918, enclosing, for my approval, final resolutions for the following named improvements:

Baltimore-Reynoldsburg road—I. C. H. No. 461, Sec. "A-1," Fairfield county.

Wooster-Millersburg road—I. C. H. No. 342, Sec. "A," Wayne county.

Lima-Sandusky road—I. C. H. No. 22, Sec. "C-2," types "A," "B" and "C," Hancock county.

Lima-Sandusky road—I. C. H. No. 22, Sec. "C-1," Hancock county, types "A," "B" and "C."

I have carefully examined said resolutions, find the same correct in form and legal, and am therefore returning them to you, with my approval endorsed thereon, in accordance with the provisions of section 1218 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1169.

APPROVAL OF BOND ISSUE OF LICKING COUNTY—$16,000.00.

COLUMBUS, OHIO, April 24, 1918.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In Re: Bonds of Licking county, Ohio, in the sum of $16,000 in anticipation of taxes and assessments to pay in part the shares of said county, Newark township, and the owners of abutting property of the costs and expense of the Cherry Valley road improvement extending for a distance of one mile westerly from the west corporation line of the city of Newark.

I have carefully examined the transcript of the proceedings of the board of county commissioners of Licking county, Ohio, and other officers, relating to the above bond issue, and find said proceedings to be in substantial compliance with the provisions of the General Code of Ohio relating to bond issues of this kind.

I am therefore of the opinion that bonds in proper form covering this issue will, when same are executed and delivered, constitute valid and subsisting obligations of said county, to be paid in accordance with the terms thereof.

No bond form of the bonds covering this issue was submitted with the transcript, and I am therefore holding said transcript until such bond form is submitted to me for approval.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1170.

OHIO BOARD OF ADMINISTRATION MAY NOT MANUFACTURE PRODUCTS WITH PRISON LABOR FOR USE OF CITIES AND VILLAGES.

The Ohio board of administration has no authority in law to manufacture lime with prison labor and sell the same to the city of Columbus.

COLUMBUS, OHIO, April 26, 1918.

Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—You ask my opinion upon the following state of facts: The city of Columbus uses a large amount of lime in softening the water used by the

inhabitants of the city. The Ohio board of administration is of the opinion that it could install a plant in connection with the penitentiary to manufacture lime with the labor of the prisoners and sell it to the city of Columbus for less than it is able to secure lime at the present time. However, said board does not care to erect a plant for manufacturing lime unless it can enter into a contract with the city of Columbus for a period of three years.

The legal questions arising are as follows:

1. Has the Ohio board of administration the right to use prison labor for the manufacture of lime to be sold to the City of Columbus?

2. Has the city of Columbus the authority to enter into a three-year contract for the purchase of lime from the Ohio board of administration?

In considering the first question, it will be noted that an act found in 98 O. L. 177 as sections 2228 to 2235 G. C., applies. Section 2228 G. C. reads as follows:

"Sec. 2228. The board of managers of the Ohio penitentiary, the board of managers of the Ohio state reformatory, or other authority, shall make no contract by which the labor or time of a prisoner in the penitentiary or reformatory, or the product or profit of his work, shall be let, farmed out, given or sold to any person, firm, association or corporation. Convicts in such institution may work for, and the products of their labor may be disposed of, to the state or a political division thereof, or for or to a public institution owned or managed and under the control of the state or a political division thereof, for the purposes and according to the provisions of this chapter."

Section 2230 G. C. reads in part as follows:

"Such labor shall be for the purpose of the manufacture and production of supplies for such institutions, the state or political divisions thereof; * * *"

There could hardly be a question raised but that the general term "supplies" would include lime, and that the Ohio board of administration might manufacture lime with prison labor and sell the same to the state or political divisions thereof, or to any public institution of the state or of a political division thereof.

This leaves one other question for consideration, viz., whether the term "political division" includes a municipality of the state and in this particular instance the city of Columbus.

There are a number of provisions in the act above referred to which seem to indicate that the legislature used the term "political division" as applying to counties and townships only and not to municipalities. For instance, in section 2231 G. C. we have the following provision:

"Sec. 2231. Such tile, brick and culvert pipe and road building material and such products of convict or prison labor as are used in the construction or repair of the public roads shall be furnished the political divisions of this state at cost. * * *"

In section 2232 G. C. we find the following:

"The trustees of a township or the board of commissioners of a county may make application to the board of managers of the penitentiary

or to the board of managers of the reformatory for supplies manufactured under the provisions of this chapter. * * *"

If the legislature had intended that the term "political divisions" should include a municipality, it is altogether reasonable to assume that in section 2232 G. C. it would have referred not only to the trustees of a township and the board of county commissioners, but also to the proper officials of a municipality.

Section 2234 G. C. reads in part as follows:

"Such boards may lease and operate plants for the manufacture of brick or road building material or supplies, needed for the construction and maintenance of public roads, which shall be furnished at cost to a township or county proportionately as demanded. * * *"

If the legislature had intended that "political divisions" should include municipalities, it would not have provided that the supplies should be furnished only to a township or county proportionately as demanded, but would have included in this list municipalities as well.

In section 2235 G. C. we find the following provision:

"* * * and the products thereof shall not be disposed of except to a township or county in this state for the construction, repair or maintenance of public roads outside of the limits of incorporated cities or villages. * * *"

This provision seems not only to indicate that the supplies and products spoken of in this act are to be sold only to townships and counties, but that cities and villages are not to have the benefits to be secured under this act. Hence from a general suvey of the whole act I am of the opinion that it was not the intention of the legislature that the Ohio board of administration should manufacture lime with prison labor and sell the same to municipalities.

I am not unmindful of the provisions of sections 1846 and 1847 G. C. (107 O. L. 427).

Section 1846 reads as follows:

"The board, subject to the approval of the secretary of state and auditor of state, shall fix the prices at which all labor performed and all articles manufactured in such institutions shall be furnished to the state or the political divisions and public institutions thereof, as is or may be provided by law, which shall be uniform to all and not higher than the usual market prices for like labor and articles."

Here we again find the legislature using the term "political divisions."

From a provision we find in section 1847, it is evident that the legislature intended in this act that the term "political divisions" include the municipalities of the state, for we find in this section the following:

"Sec. 1847. * * * The provisions of this section shall not apply to any officer, board or agent of any municipality which maintains an institution that produces or manufactures articles of the kind desired. * *

If the legislature had intended that the term "political divisions" should not include municipalities, there would have been no necessity of exempting those municipalities which maintain institutions that produce or manufacture articles of the kind desired, because the act then would have applied to no municipality. So we must reach the conclusion that the legislature intended said term to include municipalities.

The question now to be considered is whether the provisions of this act are broad enough to include lime. It is my opinion they are not. Section 1847, supra, contains the following provision:

> "The board shall, with the advice and consent of the secretary of state and auditor of state, classify public buildings, offices and institutions and determine the kinds, patterns, designs and qualities of articles to be manufactured for use therein which shall be uniform for each class, so far as practicable. * * *"

The fact that the legislature provided for the classification of public buildings, offices and institutions, indicates it did not have in mind such a substance as lime. It is also provided that the board shall determine the kinds, patterns, designs and qualities of articles to be manufactured for use therein. This phrase negatives the idea that the legislature intended to include such a substance as lime. The term "kinds, patterns, designs and qualities" could hardly be said to apply to lime, and the term "for use therein" also apparently negatives the idea that the legislature intended to include a substance like lime within the provisions of this act.

Therefore, answering your question specifically, I am of the opinion that the Ohio board of administration would not be authorized in law to manufacture lime with prison labor and sell the same to the city of Columbus.

The conclusion above reached in answer to your first question, makes it unnecessary to consider the second question.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1171.

TOWNSHIP TRUSTEES NOT AUTHORIZED TO ISSUE BONDS OF A TOWNSHIP ROAD DISTRICT FOR A JOINT COUNTY IMPROVEMENT.

Sections 3298-25 to 3298-53 of the General Code as enacted in the White-Mulcahy act, providing for the improvement of roads by a township road district consisting of the territory of a township outside of municipalities therein do not authorize the trustees of said township to issue the bonds of said township road district for the purpose of paying that part of the cost and expense of the improvement of a road located in said road district and on adjoining township or township road district, or on the line between the same, apportioned to said township road district by and as a part of proceedings for the improvement of said road conducted by a joint board of township trustees consisting of the trustees of such adjoining townships.

COLUMBUS, OHIO, April 26, 1918.

HON. CALVIN D. SPITLER, *Prosecuting Attorney, Tiffin, Ohio.*

DEAR SIR:—As previously acknowledged, I have your favor of February 22, 1918, in which you state:

"The question has arisen whether Bloom township can issue bonds to be paid from the property within the taxing district created by said township excluding the corporation of Bloomville therein for the purpose of improving her half of a joint county road which said improvement is to be made by the joint boards of township trustees of Bloom township, Seneca county, Ohio, and Lykens township, Crawford county, Ohio.

After looking carefully at the provisions of section 3298-25, section 3298-26 and section 3298-45 I have reached the opinion that the trustees have the authority to issue bonds for the purpose indicated, but I would like your opinion in the matter before the trustees proceed further with the improvement."

Sections 3298-1 to 3298-15n, inclusive, of the General Code, as amended and enacted in the White-Mulcahy act (107 O. L. 73 et seq.), provide for the construction and improvement by township trustees of public roads in townships, whether such public roads be township roads, county roads, intercounty highways or main market roads. The proceedings outlined in the above sections of the General Code with respect to township road improvements follow very closely those provided for with respect to road improvements by county commissioners by sections 6906 et seq. General Code. More immediately pertinent to the facts upon which your inquiry is predicated, section 3298-15n, as enacted in the White-Mulcahy act, provides as follows:

"The boards of trustees of two or more townships shall have the power to construct, reconstruct, resurface or improve a township road, or part thereof, along the line between such townships, or extending into or through all such townships, or wholly within one township but within less than the legal assessment distance of the township line. In such case the several boards of township trustees, when acting as a joint board and when acting separately in the making of assessments and issuing bonds, shall be governed and controlled by the provisions of law relating to the construction of joint county road improvements by joint boards of county commissioners in so far as the same are applicable. They shall also have the same power with respect to county roads and intercounty highways and main market roads located as above provided, subject to the limitation expressed in section 3298-1 of the General Code."

The provision in the section of the General Code above quoted that in such case the several boards of township trustees, when acting as a joint board and when acting separately in the making of assessments and issuing bonds, shall be governed and controlled by the provisions of law relating to the construction of joint county road improvements by joint boards of county commissioners in so far as the same are applicable, refers to the provisions of sections 6930 to 6944 inclusive of the General Code, relating to the improvement by county commissioners of roads in two or more counties or along the county line between two or more counties in this state. With respect to such improvements it will be sufficient in this connection to note that the proceedings relating to the same down to the point where assessments are to be made and bonds issued are conducted by the joint board of county commissioners, consisting of the county commissioners of the counties interested in such improvement. In this connection section 6934 General Code provides that such joint board shall determine the proportion of the compensation, damages, costs and expenses of such improvement to be paid by each of the several counties interested therein, and that thereupon the county

commissioners of each interested county shall with the assistance of the county surveyor thereof make the assessments against the real estate within said county to be charged therewith of the proportion of the compensation, damages, costs and expenses of said improvement to be raised by special assessment against the benefited real estate within such county.

I might add that in case the joint board of county commissioners cannot agree on the apportionment of the compensation, damages, costs and expenses of the improvement between the several counties interested therein, the joint board of county commissioners is required to certify that fact to the state highway commissioner, who shall thereupon make such apportionment. (Sec. 6935 G. C.)

With respect to such joint county road improvement section 6944 General Code provides that in case bonds are issued in anticipation of the collection of taxes and assessments on account of such improvement, such bonds as may be required shall be issued separately by each county to cover its proportion of such costs and expenses.

So in the case of the improvement of roads located in two or more townships or along the line between such townships a joint board of township trustees will conduct the proceedings relating to the construction or improvement of such road up to the time when assessments are to be made and bonds issued. The matter of making assessments and the matter of issuing bonds covering the portion of the cost and expense of such road improvement apportioned to each township are to be provided for by the township trustees of such township. Such bonds are to be issued under the authority of and in pursuance to the provisions of section 3298-15e General Code, which provides, in part, as follows:

> "The township trustees, in anticipation of the collection of such taxes and assessments, or any part thereof, may, whenever in their judgment it is deemed necessary, sell the bonds of said township in any amount not greater than the aggregate sum necessary to pay the estimated compensation, damages, costs and expenses of such improvement. Such bonds shall state for what purpose they are issued and shall bear interest at a rate not to exceed five per cent per annum, payable semi-annually, and in such amounts and to mature at such times as the trustees shall determine, subject to the provision, however, that said bonds shall mature in not more than ten years. Prior to the issuance of such bonds the township trustees shall, in case all or any part of said bonds are to be redeemed by special assessments, provide for the levying of a tax upon all the taxable property of the township to cover any deficiencies in the payment or collection of any such special assessments. * * *"

Bonds issued by township trustees under authority of this section to pay the township's apportionment of the cost and expense of a joint township road improvement, or otherwise, are, so to speak, a charge upon all the taxable property in said township, including that in municipal corporations therein, and tax levies to provide for the payment of such bonds and interest thereon are required to be made upon all of such taxable property.

The question as to the application of the above statutory provisions relating to the construction of roads by townships to a road improvement in adjoining townships located in different counties or on the line between such townships and counties is not here determined.

Sections 3298-25 to 3298-53 of the General Code, inclusive, as enacted in said White-Mulcahy act, provide for the establishment by the township trustees of a road district out of that part of the territory of the township not included within

the corporate limits of a municipal corporation or corporations located therein and for proceedings by such township trustees for the construction of public roads within such road district, whether such roads be township roads, county roads, intercounty highways or main market roads. The proceedings outlined by such statutes for the construction and improvement of roads by such township road district are, in their main features, quite identical with those provided by sections 3298-1 et seq. General Code for the improvement of roads by the township; and section 3298-45 General Code provides for the issue by the township trustees of bonds of such road district in anticipation of the collection of taxes and assessments for the improvement of roads on proceedings conducted by such road district. There is nothing, however, in the statutory provisions relating to the construction and improvement of roads by a township road district providing for the improvement by joint action of the township trustees of a road located in two or more townships or township road districts, or on the line between two townships or township road districts, and there is therefore no authority in the township trustees to issue the bonds of a township road district established in the manner provided by section 3298-25 General Code for the purpose of paying such township road district's portion of the cost and expense of a road improvement conducted by said township trustees and the trustees of the adjoining township.

Answering your question as specifically as the nature of the same permits, therefore, I am of the opinion that the trustees of Bloom township, Seneca county, can create a road district out of the territory of said township outside of the corporate limits of Bloomville, or other municipality therein; but that the trustees of said township are not authorized to issue the bonds of said township road district for the purpose of paying that part of the cost and expense of the improvement of a county road located in said road district and an adjoining township or township road district, or on the line between the same, apportioned to said township road district by and as a part of proceedings for the improvement of said road conducted by a joint board of township trustees, consisting of the trustees of Bloom township and the trustees of such adjoining township, and this whether such adjoining township be in the same or another county.

The above conclusion reached by me requires your question on the facts stated by you to be answered in the negative.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1172.

LICENSEE UNDER LLOYD LOAN ACT (107 O. L. 509) MAY ADVERTISE AND SOLICIT BUSINESS, ETC., OUTSIDE OF THE COUNTY IN WHICH HIS PLACE OF BUSINESS IS LOCATED—MAY NOT ESTABLISH AN OFFICE OUTSIDE OF SUCH COUNTY.

(1) *There is no provision in the special amended act found in* 107 *O. L.* 509, *which would prevent a licensee under said act from (a) advertising for business or soliciting business outside the county in which his office or place of business is located; (b) from viewing or appraising of property outside of said county upon which a loan is being considered; (c) from procuring signatures outside of the office, and (d) from paying out money outside of the office.*

(2) *But the licensee must not have any other office than that for which the license was granted, and in which the license is found, nor any other place of*

business anywhere in the state, whether maintained by the licensee himself or by some agent of the licensee.

COLUMBUS, OHIO, April 26, 1918.

HON. P. A. BERRY, *Commissioner of Securities, Columbus, Ohio.*

DEAR SIR:—I have your communication of April 3, 1918, which reads as follows:

> "A licensee of this department whose place of business is in Xenia advertises in several adjoining counties that he lends money on chattel mortgages. When an application for a loan is received from say Warren county, he sends an appraiser from Xenia to view the property. On his return 'if the business looks good' the papers are prepared in Xenia and are sent to some person in Warren county who procures the signatures and pays out the money, returning the papers to the licensee at Xenia.
>
> We would like an opinion from you as to whether there has been a violation of the Lloyd act on any or all of the following points: 1st, the advertising or soliciting outside of Greene county; 2nd, the viewing or appraising of property outside of Xenia or Greene county; 3rd, the procuring signatures outside of the office in Xenia; 4th, the paying out money outside of said office."

The section which lies at the foundation of your inquiry, and at the foundation of the act having to do with the matters about which you inquire is 6346-1 General Code, 107 O. L. 509, which reads as follows:

> "It shall be unlawful for any person, firm, partnership, association or corporation, to engage, or continue, in the business of making loans, on plain, endorsed, or guaranteed notes, or due-bills, or otherwise, or upon the mortgage or pledge of chattels or personal property of any kind, or of purchasing or making loans on salaries or wage earnings, or of furnishing guarantee or security in connection with any loan or purchase, as aforesaid, at a charge or rate of interest in excess of eight percentum per annum, including all charges, without first having obtained a license so to do from the commissioner of securities and otherwise complying with the provisions of this chapter."

That is, before any person may lawfully engage in the business set out in said section at a charge or rate of interest in excess of eight per cent, he must first obtain a license from the state. The language in reference to the business for which a license must be secured is broad and general. It does not seem to place any restrictions or limitations upon the question as to how the business is to be secured, or how the business is to be closed or consummated. Of course, this section further provides that a person cannot lawfully transact such business without "otherwise complying with the provisions of this chapter."

This makes it necessary for us to examine into the whole act to ascertain whether there is any provision in it which would forbid the licensee (a) to solicit or advertise for business outside the county where his place of business is located; (b) viewing or appraising of property located outside of said county (c) the procuring of signatures outside the office, and (d) the paying out of money outside the office.

Under the provisions of section 6346-2, any person about to engage in the business set out in 6346-1 General Code, must apply for a license on prepared

blanks, and must pay a fee of $100 a year for the license for permission to do business. Under section 6346-3 General Code, the applicant must state, among other things, the location of the office or place of business in which the business is to be conducted. From this provision it is quite clear that the applicant must have an office or place of business located somewhere within the state.

We find the further provision in this section that "such license shall be kept posted in a conspicuous place in the office where the business is transacted"; and further, "no person, firm, partnership, association or corporation so licensed shall transact or solicit business under any other name."

From this provision it is quite evident that authority, at least indirectly, is given to the licensee to solicit business as well as to transact business. There is no limitation here whatever as to the territorial limits within which the soliciting must be done, or within which the transaction must be had. The only provision is that the licensee shall not transact or solicit business under any other name. This further provision is found in the section:

> "Not more than one office or place of business shall be maintained under the same license."

The above possibly embodies all the conditions and limitations in reference to the matter about which you inquire.

There is nothing in any of these provisions that seems to indicate either directly or indirectly that the licensee is limited in the matter of soliciting business to the confines of his own county, any more than he would be limited to the confines of his own city, or the confines of his own ward. Under the broad terms of the act as set out herein, I am of the opinion that a licensee may, under authority of law, advertise for business or solicit the same outside the limits of the county in which his place of business is located. This answers your first question.

If he has authority to solicit business or advertise for the same outside of the territorial limits of the the county in which his office or place of business is located, then it certainly must follow that he may take care of this business when he gets it, this unless the act itself would specifically provide otherwise. It would be absurd to hold that a licensee has authority to solicit business and advertise for the same, and then to hold that he has no authority to take care of business secured through said advertisement.

As the appraisal of the property upon which the loan is based is necessary under sound business principles, it is my opinion that the licensee could have the property viewed and appraised even though the same is located outside the limits of the county in which his office is located. This might be absolutely necessary, due to the fact that the property would be of such a nature that it could not be appraised in any other place than that in which it is located generally; at any rate, it would be absurd to hold that property before it could be appraised would have to be moved to the county in which the licensee is located, and such a construction should not be given to the statute unless it is absolutely essential from the plain provisions of the same. Hence, I hold in answer to your two questions as above set out.

This leaves for consideration the two questions as to whether the procuring of signatures to the necessary papers in reference to the loan might be procured outside of the office, and whether the money could be paid to the borrower outside of said office. These two acts would conclude the whole matter in reference to any transaction, and the question is as to whether the parties borrowing the money, no difference where they might reside, would be compelled to go to the

office or place of business of the licensee in order to sign certain papers and receive the money borrowed. The only language used in the act from which such a construction could be derived is the following:

> "Not more than one office or place of business shall be maintained under the same license."

I cannot arrive at the conclusion from said language that a person receiving money from a licensee would be compelled to go to the office or place of business in order to perform said act. If the licensee has the right to advertise for business and solicit business in other counties than that in which his place of business is located, and has the right to view and appraise the property, he certainly would have the right to have the papers signed and the right to pay over the money, unless the statute itself would specifically forbid these acts either directly or indirectly.

An office is the place where mail is ordinarily addressed when writing to the person maintaining the office, and from which mail is directed when the person maintaining the office writes; it is the place to which people would go to transact business provided they had business to transact with the person maintaining the office, and from which people are sent to transact business in connection with the office; it is the place where the persons chiefly interested in the matters pertaining to the office are usually found, and if the licensee does not maintain more than one of these places in the state, he does not violate the provisions of the act, and would have authority, in my opinion, both to secure the signatures of the persons interested in any transactions, and deliver the money to said persons outside of the limits of the county in which the office or place of business is located.

However, I desire to call attention to the fact that the language used in this section is, "not more than one office or place of business shall be maintained." The language refers both to "office" and to "place of business." While the terms "office" and "place of business" are to some extent synonymous, yet I do not believe the general assembly intended so to use them in this act. "Office" might, and generally would, in business under consideration, be the "place of business," also; but, on the other hand, the term "place of business" might not at all include the term "office." "Office" is the place where the officers would meet to transact their business provided it was a corporation or partnership, where the stockholders, for example, would meet, or where the partners would meet to elect their officers, providing it is a corporation or a partnership. Also, it is where the men chiefly interested in the business would be found, where the papers, vaults, records and everything that pertains to the business would be found; while a "place of business" might be maintained and none of these characteristics apply. "Place of business" might be maintained through an agent or employe; but this section forbids the maintaining of either more than one "office" or "place of business" under one license.

In reference to this matter I desire to call attention to a case found in 29 Colo. 129, Rocky Mountain Oil Co. v. Central National Bank. In the opinion, on page 131, the court say:

> "The expressions in the attachment act, 'chief office' or 'place of business,' while not strictly synonymous, must be regarded as equivalent. The essential characteristics of each might be very different. The former would ordinarily be the place where the officials charged with the general management of its affairs might meet and direct them; while the latter might be the same, or the place where its business operations were carried on under the direction and supervision of an authorized agent."

In the case of Bank of Columbia v. Lawrence, 26 U. S. 578, in the opinion the court say:

> "But the evidence does not show that the defendant had a place of business in the city of Washington, according to the usual commercial understanding of a place of business. There was no public notoriety of any description given to it as such. No open or public business of any kind carried on, but merely occasional employment there, two or three times a week, in a house occupied by another person."

From all the above it is clear that a licensee could not establish and maintain a place of business other than the one set out in his application, and have the same managed by an agent, to which place of business the people of those localities in which the same were located might go to transact business, and which places of business are given notoriety in the community. If this were done the licensee would be maintaining not only an office, but he would also be maintaining a place of business, and this would be contrary to the provisions of the statute. But in my opinion so long as the business is transacted from the office there is nothing in the act which would prevent the licensee from advertising for business or soliciting business in counties other than that in which he is located under his license, nor to prevent him from viewing and appraising property in another county, nor to prevent him from having the necessary papers signed in another county, and paying over the money to the proper party under any transaction, because in all this he would not be maintaining an office or a place of business other than the particular one for which he secured his license.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1173.

APPROVAL OF BOND ISSUE OF ASHLEY VILLAGE SCHOOL DISTRICT, DELAWARE COUNTY—$4,000.00.

COLUMBUS, OHIO, April 29, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

> IN RE: Bonds of Ashley village school district, Delaware county, Ohio, in the sum of $4,000.00, for the purpose of completing the construction and equipment of school building in said school district.

I have carefully examined the corrected transcript of the proceedings of the board of education of Ashley village school district relating to the above bond issue.

The only question presented on consideration of this transcript is that considered by me at some length in opinion No. 966 with respect to the validity of the bonds of Canton city school district under date of January 25, 1918. In other words, as appears from this transcript, the above bonds in the sum of $4,000.00 are issued by the board of education of Ashley village school district under the authority of section 7629 General Code without a vote of the electors

of said school district, for the purpose of completing the construction and equipment of a school building which has been constructed to its present condition from the proceeds of bonds issued by the board of education on a vote of the electors of the school district. The same considerations which in the case of the Canton city school district bonds led me to the conclusion that the board of education of a school district can legally issue bonds under section 7629 General Code, within the limitations of that section, for the purpose of completing a school building constructed to present condition from the proceeds of bonds issued on a vote of the electors of the school district, of course lead to an approval of the present issue of bonds so far as this question is concerned.

You will recall that in reaching this conclusion with respect to the authority of a board of education to issue bonds under section 7629 General Code on the facts presented in the case of the Canton city school district bonds I took a position adverse to that reached by my predecessors, Mr. Hogan and Mr. Turner.

Not knowing but that perhaps the fact of such prior adverse rulings might have had some influence in causing you to finally reject the Canton city school district issue, I have here deemed it but fair to you to point out that the same question is involved with respect to the issue of bonds now under consideration.

Inasmuch as the corrected transcript relating to this bond issue presents no questions other than that above mentioned, I am of the opinion that the proceedings relative to said issue are in conformity to the provisions of the General Code relating to bond issues of this kind, and that properly prepared bonds covering said issue on bond form submitted will, when properly signed and delivered, constitute valid and subsisting obligations of Ashley village school district.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1174.

CLERK HIRE—COUNTY SURVEYOR AND AUDITOR LIABLE FOR AMOUNT PAID IN EXCESS OF THAT ALLOWED BY COMMISSIONERS—COMMISSIONERS AND TREASURER NOT LIABLE FOR SUCH EXCESS.

1. *Under sections 2787 and 2788 G. C. (107 O. L. 70), the county surveyor and the county auditor are liable for any amount paid out for clerk hire in excess of that allowed by the county commissioners.*

2. *Under these sections neither the county treasurer nor the county commissioners are liable for any excess so paid out for clerk hire for the county surveyor.*

COLUMBUS, OHIO, April 29, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your communication which reads as follows:

"We desire to call your attention to an opinion of Attorney General Timothy S. Hogan, Annual Report for 1913, Vol I, page 200, and to an opinion in the Annual Report for 1915, Vol. I, page 703, in which Attorney General Turner approves the former opinion of Mr. Hogan touching the

matter of clerk hire in the offices of the salaried officials of the county and the findings that should be made by this department when the amount set aside is exceeded.

We desire to have your written opinion as to whether these opinions can be applied with equal force in instances where the amount is set aside by the county commissioners for the payment of necessary assistants, deputies, draftsmen, inspectors, clerks or employes in the office of the county surveyor as provided by sections 2787 and 2788 G. C.

We take it that no findings could be made against the commissioners, as they are not limited by any maximum in making the allowance, but where the amount is exceeded, should you hold that the previously mentioned opinions are applicable, to hold against the county surveyor for certifying the payment, against the county auditor for issuing the warrant, and against the county treasurer for paying same, or is the county treasurer not presumed to have any knowledge of the maximum allowed?"

We will consider what my predecessors, Hon. Timothy S. Hogan and Hon. Edward C. Turner, found in the opinions to which you refer. They held:

1. That when a county auditor issues a voucher for the payment of clerk hire in excess of the county commissioner's allowance for clerk hire, he is liable for the amount so paid in excess of the allowance.

2. That a county officer, certifying to the county auditor compensation for his deputies, assistants, etc., in excess of the aggregate amount allowed his office by the county commissioners, is liable to the county for the amount so paid in excess of the allowance of the county commissioners.

3. Excepting in cases where the county commissioners make an allowance greater than that provided in section 2980-1 G. C. and the county treasurer pays out said excess, he is not liable for paying out moneys in excess of the allowance made by the county commissioners for clerk hire in any county office, for the reason that he has received no notice of the action of the county commissioners in fixing an aggregate allowance.

4. That if the county commissioners allowed an aggregate amount for clerk hire in any county office, in excess of the amount set forth in section 2980-1 G. C., they are liable for the excess allowed over and above that provided for in said section, provided the county officer to whom the allowance is made expends for clerk hire an amount in excess of that provided in said section.

Messrs. Hogan and Turner were placing a construction upon sections 2980, 2980-1 and 2981 G. C.

You desire to know whether the findings of Messrs. Hogan and Turner could be made to apply to the county surveyor in the same matters upon which they passed in said opinions. In considering this question it will be necessary for us to compare sections 2787 and 2788 G. C. (107 O. L. 70) with the sections pertaining to other county officials and upon which Messrs. Hogan and Turner placed a construction.

When we compare section 2787 with section 2980 and section 2788 with section 2981, we find there is no material difference between these sections. Section 2980-1 provides for a maximum percentage allowance by the county commissioners for clerk hire for the probate judge, auditor, treasurer, clerk of courts, sheriff and recorder. There is no such provision for clerk hire for county surveyors.

Section 2981 G. C. reads as follows:

"Such officers may appoint and employ necessary deputies, assistants, clerks, bookkeepers or other employes for their respective offices, fix their compensation and discharge them, and shall file with the county auditor certificates of such action. Such compensation shall not exceed in the aggregate for each office the amount fixed by the commissioners for such office. When so fixed, the compensation of each duly appointed or employed deputy, assistant, bookkeeper, clerk and other employe shall be paid monthly from the county treasury, upon the warrant of the county auditor."

Section 2788 (107 O. L. 70) reads in part as follows:

"The county surveyor shall appoint such assistants, deputies, draughtsmen, inspectors, clerks or employes as he deems necessary for the proper performance of the duties of his office, and fix their compensation, but compensation shall not exceed in the aggregate the amount fixed therefor by the county commissioners or allowed by a judge of the court of common pleas of the county. After being so fixed such compensation shall be paid to such persons in monthly installments from the general fund of the county upon the warrant of the county auditor. * * *"

It will be noted that the only material difference between these two sections is that section 2981 makes this provision:

"* * * and shall file with the county auditor certificates of such action. * * *"

that is, his action in the appointment of his deputies, assistants, clerks, bookkeepers or other employes and fixing their compensation; while section 2788, supra, makes no provision in reference to this particular matter. So that under section 2981 G. C. the county auditor would have notice of the appointments and salaries of deputies and assistants, while under section 2788 he would have no such notice. However, he would have notice of the action of the county commissioners in fixing the aggregate amount which should be spent in any one year by the county surveyor, as shown by the journal of the county commissioners which is kept in the office of the county auditor.

Without quoting from the opinions of Messrs. Hogan and Turner, above referred to, I approve and confirm said holdings and am of the opinion that the same principles laid down by them as applying to the probate judge, auditor, treasurer, clerk of courts, sheriff and recorder, would also apply to the county surveyor, with one exception which I shall note later on.

Hence it is my view that:

1. The county auditor would be liable for any amount for which he might issue his warrants in excess of the amount which was fixed by the county commissioners as clerk hire for the county surveyor in any one year.

2. The county surveyor himself would be liable for any amount which he might certify to the county auditor, in excess of the aggregate amount allowed him by the county commissioners as clerk hire for any year, provided, of course, that the county auditor drew his warrants for such excess and the same was paid out by the county treasurer.

3. The county treasurer would not be liable for such excess so paid out by

him in honoring warrants issued by the county auditor, for the reason that he has no notice of the amount so fixed by the county commissioners, and for the further reason that his records as to the condition of any particular fund are not as definite and minute as those of the county auditor.

4. The county commissioners would in no case be liable for the allowance made for clerk hire to the county surveyor, for the reason that there is no maximum allowance fixed by law for his office. In other words, there are no such provisions as those found in section 2980-1 G. C., which apply to the county surveyor.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1175.

AUTOMOBILE—TOWNSHIP TRUSTEES HAVE NO AUTHORITY TO PURCHASE FOR THEIR OWN USE OR THE USE OF TOWNSHIP HIGHWAY SUPERINTENDENT.

Township trustees have no authority in law to purchase an automobile for their own use and for the use of the township highway superintendent.

COLUMBUS, OHIO, April 29, 1918.

HON. T. R. ROBISON, *Prosecuting Attorney, Mansfield, Ohio.* L

DEAR SIR:—I have your communication of April 22, 1918, in which you request my opinion on the following matter:

> "A township board of trustees has asked my opinion whether or not it has the legal authority to purchase an automobile for the use of said trustees and the township highway superintendent."

The above question is decided mainly by section 3373 G. C. (107 O. L. 93). Said section, in so far as it relates to the matter under consideration, reads as follows:

> "Sec. 3373. * * * Township trustees are hereby authorized to purchase or lease such machinery and tools as may be deemed necessary for use in maintaining and repairing roads and culverts within the township. They shall have the power to purchase such material and to employ such labor and teams as may be necessary for said purpose, or they may authorize the purchase or employment of the same by one of their number or by the township highway superintendent at a price to be fixed by the township trustees. All payments on account of machinery, tools, material, labor and teams shall be made from the township road fund as provided by law. All purchases of materials, machinery and tools, shall, where the amount involved exceeds one hundred dollars, be made from the lowest responsible bidder after advertisement made in the manner hereinbefore provided. * * *"

The part of the above quoted matter which is particularly in point is as follows:

"Township trustees are hereby authorized to purchase or lease such machinery and tools as may be deemed necessary for use in maintaining and repairing roads and culverts within the township."

The question to be considered is whether the word "machinery" or the word "tools" is broad enough to include automobiles within its meaning. I am of the opinion that neither of said words is broad enough, in its ordinary, accepted meaning, to include automobiles. In considering the above quotation from said section 3373, it is evident that the legislature did not intend that "machinery" and "tools" should include automobiles.

The machinery and tools are purchased or leased "for use in maintaining and repairing roads and culverts." It could hardly be said that an automobile directly or indirectly could be used in maintaining or repairing roads and culverts.

This section further provides that the payments for machinery, tools, etc., shall be made from the township road fund, which would indicate that the idea the legislature had in mind, in using the language found in said section, was that the different articles purchased are to be used altogether upon the roads of the township; else the provision would not have been made that the same be paid for from the township road fund.

The township trustees desire to purchase an automobile to be used not only by the township highway superintendent, but by the trustees themselves in the transaction of their business. Much of the business of the trustees has nothing to do with the roads of the township, and therefore it could not be held that it was the intention of the legislature, in enacting this section, to include authority for the trustees to purchase an automobile for their own general use, as well as the use of the township highway superintendent.

This section further provides that all purchases of machinery and tools shall be made from the lowest responsible bidder, if the cost of the same exceeds one hundred dollars. I do not think this provision could be made to apply to the purchase of automobiles, and therefore the legislature did not intend that automobiles should be included in the terms used in section 3373, supra.

There is another act of the same legislative body passed one day after the act which includes section 3373 was passed, which throws some light upon the question under consideration. This act is found in 107 O. L. at p. 585, and gives authority to the county commissioners to purchase one or more automobiles for the use of the county commissioners and the county sheriff. This act is very specific and definite in its provisions and in it the power and authority of the county commissioners are very much restricted, in that they are first compelled to file an application in the court of common pleas and secure an order from the court, before they are authorized to purchase an automobile. While this is not conclusive, yet it cannot be held that the legislature intended to give power and authority to the township trustees to purchase an automobile for their own use and for the use of the township highway superintendent, under such uncertain authority as is found in section 3373, supra, when it gave the same power to the county commissioners in such specific and definite terms, and at the same time hedged it about in the manner set out in the act to which reference is herein made.

In view of all the above, it is my opinion that the township trustees have no authority in law to purchase an automobile for their own use and for the use of the township highway superintendent.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1176.

WHEN ROAD IMPROVEMENT COMPLETED UNDER CASS LAW, ASSESSMENT MUST BE MADE IN ACCORDANCE WITH SAID ACT.

In those road improvements in which application for state aid was made under the Cass act and the improvement constructed and completed under said act, the assessment against abutting property owners would be made in accordance with the provisions of section 1214 as it stood in the Cass act.

COLUMBUS, OHIO, April 29, 1918.

HON. FRANKLIN J. STALTER, *Prosecuting Attorney, Upper Sandusky, Ohio.*

DEAR SIR:—I have your communication of April 17, 1918, which reads as follows:

> "In 1913-14-15 and 16 and prior to the taking effect of house bill No. 3 (300) which amended the 'Cass law,' the commissioners of Wyandot county, Ohio, made application to the state highway department, in regular form, for state aid in the construction and improvement of several intercounty highways within this county.
>
> The improvements were constructed and completed under the 'Cass law,' and before the amendments above referred to.
>
> When the application was made and the roads constructed and completed, section 1214 General Code of Ohio (106 Session Laws 637) read as follows:
>
> '* * * The township trustees shall apportion the amount to be paid by the owners of the abutting property according to the benefits accruing to the owners of the land so located. * * *'
>
> Before the state highway commissioner ascertained and reported the costs and expenses as provided by section 1211 of the General Code, and consequently before the trustees made any apportionment as provided by the above mentioned section 1214, said section 1214 was amended (107 O. L. 129) to read as follows:
>
> '* * * The county commissioners or township trustees upon whose application the improvement is made shall cause the county surveyor to make a tentative apportionment of the amount to be paid by the owners of the property specially assessed which apportionment shall be made according to the benefits accruing to the land so located. * * *'
>
> Said section also provides that the commissioners or township trustees may approve and confirm said assessments as reported by the surveyor or modified by them.
>
> Section 3 of the act amending the 'Cass law' (107 O. L. 141) provides that priority rights or contracts are not affected.
>
> I would be pleased to have an expression from your department as to whose duty it is, in the roads above referred to, to make the assessments, whether it is the duty of the trustees or the duty of the county commissioners, and if it be the duty of the trustees, is it the surveyor's duty to make a tentative apportionment according to benefits?"

Your question, briefly stated, is as to whether the assessment against abutting property owners for a road improvement would be made according to the provisions of section 1214 G. C. as it stood in the Cass highway act, or under the

provisions of section 1214 as amended in the White-Mulcahy law, where application was made for state aid under the Cass act and the improvement was constructed and completed while the Cass act was in force and effect, and the assessment of the part of the cost and expense to be borne by abutting property owners is to be made after the White-Mulcahy law became effective.

The first question to be determined is as to whether an improvement of a public highway would be such a proceeding as would come within the provisions of section 3 of the White-Mulcahy law. It undoubtedly would come under section 26 G. C., but inasmuch as section 2 of the White-Mulcahy law embodies certain saving clauses which are more limited than those set out in section 26, it might be held that section 26 would not apply in a proceeding coming under the White-Mulcahy law.

In an opinion rendered by me on July 16, 1917, to Hon. Clinton Cowen, State Highway Commissioner, and found in Vol. II, Opinions of the Attorney-General for 1917, p. 1231, I held that a matter having to do with a road improvement is such as would come under section 3 of the White-Mulcahy law.

If a road improvement is a proceeding within the purview of section 3 of the White-Mulcahy law, the next question to be considered is as to when the proceeding would be pending so as to bring it within the saving provisions of said section 3. In the opinion rendered to Mr. Cowen, above noted, I held as follows, in regard to the particular time at which a road improvement could be considered as a pending proceeding (p. 1236):

> "The question now is as to when the first step in the matter of a road improvement is taken, because the law which is in force and effect at the time of the taking of said first step will control in the further steps involved in the proceeding. It is my opinion that the first step is taken when the state highway commissioner approves the application of the county commissioners for the improvement of the intercounty highways or main market roads of the county, or when he approves any part of said highways for which application has been made, and orders the county surveyor to prepare plans, profiles, specifications, etc., for said improvement."

Under this holding of course the improvements about which you speak were pending at the time the White-Mulcahy law became effective on June 28, 1917.

In the same opinion on p. 1236 thereof, I reached the following conclusion:

> "Hence, if this approval of the state highway commissioner was made and his ordering the county surveyor to make plans, specifications, etc., for an improvement occurred before June 28, 1917, then your department would proceed under the provisions of the old law. But if these steps have been taken since the 28th day of June, 1917, the provisions of the new law would control in the matter of your further proceedings."

Hence from the above it is evident that the assessment against abutting property owners for their share of the cost and expense of the improvement would be made in accordance with the provisions of section 1214 G. C., as it existed in the Cass highway act and not as it was amended in the White-Mulcahy law, and therefore the county surveyor would make no tentative assessment as provided in section 1214 G. C., in the White-Mulcahy law.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1177.

AN EMPLOYE OWNING STOCK IN THE CORPORATION IS ENTITLED TO COMPENSATION UNDER WORKMEN'S COMPENSATION LAW.

The fact that an employe is a stockholder in the corporation by which he is employed, does not affect his right to claim compensation under the workmen's compensation act.

COLUMBUS, OHIO, April 29, 1918.

HON. FRANKLIN J. STALTER, *Prosecuting Attorney, Upper Sandusky, Ohio.*

DEAR SIR:—You have submitted the following request for my opinion:

> "Under the workmen's compensation law is a person who holds stock in a corporation and works for the corporation barred from receiving benefits for an injury done to him?"

Employers in this state, who are subject to the provisions of the workmen's compensation act, are designated by section 1465-60, of the General Code, which provides as follows:

> "Sec. 1465-60. The following shall constitute employers subject to the provisions of this act:
> 1. The state and each county, city, township, incorporated village and school district therein.
> 2. Every person, firm, and private corporation including any public service corporation that has in service five or more workmen or operatives regularly in the same business, or in or about the same establishment under any contract of hire, express or implied, oral or written."

The terms "employe," "workman," and "operative," as used in the act, are defined in section 1465-61, paragraph 2, of which, reads as follows:

> "2. Every person in the service of any person, firm or private corporation, including any public service corporation employing five or more workmen or operatives regularly in the same business, or in or about the same establishment under any contract or hire, express or implied, oral or written, including aliens, and also including minors who are legally permitted to work for hire under the laws of the state, but not including any person whose employment is but casual and not in the usual course of trade, business, profession or occupation of his employer."

Other provisions of the act, which it is not necessary to quote here, provide that the employes mentioned in the above quoted paragraph of 1465-61, are entitled to benefits of the workmen's compensation act.

There is no exception made in the act, as to employes who are also stockholders of the corporation by which they are employed, and therefore, provided a contract of employment exists, by which the employe is hired to work for the employer, he would be entitled to the benefits of the act and the fact that he was a stockholder in the corporation with which his contract of hire was made, would be immaterial. In other jurisdictions it has been held that officers of corporations were entitled to the benefits of the compensation act, if a contract of hire existed.

In *Honnold on Workmen's Compensation*, Vol 1, page 173, it is stated:

> "Nor, as a general rule, will it preclude one from being an employe * * * that he is an officer or director of the corporation employing him. It is essential, however, that some wages be in fact paid or payable."

In *Kennedy v. Kennedy Mfg. Co.*, The Bulletin, N. Y., Vol. 1, No. 5, p. 12, it is held that an officer of a corporation, even though he be a principal stockholder, is not debarred from compensation by that reason alone.

Bowne v. S. W. Bowne Company, The Bulletin, N. Y., Vol. 1, No. 12, page 17, it is held that an officer or director of a company is nevertheless an employe of the company, where he receives regular wages and performs regular duties of an employe of the business.

In *Cantor v. Rubin Musicant Company*, 3 N. Y. State Dept. Reports 393, it is held that a mechanic operating a machine at a day wage of an employe, was an employe, even though he was president and stockholder of the employing company.

From these holdings, as to the right of officers of corporations to claim compensation, and from the fact that no exemption appears in the Ohio act, either directly or indirectly, as to such right on the part of stockholders, my opinion is that the fact that an employe happens to be a stockholder in a corporation, would have no bearing upon his right to claim compensation as its employe.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1178.

APPROVAL OF CONTRACT BETWEEN BOARD OF TRUSTEES OF BOWLING GREEN STATE NORMAL SCHOOL AND THE FINCH ENGINEERING COMPANY.

COLUMBUS, OHIO, April 30, 1918.

DR. H. B. WILLIAMS, *President Bowling Green State Normal School, Bowling Green, Ohio.*

DEAR SIR:—You have submitted to this department for approval contract entered into by the board of trustees of your college and The Finch Engineering Company, of Bowling Green, Ohio, on the 19th day of March, 1918, for the construction and completion of Court St. Mall, and intersection of Court and Wayne streets, which work includes excavation, drainage, partial irrigation, illumination, stone sidewalks and curbs, tarvia pavement on concrete base, rough grading surrounding areas and about certain buildings, surfacing lawns, and removing old curbs, walks and interfering trees, according to Plan No. 60-17 "Portion of Plan for Irrigation, Electric Light and Drainage;" Plan No. 60-19 "Detail of Catch Basins and Tile Inlets;" Plan No. 60-22 "Plan of Court St. Entrance and Circle, showing curbing;" and Plan No. 60-16 "Typical Cross Section of Court St. Mall," the said contract calling for not to exceed $21,784.37.

With your contract you submit a bond securing the same, the sureties thereon being personal sureties and not a surety company. You have submitted with such bond a certificate from the county auditor of Wood county to the effect that the principals and surety have on the tax duplicate of Wood county, Ohio, property

in the aggregate of $40,000, free and unincumbered, and you have assured me that your board has passed upon said bond and is satisfied as to the security thus offered.

Finding the contract to be in compliance with law, and the auditor of state having certified that there is the sum of $21,784.37 available for the purpose of said contract, I have this day approved said contract and filed the same, together with the bond securing the same, in the office of the auditor of state.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

P. S. I am herewith returning to you balance of papers left with us.

1179.

APPROVAL OF LEASE FOR OIL RIGHTS BETWEEN THE STATE OF OHIO AND THE BALTIMORE AND OHIO RAILROAD COMPANY.

COLUMBUS, OHIO, May 3, 1918.

HON. JAMES M. COX, *Governor of Ohio, Columbus, Ohio.*

DEAR SIR:—Under date of April 24th the auditor of state transmitted a joint letter, addressed to the governor of Ohio and the attorney-general, to this office relative to a lease for oil rights to the Baltimore & Ohio Railroad Company. Said letter of transmission is as follows:

> "In examining the condition of the school lands in Moorefield township of Harrison county we discovered that the Baltimore & Ohio Railroad Company had a right-of-way through the extreme southwest corner. We immediately entered into correspondence with the proper official of that company and finally they accepted our price for a deed, namely, $80.00. The $80.00 stipulated is really the full value not only of the land occupied by the right-of-way but of the corner of the section which is held under lease and which lies south of the railroad, our idea in fixing this price being that if we personally owned the entire eighty acres and the railroad cut off this corner of the remaining tract we would want a price for the right-of-way based upon the assumption that we would lose the use of the corner south of the railroad.
>
> Obviously, the railroad company did not want to acquire the fee simple title to its right-of-way encumbered with the possibility of some state officials in the future executing or threatening to execute a lease covering the right-of-way, as this would have meant the construction or threatened construction of derricks upon the right-of-way. We solved this problem by offering to execute an oil and gas lease in perpetuity to the company but so conditioned that if they should at any time wish to exploit the underlying oil or gas the state would obtain a royalty therefor. Hence, the deed is accompanied by the proposed lease to which we desire your joint approval."

The lease in question is in triplicate, entered into on April 30, 1918, between the state of Ohio and the Baltimore & Ohio Railroad Company, and is in consideration of one dollar and runs for a term of ninety-nine years, renewable forever. The said lease covers a strip of land one hundred and fifty feet wide, situate in the southwest quarter of section 16, township 10, range 6, and township 10, range 7, Moorefield township, Harrison county, Ohio.

Upon request the auditor of state has furnished me, under date of May 1, with the following facts:

> "In the matter of the gas and oil leases to the Baltimore & Ohio Railroad Company in Moorefield township, Harrison county, the agreement was as follows:
>
> We would execute a deed conveying the title and at the same time and as a part of the same transaction execute a lease in perpetuity for the minerals, the purpose of the lease having been stated in our previous communication to you.
>
> In determining the price we fixed it at a sum several times greater than the actual value of the title conveyed by the deed itself. The strip is between thirteen and fourteen hundred feet long cutting through the southwest corner of the section, and we doubt very much whether the adjoining land would yield to the state in excess of fifteen to twenty dollars per acre. In other words, the consideration determined upon contemplated the execution of the lease which you have for your approval."

The lease is submitted for approval under the provisions of section 3209-1 of the General Code.

Having carefully considered the matter, I have attached my approval to the said lease and herewith transmit the same to you for such action as you may deem advisable.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1180.

APPROVAL OF LEASE FROM THE STATE OF OHIO TO THE MIAMI CONSERVANCY DISTRICT.

COLUMBUS, OHIO, May 3, 1918.

HON. JAMES M. COX, *Governor of Ohio, Columbus, Ohio.*

DEAR SIR:—On the 24th day of April the auditor of state submitted a letter addressed to the governor of Ohio and the attorney-general to the following effect:

> "We are herewith transmitting deeds conveying school lands in Bath township, Greene county, Ohio, to the Miami conservancy district. Also a lease covering a portion of the lands included in the aforesaid conveyances.
>
> The conservancy district is primarily acquiring these lands for the purpose of exchanging a new right-of-way to the railroad company for

the old right-of-way of the company. The railroad company has demanded as good a title to the new right-of-way as they have to the old.

In order that we may, as nearly as possible, give them such absolute title, we have executed and submit for your approval a mineral lease which is confined to the bounds of the right-of-way only and does not include all of the lands conveyed in the deeds."

At the same time the auditor of state submitted a lease in triplicate from the state of Ohio to the Miami conservancy district whereby the state of Ohio, in consideration of one dollar and all royalties, covenants, stipulations and conditions contained in said lease, does demise, grant, lease and let unto the Miami conservancy district for the term of ninety-nine years all oil deposits and natural gas in or under certain real estate located in section 16, in the civil township of Bath and in the county of Greene, said lease having been submitted for approval under section 3209-1 of the General Code.

On request for further information we have received from the auditor of state, under date of May 1, 1918, the following:

"In the matter of the oil and gas leases to the Miami conservancy district the agreement was as follows:

The Miami conservancy district, being lessees of certain lands in Bath township, Greene county, made application to this department under section 43-1 of the Garver act, 107 O. L. 357, for the execution of deeds. Upon investigation for the purpose of determining the price it developed that a part of the lands for which they desired to secure a deed were to be conveyed by the district to the Big Four Railroad as a right-of-way instead of the present right-of-way of that railroad which runs over what will be a part of the flooded district.

We determined upon a price which would move from the conservancy district to the trust and in fixing the sum had in contemplation the execution of leases for oil and gas covering the right-of-way and also the fact that the right-of-way passed over a gravel hill and that it would be necessary to make a very deep cut through that hill; hence, the provision in the lease that the railroad company could remove and use that gravel throughout the length and width of the right-of-way of the railroad company. The price determined upon is considerably in excess of the true value of the lands considered from the point of view of the act under which the original leases to these lands were executed; that is to say, much in excess of the value of the lands in their uncultivated and unimproved condition, but having the same advantages as adjoining lands."

I am assured by the auditor of state that the lands described in the lease submitted for approval cover only the right-of-way to be conveyed to the railroad company by the Miami conservancy district.

In view of the fact that the Miami conservancy district is acquiring the lands described in the lease for the purpose of transferring the same to the railroad company as a right-of-way to replace the present right-of-way and said lease is granted for the sole purpose of protecting said railroad in its said right-of-way, I have this day approved the same and forwarded the same to you for such action as you may deem proper.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1181.

APPROVAL OF DEED FROM OSCAR AND HARRIET P. BAKER TO THE STATE OF OHIO.

COLUMBUS, OHIO, May 3, 1918.

HON. JOHN I. MILLER, *Superintendent Board of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of April 30, 1918, in which you enclose, for my consideration, a deed for certain lands situated in Walnut township, Fairfield county, made to the state of Ohio by Oscar and Harriet P. Baker.

I have carefully examined said deed, find it correct in form and legal, and that it in all respects protects the rights of the state in reference to the lands therein deeded.

I am therefore returning the same to you with my approval.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1182.

APPROVAL OF FINAL RESOLUTION FOR ROAD IMPROVEMENT IN BUTLER, CLERMONT AND SANDUSKY COUNTIES.

COLUMBUS, OHIO, May 3, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letters of April 29 and 30, respectively, enclosing, for my approval, final resolutions for the following named improvements:

Cincinnati-Hamilton road, I. C. H. No. 39, Sec. "F," Butler county, types "A" and "B."

Ohio river (Cincinnati-Pomeroy) road, I. C. H. No. 7, Sec. "I," Clermont county.

Fremont-Port Clinton road, I. C. H. No. 277, Sec. "P," Sandusky county, "types "A," "B," "C" and "D."

I have carefully examined said resolution, find the same correct in form and legal, and am therefore returning them to you with my approval endorsed thereon, in accordance with the provisions of section 1218 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1183.

APPROVAL OF ARTICLES OF INCORPORATION OF THE LIBERTY MUTUAL INSURANCE COMPANY.

COLUMBUS, OHIO, May 3, 1918.

HON. WILLIAM D. FULTON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have examined the proposed articles of incorporation of The

Liberty Mutual Insurance Company, and find said articles to be in accordance, both as to purpose and execution, with the provisions of section 9607-2 General Code, as amended 107 Ohio Laws 647; and finding the same not to be inconsistent in any degree with the constitution and laws of the state of Ohio or of the United States, the same are approved. Very truly yours,

JOSEPH MCGHEE,
Attorney-General.

1184.

COUNCIL MAY FIX A GRADUATED SCALE OF COMPENSATION FOR A PARTICULAR POSITION.

Under the provisions of section 4214 G. C. a city council may fix a graduated scale of compensation for a particular position based upon the number of years of service of the occupant thereof, providing thereby for the person holding said position to receive more for his second year of service than for his first, and more for his third year than for his second, etc.

COLUMBUS, OHIO, May 4, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I have your communication requesting my opinion on the following:

> "A municipality of the state of Ohio by ordinance adopted specializations and classifications of personal service covering all appointive positions, fixing the compensation for all in the manner which we shall illustrate by the following position of filter operator. 'Salary rates $1,080, $1,140, $1,200.' This means $1,080 for the first year's service of the incumbent; $1,140 for the second year's service of the same person; $1,200 for the third year's service. This is the general plan covering all the positions mentioned.
>
> *Question* 1: Is such procedure legal?
>
> *Question* 2: Does such procedure conform to the provisions of section 4214 of the General Code?"

Inasmuch as I do not have a copy of the ordinance fixing the salary or compensation of the filter operator, which you have referred to, before me, I am assuming that said ordinance provides for a graduated salary or compensation for the occupant of the position of filter operator, dependent upon the number of years of service in said position, the salary being as you state in your communication, $1,080 for the first year of service, $1,140 for the second year and $1,200 for the third year.

The questions that you ask in your communication request, as I take it, my opinion on the point as to whether a municipal council may fix the compensation or salary of a municipal employe upon a graduated basis dependent upon the period of service.

Section 4214 G. C. reads:

> "Except as otherwise provided in this title, council, by ordinance or resolution, shall determine the number of officers, clerks and employes in

each department of the city government, and shall fix by ordinance or resolution their respective salaries and compensation, and the amount of bond to be given for each officer, clerk or employe in each department of the government, if any be required. Such bond shall be made by such officer, clerk or employe, with surety subject to the approval of the mayor."

This section provides for the fixing of the salary and compensation of officers, clerks and employes in each department of the city government and grants to the city council the general power to determine and fix the salaries and compensation of such officers, clerks and employes.

In the instant case the city council has fixed the compensation of the filter operator at three different amounts, depending upon the number of years of service, and allowing more compensation for the second and third years of service than for the first. The city council fixed this basis of compensation upon the theory, no doubt, that a person who had rendered a year's service as a filter operator would be more efficient during his second year of service and would be worth more to a municipality during said second year than he would during the first year and would likewise be more valuable during the third year of service than during the second year. Such a basis of fixing compensation is a reasonable one, as I view it, and is the method used by the federal government and private employers for the ascertainment of the amount of compensation that is paid to employes who have been in their service for an extended period of time.

I therefore advise you that it is my opinion that a city council may provide legally for a graduated scale of compensation based upon the number of years of service and may provide for the occupant of a particular position to receive more for his second year of service than he does for his first and more for his third year than for his second year.

I am returning herewith copy of the report of the Bureau of Municipal Research of the city of Akron on the standardization of salaries, which you transmitted to me with your communication.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1185.

APPROVAL OF BOND ISSUE OF WILLIAMS COUNTY—$36,000.00.

COLUMBUS, OHIO, May 4, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of Williams county, Ohio, in the sum of $36,000.00, to pay the shares of said county and benefited property and a part of the share of Madison township, said county, of the improvement of a certain section of intercounty highway No. 306 in said county and township.

I have carefully examined the corrected transcript of the proceedings of the board of county commissioners of Williams county, Ohio, and of other officers relating to the above bond issue, and after an examination of the same and the files

of the state highway commissioner relating to said improvement (a part of which files I have had copied and made a part of the transcript), I have arrived at the conclusion that the proceedings of the duly authorized officers of said county and the state relating to said improvement and to this issue of bonds are in substantial conformity to the provisions of the General Code relating to improvements of this kind and bond issues therefor.

I am of the opinion, therefore, that bonds prepared in due and proper form covering the above issue will, when the same are executed and delivered, constitute valid and binding obligations of said county to be paid according to the terms thereof.

No bond form of the bonds to be delivered covering said issue was submitted with and as a part of said transcript, and I am therefore holding said transcript until said bond form is submitted for my approval.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1186.

BOND ISSUE FOR SCHOOL PURPOSES—HOW LEVY FOR INTEREST AND SINKING FUND PURPOSES SHOULD BE MADE—DISAPPROVAL OF BOND ISSUE OF RUSHVILLE UNION SCHOOL DISTRICT, FAIRFIELD COUNTY, OHIO—$46,000.00.

Where serial bonds are issued by a board of education for school purposes, section 11 *of article XII of the state constitution requires provision to be made for a levy of taxes for both interest and sinking fund purposes during the entire number of years between the incurring of the indebtedness and the date of the maturity of the last of the series; and where the resolution of the board of education providing for the issue of serial bonds bearing the date of March* 1, 1918, *by its terms provides that the first annual levy for interest and sinking fund purposes shall be made in* 1919, *such resolution is illegal and the bonds therein provided for should be rejected.*

COLUMBUS, OHIO, May 4, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of Rushville union school district, Fairfield county, Ohio, in the sum of $46,000.00, for the purpose of purchasing a site for and erecting and furnishing a school building in said school district.

I am herewith returning to you without approval transcript of the proceedings of the board of education and other officers of Rushville union school district relating to the above bond issue. The proceedings relating to this bond issue are for the most part regular and in conformity to the provisions of the General Code relating to bond issues of this kind. They are, however, defective in one particular, which in my opinion is fatal to the validity of said issue.

The resolution providing for this bond issue provides that said bonds shall be dated March 1, 1918, and be in the sum of one thousand dollars each, and be num-

bered from one to forty-six inclusive. It is provided that bond No. 1 shall mature March 1, 1920, and that one bond shall mature each six months thereafter until all of said bonds shall have matured and become due and payable; all of said bonds shall bear interest at the rate of five per cent per annum, payable semi-annually on March 1st and September 1st of each year after the date of said bonds. That part of the resolution of the board of education providing for this issue of bonds which relates to the matter of tax levies for the purpose of paying the interest on said bonds and creating a sinking fund to pay the principal thereof at maturity reads in part as follows:

> "Be it further resolved by the said board of education that for the purpose of providing funds to pay the interest on the aforesaid bonds as the same fall due and also to create and maintain a sinking fund sufficient to discharge the principal of said bonds at maturity, there shall be and is hereby levied on all the taxable property of said Rushville union school district, Fairfield county, Ohio, in addition to all other taxes, the following direct annual tax, to-wit: For the year 1919 a tax sufficient to produce a net sum of three thousand four hundred and fifty dollars ($3,450.00), for interest falling on September 1, 1918, March 1, 1919, and September 1, 1919, and six hundred dollars ($600.00) to supplement principal falling due in 1920 and 1921."

The resolution further specifies the amount that shall be levied annually for interest and for principal on said bonds for the years 1920 to 1942 inclusive.

It is obvious that the above provisions of said resolution providing for tax levies to meet the principal and interest on these bonds do not conform to the requirements of section 11 of article XII of the state constitution, which reads as follows:

> "No bonded indebtedness of the state, or any political subdivisions thereof, shall be incurred or renewed, unless, in the legislation under which such indebtedness is incurred or renewed, provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds, and to provide a sinking fund for their final redemption at maturity."

My predecessor, Hon. T. S. Hogan, in an opinion to Hon. Lee Warren James, city attorney, Dayton, Ohio, September 12, 1914 (Reports of the Attorney-General for 1914, Vol. II, page 1224), construing this section of the state constitution, held that where serial bonds are issued by a political subdivision provision should be made for an annual levy of taxes for the retirement of the indebtedness considered as a unit and that such levies should be substantially equal in amount and distributed over the entire number of years between the incurring of the indebtedness and the date of the maturity of the last of the series. This proposition to my mind is the correct interpretation of the letter and spirit of this provision of the state constitution and is a proposition which cannot be too often impressed upon the official conscience of members of boards of education of school districts and of officers of other political subdivisions who, under the law, are authorized to issue bonds. The provisions of the resolution providing for this bond issue exclude the making of a levy in the year 1918 for interest and sinking fund purposes with respect to the bonds therein authorized and provided for. This to my mind is not only unwarranted but directly contrary to the letter and spirit of the constitutional provision above quoted. From the terms of said resolution it appears that the

board of education is depending upon the tax levy to be made in the year 1919 for the purpose of paying interest falling due on September 1, 1918, March 1, 1919 and September 1, 1919. This being so, it is obvious that so far as the proceeds of any tax levies authorized by this resolution are concerned a default is bound to occur with respect to interest coupons becoming due and payable on the dates above mentioned.

Moreover, the amount of taxes directed to be levied in the year 1919 is wholly insufficient to meet the principal and interest on said bonds maturing in the year 1920 when the proceeds of said levy for the year 1919 will become available according to the terms of the resolution on the first of said bonds will mature on March 1, 1920. At this time the amount of interest that will be due upon the whole issue is the sum of $4,600.00. Adding to this amount the principal of said bond makes a total of $5,600.00, which will be due and payable March 1, 1920. On October 1, 1920, the second of said bonds will mature, at which time there will also be due additional interest in the amount of $1,125.00, making a total of $2,125.00 due and payable October 1, 1920, and making a total of $7,725.00 of principal and interest due and payable in said year.

I have made no computation to ascertain whether or not the specific amounts directed to be levied in each of the subsequent years will be sufficient to pay principal and interest on bonds maturing in the years when said respective tax levies become available, but the above is sufficient to show that this bond issue should be disapproved for the reasons stated. Very truly yours,

JOSEPH MCGHEE,
Attorney-General.

1187.

COUNCIL—MEMBER MAY NOT HOLD OTHER OFFICE OR PUBLIC EMPLOYMENT—FINDINGS.

1. *The inhibition found in section 4207 G. C. against holding another public office is not limited to office in or appointment by the municipality, but extends to all public offices and employments.*

2. *Whenever a member of council accepts and holds any other public office or employment, he ipso facto forfeits his office of councilman.*

3. *Where a member of a city council at the same time holds the position of superintendent of booth and assistant clerk of the election board, no finding can be made against him for the amount of compensation drawn by him as such superintendent and assistant clerk.*

COLUMBUS, OHIO, May 4, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

DEAR SIR:—You have asked me to advise you upon the following matter:

> "A duly elected and qualified member of council of the city of Akron, Ohio, while occupying his position as councilman and performing the duties thereof, was employed as superintendent of booths for the board of elections and at other times was employed as assistant clerk of the board of elections drawing compensation for such work in addition to his compensation as member of council. We are referring you to the provisions of section 4207 G. C.

QUESTION: Can this department hold the person named herein for the compensation drawn as superintendent of booths and assistant clerk of the board of elections?"

The question is to be determined from an interpretation of section 4207 G. C. which prescribes the qualifications of council in cities, and among other things this section provides:

"* * * Each member of council shall be an elector of the city, shall not hold any other public office or employment, except that of notary public or member of the state militia, * * *. A member who ceases to possess any of the qualifications herein required, * * * shall forthwith forfeit his office."

It has been held in this state that the inhibition against a person holding other public office or employment is not limited to an office in or employment by the municipality, but extends to all public offices and employments.

State ex rel. v. Gard, 8 C. C. (N. S.) 599; affirmed, 75 O. S. 606.

In volume II of the Annual Report of the Attorney-General for 1911-1912 at p. 1180, one of my predecessors, Hon. Timothy S. Hogan, held as follows under date of May 3, 1911: (Syll.)

"A member of council who accepts the position of probation officer, *ipso facto*, forfeits his position as councilman, and is legally entitled to compensation received as probation officer."

In that opinion attention is called to the fact that the section fixing the qualifications of members of council under the Revised Statutes was section 1717 and read as follows:

"* * * no member of council shall be eligible to any other office, or to a position on any board provided for in this title, or created by law, or ordinance of council, except as provided in the seventh division of this title."

This section was considered in the case of State ex rel. v. Kearns, 47 O. S. 566, the fifth branch of the syllabus of which reads as follows:

"The appointment by a city council of a member thereof to an office which the statute makes a member of council ineligible to fill, and his acceptance thereof, does not work an abandonment of his office as councilman. The appointment to the second office is absolutely void."

It will be noted that there is a difference between the provisions of the Revised Statutes construed in the above opinion and those now found in the General Code. Then, a member of council was *ineligible* to hold any other office. Now, section 4207 G. C. provides that he shall not *hold* any other public office.

It is a well settled rule of the common law that he who, while occupying one office, accepts another incompatible to the first, *ipso facto* absolutely vacates the first office and his title is thereby terminated without any other act or proceeding. A seeming exception to this rule obtained when the statute declared that persons

holding one office should be ineligible to election to another. The provision being held to incapacitate the incumbent of the first office to *election* to the second, it followed that any attempted election to the second would be void.

Thus in construing section 1717 R. S., in State ex rel. v. Kearns, supra, the court arrived at its conclusion in consonance with this rule. Spear, J., at p. 569, speaking of certain persons while members of council being ineligible to certain other offices to which they had been appointed, said:

> "Not being eligible, he could not become such officer, and his attempted appointment was a nullity. It could not, therefore, in law have any effect whatever upon the office which he did hold. The acceptance and entering upon the duties of a member of the decennial board, by Tibbitts, might be evidence tending to show intent to abandon the office of councilman, but standing alone does not establish it. There was no abandonment on the part of either of these men. *Vogel v. The State,* 107 Ind. 374; *Crawford v. Dunbar,* 52 Cal. 36; *In re Corlis,* 11 R. I. 638."

To the same effect is:

> State v. Newark, 6 N. P. 523.
> State ex rel. v. Taylor, 12 O. S. 130.
> State ex rel. v. Craig, 69 O. S. 236.

However, as stated by Mechem, in his work on Public Offices and Officers, section 429:

> "Where, however, it is the *holding* of two offices at the same time which is forbidden by the constitution or the statutes, a statutory incompatibility is created, similar in its effect to that of the common law, and, as in the case of the latter, it is well settled that the acceptance of a second office of the kind prohibited, operates *ipso facto* to absolutely vacate the first.
>
> No judicial determination is therefore necessary to declare the vacancy of the first, but the moment he accepts the new office the old one becomes vacant. As is said in one case, 'His acceptance of the one was an absolute determination of his right to the other, and left him "no shadow of title, so that neither *quo warranto* nor a motion was necessary"'".

Summers, J., in State ex rel. v. Egry, 79 O. S. 400, at p. 407, construing section 1536-613 R. S. (now section 4207 G. C.) said:

> "The qualifications here prescribed are: 1. Residence in the city and ward for one year next preceding the election. 2. That he shall be an elector of the city. 3. That he shall not hold any other public office or employment, excepting that of notary public, or member of the state militia. 4. That he shall not be interested in any contract with the city. These are 'qualifications' within that term in section 1536-612."

Inasmuch as the statute now prohibits any member from *holding* any other public office or employment, and further provides that a member ceasing to possess any of the qualifications required shall forthwith forfeit his office, it is my opinion that when a member of council accepted employment as superintendent of booths for the

board of elections and as assistant clerk of the board of elections, he *ipso facto* forfeited the office of councilman.

Coming then to your specific question, I am of the opinion that your bureau cannot make a finding against such person for compensation drawn as superintendent of booths and assistant clerk of the board of elections, because at the time he performed such services he was no longer a member of council of the city of Akron.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1188.

DIRECTOR OF PUBLIC SERVICE—REDUCTIONS OF WATER RENTS BY SUCH OFFICIAL ON ACCOUNT OF LEAKS ON PREMISES ILLEGAL—RULES.

The director of public service is without authority to grant reductions of water rents on account of leaks which exist upon the premises of the consumer.

The rules of the waterworks cannot contain a provision permitting the director of public service to grant reductions in water rents on account of leaks occurring on the premises of the consumer.

COLUMBUS, OHIO, May 4, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Under recent date you request my opinion upon the following:

> "*Question* 1: When rates have been adopted according to law for water furnished by municipal waterworks has the director of public service authority to grant reduction of 25 or 50 per cent of the charges owing to leaks which may exist upon the premises of the water consumer when the rules of the waterworks do not make any provision for such reduction?
>
> *Question* 2: Can the rules of the waterworks legally contain provision that such reductions may be made at the discretion of the director of public service?"

Section 3958 of the General Code provides that the director of public service may "assess and collect from time to time a water rent of sufficient amount in such manner as he deems most equitable upon all tenements and premises supplied with water. * * *"

Section 3957 G. C. authorizes the director of public service to make "such by-laws and regulations as he deems necessary for the safe, economical and efficient management and protection of the waterworks."

A municipal corporation in operating a water plant exercises business and administrative functions and not governmental functions and is governed largely by the same rules applicable to private corporations engaged in the same business.

> See Fretz v. Edmond, et al., 168 Pac. 800 (Okla.)
> Dillon on Municipal Corporations, Sec. 1317.

The discretion reposed in the director of public service is very wide.

Ladd v. Boston, 170 Mass. 332, 335.

While it is true that a municipal corporation in operating a waterworks does not exercise governmental functions, but solely proprietary business and administrative functions, and while it is true that a very wide discretion is placed in the director of public service in the operation thereof, nevertheless, your question as it seems to me strikes deeper than the mere operation of a waterworks. After water has been furnished to a consumer and has been through the meter, the water then is the sole property of the consumer and the same is true when the consumer pays a flat rate, either in advance or at the end of a certain period. In either case, as before stated, the water after reaching the premises of the consumer and is being distributed through pipes in the premises is the property of the consumer and if the consumer permits the same to escape by way of leakage on his premises it should be and is his loss exclusively. Therefore, I am of the opinion that no reduction can be made from the water bill for water that has been furnished. To hold otherwise would be to hold that the director of public service can remit a claim due the city for which there is no authority of statute.

Specifically answering your questions, therefore, I am of the opinion:

1. That when water rates have been adopted the director of public service is without authority to grant reductions owing to leaks which may exist upon the premises of the water consumer when the rules of the waterworks do not make any provision therefor.

2. That the rules of the waterworks cannot legally contain such a provision.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1189.

APPROVAL OF GOVERNOR'S DEED TO A CERTAIN TRACT OF LAND IN WOOD COUNTY.

COLUMBUS, OHIO, May 4, 1918.

HON. JAMES M. COX, *Governor of Ohio, Columbus, Ohio.*

DEAR SIR:—Hon. George W. Ritter, of Toledo, Ohio, attorney for various persons who claim title as successors of one Gabriel Crane to certain real estate, situated in section 33, township 8 north, range 12 east, in Ross township, Wood county, has on behalf of his clients made application for a correction in the deed which was given by Hon. Mordecai Bartley, Governor of Ohio, to said Gabriel Crane on the fourth day of May, 1846. The description of the land conveyed by said deed was stated therein as follows:

> "The west part fractional section 33, township 8 N., range 12 E., containing sixty-six acres of land more or less."

It appears that section 33, referred to, is itself a fractional section. It also appears that the state of Ohio did not obtain title to the whole of said fractional section 33, but only to the eastern part thereof, which may be roughly described by drawing a direct line from a point on the north section line forty-seven (47) poles west of the northeast corner of said section to a point on the south section

line six and twenty-seven hundredths (6.27) poles west from the southeast corner of said section, and which constituted a part of McCarthy's Village Reservation. This information was obtained from volume 5 of the Record of Surveys of United States Lands, page 96, and Record of Canal Lands and Selections, page 73, both records being on file in the office of the auditor of state.

It is apparent, therefore, that the description contained in the deed from the state to Gabriel Crane, hereinbefore referred to, is so indefinite as to virtually amount to a misdescription.

The tract book of the 18 range northwest, on file in the office of the auditor of state, on page 221 contains the record of the sales of section 33, town 8 north, range 12 east, whether the said lands were conveyed by the United States to the state of Ohio or not, and from the said records, which contain the names of the purchasers of the entire acreage contained in said section 33, it appears that one Perry Stevens bought eighty acres in the east part of the fractional quarter section; that William Chambers, Jr., purchased the fractional southeast quarter containing sixty-two and eighty-six hundredths (62.86) acres, and that William Oliver bought all of section 33 which was not owned by the state and which lay west of the line hereinbefore indicated, which leaves the tract of sixty-six (66) acres purchased by Gabriel Crane as the northwest sixty-six (66) acres of the lands owned by the state in said section 33 as the same is laid out on the plat books as found in the office of the auditor of state.

The said George W. Ritter, on behalf of his clients, has tendered to the state of Ohio a deed duly executed by various persons who are the successors in title of said Gabriel Crane for said "the west fractional section 33, township 8 north, range 12 east, containing sixty-six (66) acres more or less" with the request that a deed be executed by the state for the following described property:

> "The northwest sixty-six (66) acres of that part of fractional section thirty-three (33), which lies in the McCarthy's village reservation, as surveyed by Charles Roberts in 1820, and as re-surveyed by A. Rice in 1834, as appears in Plat Book Vol. 5, U. S. surveys, in the office of the auditor of state of Ohio, the same being part of the lands conveyed by the state of Indiana to the state of Ohio, in connection with the opening of the canal to connect the waters of the Wabash river with those of Lake Erie."

In said deed from the state it is recited that said deed is given

> "for the purpose of correcting the error in said deed from the state of Ohio to Gabriel Crane, above referred to, and without intending to convey to any of the aforesaid persons who do not have title properly acquired through Gabriel Crane, or any of his successors in title, any title to said premises as against any persons who have any actual right, title or interest therein."

Section 8528 of the General Code provides as follows:

> "When, by satisfactory evidence, it appears to the governor and attorney-general, that an error has occurred in a deed executed and delivered in the name of the state, under the laws thereof, or in the certificate of any public officer, upon which, if correct, a conveyance would be properly required from the state, the governor shall correct such error by the execution of a correct and proper title deed, according to the intent and object of the original purchase or conveyance, to the party entitled to

it, his heirs, or legal assigns, as the case may require, and take from such party a release in due form, to the state, of the property erroneously conveyed."

Mr. Ritter claims that the description contained in the original deed from the state of Ohio to Gabriel Crane was erroneous for the reason that section 33 is itself a fractional section and the west part thereof did not and never has belonged to the state of Ohio.

I have examined into the records with considerable care and believe that the deed offered by Mr. Ritter on behalf of his clients should be accepted and the deed prepared by him for signature by the state should be executed.

I am herewith handing you two abstracts and the two deeds in question, and if you are satisfied that such error has occurred, will you not kindly execute the deed and send the same to the auditor for record and transmission to Mr. Ritter?

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1190.

DENTAL LICENSE VALID ON ITS FACE WILL BE PRESUMED TO HAVE BEEN PROPERLY ISSUED.

A dental license which purports validity upon its face will be presumed to be valid and all things necessary to be done in the issuing thereof will be presumed to have been properly done until the contrary is shown.

COLUMBUS, OHIO, May 6, 1918.

HON. HOLSTON BARTILSON, *Ohio State Dental Board, Columbus, Ohio.*

DEAR SIR:—In your request for my opinion you state:

"One H. H. holds a license to practice dentistry in the state of Ohio. The number of the said license is 4,575 and purports to have been issued July 10, 1911. The records of the state dental board do not show that the said H. H. has ever taken an examination before the board in compliance with section 1322 of the General Code, or to have paid the fee required under section 1328 of the General Code, moreover the records of the board do not show the board to have been in session on July 10, 1911.

The facts in the case are, that on or about July 26, 1911, one H. H., a citizen of Pennsylvania, was issued a license to practice dentistry in the state of Ohio by L. L. Yonkers, secretary of the Ohio State Dental Board, *but without examination or the knowledge or approval of the board and the license number* marked *duplicate.* In dating the license back evidently an attempt was made to make it agree with a former meeting of the board."

Upon my request for additional information you say:

"In compliance with your request for additional information than that contained in the records of the state dental board regarding the issuance

of license No. 4575, I beg to amend the request filed in your office July, 1917, and add thereto as follows:

AMENDMENT TO REQUEST.

A meeting of the men who were members of the state dental board in 1911 was called in the office of the attorney-general February 16, 1918, to secure information regarding the issuance of license 4575, three members of the board being present. One member of the board had no knowledge that the said license had been issued. One member had no distinct recollection of the license and one member was positive the said license was issued under reciprocity with the state of Pennsylvania.

I beg to quote a letter from the secretary of the Pennsylvania State Dental Board of dental examiners:

'Philadelphia, Pa., February 26, 1918.

'Dr. H. Bartilson, Columbus, Ohio.

'My dear Doctor:—Yours of the twenty-first at hand. Reciprocity never existed between Ohio and Pennsylvania. There was a meeting in Cleveland of committees from each board, but no agreement was reached or signed.

(Signed) Alexander Reynolds, Secretary.'

I submit a letter from Dr. J. R. Owens, a member of the board in 1911, and in the same states no vote was taken on the issuance of the said license.

I beg to quote section 9 of the General Code of the state of Pennsylvania:

'Section 9, General Code of Pennsylvania: Each applicant shall also furnish to the board of dental examiners satisfactory evidence of his or her proficiency in manipulative procedure of dentistry, *either by producing an example of his or her work, duly attested by the demonstrator in charge of the clinic of the college issuing his or her diploma,* or by a practical demonstration of his or her skill in the presence of the examining members of the said board.'

It appears there is a conflict between the laws of Ohio and Pennsylvania and the requirements of the respective states are not equal. The law of Pennsylvania delegates the power of examination to a demonstrator of a college, while the law of Ohio requires the examination to be given by the board of examiners, or in other words, the state of Pennsylvania accepts an affidavit from a college demonstrator in lieu of an examination.

It further appears the state of Pennsylvania does not require an examination in orthodontia and oral hygiene, while the statutes of the state of Ohio requires an examination in the said subjects.

The statutes of Ohio require that an applicant for reciprocity shall hold a license under requirements equal to those of this state."

Following the meeting of certain persons who were members of the state dental board in 1911, which meeting was held in my office February 16, I received

a photographed copy of the license issued to H. H., which is in words and figures as follows:

STATE DENTAL BOARD OF OHIO.

"This certifies that J. Herbert Hood, of Oil City, Pa., state, is hereby granted a license to practice dentistry in accordance with and subject to the provisions of the Revised Statutes of the state of Ohio, entitled 'An act to regulate the practice of dentistry as enacted April 7, 1908.'

Given under the hands and seal of the state dental board of Ohio at the city of Columbus, this tenth day of July, A. D. 1911.

W. D. TREMPER *D. D. S.*
J. R. OWENS, *D. D. S.*
(SEAL)
H. C. MATLACK, *D. D. S., President.*
L. L. YONKERS, *D. D. S., Secretary.*"

Attached to said license is an affidavit, a duplicate copy of which is signed by three of the five persons who were members of the board at the time said license was issued. Said affidavit, except the formal parts, reads:

"That on the 10th day of July, 1911, he was a member of the state dental board of Ohio, and was secretary member of that board, and on that date there was issued to J. H. H. a license to practice dentistry in the state of Ohio, of which license the above is a correct photograph, the affiant having, at the time of signing this affidavit, seen the original, and that the signature of the affiant upon the original of said license is genuine, and was signed by the affiant as secretary of the state dental board of Ohio, after J. H. H. had been given an examination by the state dental board, which examination was satisfactory to the board, and the license was issued following the examination, and in accordance with the provisions of the law of the state of Ohio."

The facts from the above communications and as determined through said meeting of February 16th, are in substance as follows:

The state dental board held a regular meeting with all members present at the Chittenden hotel, in the city of Columbus, July 8, 1911. At said meeting certain licenses were granted and signed by the members of the board and certain other license blanks were signed by the four members of the board, viz.: W. D. Tremper, J. R. Owens, H. C. Matlack and L. L. Yonker, which latter blanks were delivered to the secretary, L. L. Yonker, that the licensees' names might be engrossed thereon as of July 10, 1911. On or about the 26th of July, 1911, in the city of Cleveland, there was held a meeting of dentists, probably the National Dental Association meeting, at which meeting J. H. H. was for a portion of the time in charge of the clinic. Following the demonstrations of the said J. H. H., a meeting of the members of the state dental board was called, and an examination was given to said J. H. H., which he passed to the satisfaction of the members of the board present and he was granted the license quoted above. The question now is, is said license a valid one.

The provisions of law governing will be found in Page and Adams Anno. Ohio General Code of 1912, part 1, title 3, division 2, chapter 22. Since that time the laws governing the state dental board have been changed, but the changes that have been made since could not affect the said license which was granted as of July 10, 1911. It was provided in section 1314 G. C. that the governor, with the advice and consent of the senate, shall appoint a state dental board, consisting of five persons, giving their qualifications and length of term. Section 1315 G. C., provided that

the board shall organize by electing from its members a president and a secretary and treasurer, that the board shall hold a meeting on the third Tuesday of June and October of each year "*and other meetings as it deems necessary at such times and places as the board designates.*" Said section also provided that "*a majority of the members of the board shall constitute a quorum* * * *. The board shall make such reasonable rules and regulations as it deems necessary." Acting under the aforesaid provisions, the state dental board that had theretofore been appointed, called a meeting of its members to be held at the time of said dental meeting in Cleveland, as aforesaid. It is not clear whether all the five members of the board attended said meeting, but it is sufficient that at the meeting, when the license in question was granted, the four members who signed the license were all the members of the board present thereat. The affidavits of the members, above mentioned, say that said license was granted upon examination and persons who desired to take an examination for a license were, as the law stood at that time (section 1321) each compelled to file with the secretary of the state dental board a written application for a license and furnish satisfactory proof that he is at least twenty-one years of age, with good moral character and must also furnish evidence satisfactory to the board that he is a graduate of a reputable dental college, as prescribed by the board; that said application must be on the form prescribed by the board and certified by oath.

The information given me is conflicting as to whether or not said application was properly filed. The secretary of the board, whose duty it was to receive and file the same, is of the opinion that the application was filed. A search, however, for the same at this time shows that no application can be found among the files of the board. The presumption, however, in a case of this kind, would be in favor of the validity of the act, so that when the license was executed it will be presumed that it was properly executed, unless the contrary expressly appears upon its face, and the burden of impeaching the validity would be upon the party asserting. (Throop on Public Officers, section 108.) In this instance the license appears regular upon its face and from the affidavits of a majority of the members of the board that an examination was properly held, it seems to me that we can fairly assume that the application was filed before said examination was held.

Section 1322 G. C. provided that an applicant to practice dentistry shall appear before the state dental board at its first meeting after the filing of its application and pass a satisfactory examination, consisting of practical demonstrations and written or oral tests, or both, in the following subjects: Anatomy, physiology, chemistry, materia medica, therapeutics, metallurgy, histology, pathology, bacteriology, prosthetics, operative dentistry, oral surgery, anesthetics, orthodontia and oral hygiene. Section 1323 G. C. provides that if such applicant passes the examination, he shall receive a license from the state dental board, attested by its seal and signed by the president and secretary, which shall be conclusive evidence of his right to practice dentistry in this state. The fact that other members than the president and secretary signed the license could add nothing to the validity thereof. The only signatures which were required were those of the president and secretary. But, it seems a custom prevailed among the members of the board at that time that all members present when any license was granted should sign the license and in this instance the license was signed not only by the president and secretary, but also by members Temper and Owens, who were there present. It is said, however, that a fee of only $5.00 was paid at the time said application was filed and that for that reason the license could not be properly granted.

Section 1328 G. C. provides in part:

> "An applicant for a license to practice dentistry in this state shall pay to the secretary of the state dental board the following fees:

An applicant for a license granted upon examination, twenty-five dollars. * * *

An applicant for a duplicate license granted upon proof of loss of the original, five dollars."

There is no contention that the licensee in this instance ever had a license that had been lost or destroyed and a duplicate license can only be issued if the loss of a license is satisfactorily shown. So that, all that can be urged is that the secretary should have collected the amount of $25.00 instead of the amount of $5.00, and the fact that he did not collect the entire fee would not be sufficient to invalidate a license otherwise properly granted.

It is extremely unfortunate that the records of the state dental board should fail to show the facts in relation to this transaction. Section 1318 provided that a record of its proceedings should be kept, which record, at all reasonable times, shall be open to public inspection. There is nothing contained in the record in relation to the filing of the application, the meeting of the board and the granting of this license, except the payment of the $5.00 fee, and if it were not for the license itself, together with the information given by affidavits and otherwise from members of the board, we could arrive at but one conclusion and that is that no license had been granted. However, from all the above, and particularly from the fact that the license purports absolute verity upon its face and from the affidavits and statements made by the members of the board present at the time the license was granted, I must conclude that the license is a valid existing one.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1191.

BOARD OF EDUCATION—LIMITATION OF THE AMOUNT OF BONDS THAT MAY BE ISSUED BY SUCH BOARD FOR THE PURPOSE OF OBTAINING OR IMPROVING SCHOOL PROPERTY—DISAPPROVAL OF BOND ISSUE OF MINERVA VILLAGE SCHOOL DISTRICT.

The amount of bonds that a board of education of a school district may issue in any current year under section 7629 General Code for the purpose of obtaining or improving school property is limited to a tax at the rate of 2 mills upon the tax duplicate valuation upon which the school taxes of the district for the previous school year were extended and collected; and therefore, an issue of bonds provided for by a resolution of a board of education of a school district under said section under date of February 23, 1917, is limited as to the amount produced by a tax at the rate of 2 mills on the tax duplicate valuation of the taxable real and personal property of the school district for the year 1916.

COLUMBUS, OHIO, May 6, 1918.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of Minerva village school district for the purpose of completing, furnishing and equipping the new high school building erected within said school district.

I have carefully examined the corrected transcript of the proceedings of the board of education of Minerva village school district relating to the above bond issue.

The only question touching the validity of this bond issue is as to whether the amount of said issue, on the facts disclosed by said transcript, does not exceed the maximum limitation as to the amount prescribed by section 7629 General Code under authority of which said bond issue is provided.

Section 7629 General Code authorizes the board of education of a school district to issue bonds for the purpose of obtaining or improving school property without a vote of the electors of the school district, subject to limitation as to amount prescribed therein, as follows:

> "provide that no greater amount of bonds be issued in any year than would equal the aggregate of a tax at the rate of two mills, for the year next preceding such issue."

The transcript shows that the tax duplicate valuation of the taxable real and personal property of said school district for the year 1917 is $2,098,680, and that the tax duplicate valuation of the school district for the year 1916 was $1,822,430.

Inasmuch, as disclosed by the transcript, it appears that the board of education of this district has not provided for the issue of any bonds during the current school year, other than those here under consideration, it is apparent that the question whether or not the amount of this bond issue exceeds the maximum as to amount prescribed by section 7629 General Code, depends on whether we are required to consider the tax duplicate valuation of the school district for the year 1917 or the tax duplicate valuation for the year 1916 in computing the amount of the maximum limitation.

My predecessor, Hon. U. G. Denman, in an opinion rendered by him November 8, 1909, on this question, upon consideration of the above quoted statutory provisions, then found in section 3994 Revised Statutes, as well as other statutory provisions touching the question, says:

> "I conclude from all the foregoing that the 'preceding year' referred to in section 3994 R. S. is the year ending on the 31st day of August next preceding the date of the contemplated issue of bonds. For similar reasons the year in which boards of education are prohibited from issuing bonds exceeding in amount a tax of two mills, etc., is the year beginning on September 1, the day following the expiration of the year for which the tax, upon which the two mills is to be estimated, was levied. The duplicate which is to be employed in estimating the two mills is that certified to the county treasurer in the October preceding the thirty-first of August above referred to."

The conclusion reached by Mr. Denman with respect to the construction of the above provision of section 7629 General Code, if correct, required the board of education of Minerva school district to limit the amount of the bond issue according to the tax duplicate valuation of that school district for the year 1916.

I am of the opinion that Mr. Denman was correct in the conclusion reached by him with respect to the construction of the statutory provisions here under consideration. Since Mr. Denman rendered the above opinion, the supreme court has held that the "year" within which boards of education may issue bonds under section 7629, subject to the limitation therein prescribed, means the school fiscal year beginning September 1, of a given calendar year and ending on the 31st day of August of the succeeding calendar year.

Rabe v. Board of Education, 88 O. S. 403, 415.

The word "year" having been used more than once in the above quoted language of sec 7629, and in the same connection, it is to be presumed that the word was used in the same sense in both instances.

Rhodes v. Weldy, 46 O. S. 234.

The issue of bonds here under consideration is provided for by a resolution of the board of education of Minerva village school district, adopted by the board of education at a regular meeting under date of February 23, 1918, during the current school year which began September 1, 1917, and which ends August 31, 1918. The limitation of two mills prescribed in section 7629 is therefore to be computed upon the tax duplicate valuation for the school fiscal year beginning September 1, 1916, and ending August 31, 1917; that is, upon the duplicate valuation upon which taxes for the school year 1916-17 were extended and collected. This duplicate is the one which was transmitted to the county treasurer in October, 1916. A tax computed at the rate of two mills on the tax duplicate valuation of the school district for the year 1916 produces the sum of $3,644.86 as a maximum amount which under section 7629 General Code the board of education of Minerva village school district is authorized to issue bonds under section 7629 General Code during the current school year.

The amount provided for in the resolution of the board of education of this school district is in excess of the legal maximum, and the bonds thereby provided for are to the extent of this excess illegal and void. Inasmuch as the resolution providing for the purchase of these bonds does not indicate any intention on your part to purchase any less amount of bonds than the whole amount thereof provided for in the resolution of the board of education, I do not deem it necessary to discuss the question whether or not under this resolution bonds may be issued and sold by the board of education up to the legal maximum amount above noted, and under the circumstances I have no discretion to do otherwise than to advise you not to purchase the above issue of bonds. For the reasons above stated, said bond issue should therefore be rejected.

The transcript is herewith returned. Very truly yours,

JOSEPH MCGHEE,
Attorney-General.

1192.

COUNTY COMMISSIONERS HAVE NO AUTHORITY TO ERECT HOSPITAL FOR THE TREATMENT OF PERSONS SUFFERING WITH TRACHOMA EITHER UNDER THE LAWS RELATING TO THE INDIGENT POOR OR CONTAGIOUS DISEASES—DUTY OF TOWNSHIP AND MUNICIPAL AUTHORITIES.

1. *When viewed from the standpoint of the indigent poor, the county commissioners would have no authority to provide a temporary hospital to treat persons suffering from a disease known as trachoma, for the reason that the relief needed is temporary in nature and not permanent.*

2. *When viewed from the standpoint of a contagious disease, the county commissioners seem to have no authority in law to provide a temporary hospital to*

treat persons suffering from a disease known as trachoma. This duty rests upon the township and municipal authorities.

COLUMBUS, OHIO, May 6, 1918.

HON. CHAS. M. CALDWELL, *Prosecuting Attorney, Waverly, Ohio.*

DEAR SIR:—I have your communication of April 25, 1918, which reads as follows:

> "Recently it developed that there was an epidemic of trachoma in the schools of the Waverly village.
>
> The village board of education employed a physician and nurse under the provisions of section 7692, General Code.
>
> Now, it develops further that there are numerous cases of trachoma among older people, and some scattered throughout the whole county, and the conclusion is that this disease cannot be entirely stamped out unless the cases of older persons, as well as school children, are cured.
>
> A few days ago a representative of the national department of health and a representative of the state department of health visited us, and a proposition was made that the national department would furnish a physician, and the state department furnish a nurse and the necessary equipment and medicines, if the local authorities would furnish a temporary hospital. It was stated that a suite of about four rooms would be needed, these to be furnished with beds, or cots, and the necessary tables, chairs, etc., and provision made to feed the patients during the time of treatment.
>
> Now, the question arises as to the authority of the local authorities to appropriate the money for this temporary hospital.
>
> It is, of course, not proper for the Waverly school board to assume the entire burden, as many cases are outside the district.
>
> Queries:
>
> 1. Can the board of county commissioners, in any manner, assume and pay any part of the expense of such temporary hospital?
>
> 2. Can the board of commissioners and board of education jointly pay the expense of such temporary hospital?
>
> 3. I presume the state board of health might direct each township and village to take steps to combat this disease, under section 1237, General Code; but it is now desired to establish this temporary hospital at the central point, and have all cases brought there; but as townships are always short of funds, it is hardly practicable to proceed in that way. If the county could pay the expense, it would be most practicable."

Your question is, whether under the circumstances stated by you your board of county commissioners would be authorized under the law to provide a temporary hospital and equip the same, to take care of those persons suffering with trachoma.

It is doubtful if our statutes are broad enough to enable your county commissioners to provide a hospital and equip the same for said purposes or to assume and pay any part of the expense of such temporary hospital. Of course under the provisions of sections 3127 et seq. G. C., the county commissioners have authority to erect a hospital and levy a tax to provide for the same, provided the matter is first submitted to a vote of the people, but this in nowise takes care of the matter you have under consideration.

As a fundamental principle it can be stated that the furnishing of support or relief to the needy poor rests upon the townships and municipal corporations of

which the needy poor are residents. Section 3476 G. C. makes such provision and reads as follows:

> "Subject to the conditions, provisions and limitations herein, the trustees of each township or the proper officers of each municipal corporation therein, respectively, shall afford at the expense of such township or municipal corporation public support or relief to all persons therein who are in condition requiring it."

When we note section 3480 G. C. we find that this principle applies not only to the needy poor in general, but to those who are in need of the services of a physician or a surgeon. The first sentence of this section reads:

> "When a person in a township or municipal corporation requires public relief, or the services of a physician or surgeon, complaint thereof shall be forthwith made by a person having knowledge of the fact to the township trustees, or proper municipal officer. * * *"

The provision of this chapter in the first instance controls in the furnishing of relief to the needy poor. However, it is to be further noted that the townships and municipal corporations may be relieved of the duty of furnishing relief to the needy poor, under section 2544 G. C. This section reads as follows:

> "In any county having an infirmary, when the trustee of a township, after making the inquiry provided by law, are of the opinion that the person complained of is entitled to admission to the county infirmary, they shall forthwith transmit a statement of the facts to the superintendent of the infirmary, and if it appears that such person is legally settled in the township or has no legal settlement in this state, or that such settlement is unknown, and the superintendent of the infirmary is satisfied that he should become a county charge, they shall forthwith receive and provide for him in such institution, or otherwise, and thereupon the liability of the township shall cease. The superintendent of the infirmary shall not be liable for any relief furnished, or expenses incurred by the township trustees."

This section provides that in the event the superintendent of the infirmary is satisfied that a certain person shall become a county charge, "they shall forthwith receive and provide for him in such institution, *or otherwise,* and thereupon the liability of the township shall cease."

Under the phrase "or otherwise," the county commissioners have authority to furnish what is usually called outdoor relief; that is, making such provisions that the persons becoming county charges may be taken care of, not in the county infirmary proper, but in some manner outside the county infirmary.

Therefore, under section 2544 G. C., if the persons suffering with trachoma could be placed under the jurisdiction of the county, it would undoubtedly be possible for the county commissioners to make provision for a temporary hospital, in order that they might care for said persons outside the infirmary proper.

The question now to be considered is whether the persons mentioned by you could be taken over by the county under section 2544, supra, and the township be relieved from furnishing relief to them. This section is peculiar, in that it makes provision for the superintendent of the infirmary to pass upon the qualifications of a person for whom application is made by the township trustees to

become a county charge, and yet does not state under what conditions a person may become a county charge upon an application by the township trustees.

However, I believe section 3488 G. C. indirectly throws some light on this question. Said section reads as follows:

> "When the trustees of a township in a county having no county infirmary, are satisfied that a person in such township ought to have public relief they shall afford such relief at the expense of their township as in their opinion the necessities of the person require. When more than temporary relief is required, they shall post a notice in three public places in the township, specifying a time and place at which they will receive proposals for the maintenance of such person, which notice shall be posted at least seven days before the day therein named for receiving proposals."

While this section does not particularly relate to admitting persons as county charges, yet it indicates that so long as merely temporary relief is needed, the township trustees or the proper officers of the municipal corporation must furnish relief, and that a person would not be entitled to become a county charge unless something more than temporary relief is required.

If this view be correct, the persons in your county needing relief would not be such as could be made county charges under section 2544, supra, and therefore what might be termed outdoor relief could not be furnished them by the county commissioners, under said section. So we are compelled to look elsewhere for authority, if any, to the county commissioners to equip and maintain a temporary hospital.

If your county has a corporation or association organized for charitable purposes, the county commissioners might proceed under section 3138-1 G. C. (103 O. L. 67), which reads in part as follows:

> "That the board of county commissioners of any county may enter into an agreement with a corporation or association, organized for charitable purposes, * * * for the care of the indigent sick and disabled, * * * upon such terms and conditions as may be agreed upon between said commissioners, * * *."

Section 3138-2 G. C. provides for the levying of a tax to take care of the expenses incident to such an arrangement.

I might also call your attention to section 2502 G. C., which reads in part as follows:

> "Except in counties containing hospitals supported by public funds, the commissioners of any county, in their discretion, may pay to a hospital organized or incorporated for purely charitable purposes, in which the indigent poor of the county may receive free of charge needed medical and surgical treatment, a sum not to exceed twenty-five hundred dollars each year. * *. *"

However, it is hardly likely that your county commissioners could come under this section.

In an opinion rendered by me to Hon. Harry D. Smith, prosecuting attorney, Xenia, Ohio, on August 10, 1917, and found in Vol. II of the Opinions of the Attorney-General for 1917, p. 1468, I discussed the provisions of this section, and

therefore refer you to said opinion if you should desire to consider whether or not your county commissioners might be able to take advantage of its provisions.

Of course if your county commissioners are authorized, under any of the provisions above set forth or under any other provision of the General Code, to take the steps set out by you, they would then have authority to provide for the necessary cost and expense of the same under section 2530 G. C., which reads as follows:

> "When in any county the funds applicable for the support of the poor are insufficient, the county commissioners may levy for such purpose in addition to those otherwise authorized any rate not exceeding six-tenths of a mill on the dollar of valuation."

The provisions of law above noted apply merely to the indigent poor, and even though, under any of the above provisions, the county commissioners could proceed to carry out the matter set out in your communication and pay for the same from the funds of the county, it would only be for the benefit of the indigent poor of the county and not for those who might be able to pay for the services of a physician.

In the opinion above referred to, I made some observations as to who might be considered indigent under our statutes relating to indigent poor.

Thus far I have viewed the question from the standpoint of relief furnished to the indigent poor of a county. It might be considered in the light of a contagious disease, inasmuch as the disease mentioned by you is contagious. But when viewed from this angle, we find no provisions in the statutes that would warrant the county commissioners in paying out money for a temporary hospital.

Section 4428 G. C. provides for a hospital or place of confinement and reads as follows:

> "When complaint is made or a reasonable belief exists that an infectious or contagious disease prevails in a house or other locality which has not been so reported, the board shall cause such house or locality to be inspected by its health officer, and on discovering that such infectious or contagious disease exists, the board may, as it deems best, send the person so diseased to a quarantine hospital or other place provided for such persons, or may restrain them and others exposed within such house or locality from intercourse with other persons, and prohibit ingress and egress to or from such premises."

This section applies merely to cities and villages.

In the decision rendered by the circuit court in Turner v. City of Toledo, 15 C. C. 627, we find the following in the second branch of the syllabus:

> "The board of health of a city, or its health officer with the approval or ratification of the board, may enter into a lawful contract for nursing and caring for the sick and for the use of premises occupied as a temporary hospital."

Under the provisions of said section 4428 G. C. and the decision of the circuit court above referred to, the board of health of a city can equip a temporary hospital and the municipality is liable for the expenses thereof.

Section 3394 G. C. makes provision in reference to township boards of health as follows:

"Township boards of health shall have the same duties, powers and jurisdiction, within the township and outside of any municipality as by law are imposed upon or granted to boards of health in municipalities, * * *."

Under this section it appears that township boards of health can provide a temporary hospital and the township trustees are liable for the cost and expense thereof.

Section 1237 G. C. provides that the state board of health, now the commissioner of health, may make and enforce orders in local matters when emergency exists. But this section further states:

"* * * In such cases the necessary expense incurred shall be paid by the city, village or township for which the services are rendered."

Hence viewing this matter in the light of the disease being a contagious one, there seems to be no provision whereby the county might equip and maintain a temporary hospital and pay for the same from a county fund. The reasoning herein would apply to the county commissioners' acting jointly with the board of education in equipping and maintaining a temporary hospital.

I am aware that the suggestions herein made are not very satisfactory in the way of taking care of the situation which confronts your county, but they are as definite and certain as it is possible for me to make them under the provisions of our statutes.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1193.

APPROVAL OF CONTRACT BETWEEN BOARD OF TRUSTEES OF OHIO STATE UNIVERSITY AND D. W. McGRATH.

COLUMBUS, OHIO, May 6, 1918.

HON. CARL E. STEEB, *Secretary Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—You have submitted to this department for approval the contract entered into on April 25, 1918, between D. W. McGrath and the board of trustees of the Ohio state university for the construction and completion of an addition to Lord hall and Kiln house on the Ohio state university campus, as covered by items 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 16, 17 of the form of proposal, dated April 3, 1918, submitted by said D. W. McGrath, in the sum of $18,382.00. At the same time you submitted a bond securing said contract.

Finding the contract to be in compliance with law and having received from the auditor of state a certificate that there is money in the state treasury available for the purpose of said contract, I have this day approved the same and filed the same, together with the bond in the office of the auditor of state.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1194.

ROAD IMPROVEMENT—EFFECT OF NOTICE TO TAXPAYERS THAT BUILDING MATERIAL IS TO BE CHANGED.

A notice given to taxpayers that the authorities are about to change the material provided for in a contract for a road improvement, from waterbound macadam to brick, and setting a day upon which objections to said change may be offered, will not bind the taxpayers of the county, for the reason there is no statutory provision for giving such a notice. This would especially be true in reference to those taxpayers who would not actually read the notice so given or have it brought to their attention.

COLUMBUS, OHIO, May 6, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of March 26, 1918, in which you enclose a set of resolutions adopted by the county commissioners of Coshocton county, relative to a certain improvement in progress of completion, and ask my opinion as to whether these resolutions are legal.

I have heretofore rendered an opinion pertaining to this same matter, but the legal questions raised by the resolutions adopted by the county commissions go further than the questions raised in your former request for opinion. The matter has to do with the improvement of section "D," I. C. H. No. 407, Coshocton county.

The state highway commissioner entered into a contract with Thomas Norman & Son, for the construction of this improvement, the specifications calling for 24,889 square yards of waterbound macadam and 4,107 square yards of monolithic brick. The brick part of the improvement is completed and the grading for the other part is practically completed.

The question is whether the contractors could be released from their present contract and the plans and specifications so changed that brick could be used for the 24,889 square yards, instead of waterbound macadam.

In the opinion above referred to, rendered on January 7, 1918 (No. 919), I informed you that after a contract was once entered into for the construction of a highway, there is no provision of law by virtue of which the plans and specifications may be changed, so that the contractors might use a material different from that provided for in the original contract. I held in that case to do so would release not only the surety on the bond of the contractors, but would lay such foundations that any taxpayer of the county might enjoin the county and the state from paying the contractors for work done.

However, the set of resolutions adopted by the county commissioners go to a different point and it will be necessary, therefore, for me to note the questions therein raised. The resolutions are too lengthy to quote in full, but the part which is vital reads as follows:

> *"Therefore, be it Resolved,* That the clerk of this board be directed and he is hereby directed to give not less than ten (10) days' notice by advertisement in the Coshocton Tribune, a newspaper of general circulation in Coshocton county, Ohio, to the taxpayers of Coshocton county, Ohio, that protests against the proposed change of materials and contract will be received by the said board of county commissioners at their office at a date not less than ten (10) days after the publishment of said notice;

Be it Further Resolved, That provided there are no protests made against such proposed change in materials and contract, up to and including the date of meeting heretofore provided for, and further provided that the state highway commissioner of Ohio approves of said change, that then and in that event said board of county commissioners of Coshocton county, Ohio, shall proceed to change the type of said improvement from waterbound macadam to brick paving;

Be it Further Resolved, That in the event that such change of materials and contract is accomplished as herein proposed, that the additional costs of the improvement caused by the changing of the type of improvement from waterbound macadam to brick paving be assumed in the following proportions: The abutting property owners to assume ten per cent (10%) of such additional cost; the township of Lafayette to assume fifteen per cent (15%) of the additional cost; and the county of Coshocton to assume seventy-five per cent (75%) of such additional cost."

From a paragraph of the resolutions you enclose, not herein quoted, it will be seen that the county commissioners, township trustees, abutting property owners and the state highway commissioner are willing that the material may be changed from waterbound macadam to brick, and that the state has been relieved from the payment of any part of the additional costs arising by virtue of the substitution of brick for waterbound macadam, the county, township and abutting property owners having agreed to assume the total increased cost.

From the resolutions I gather that the contractors are to be released from the present contract and that the county commissioners expect to take charge of the remaining part of the improvement, and enter into a contract with Thomas Norman & Son for the same. As said in my former opinion, this would release the present sureties of Thomas Norman & Son. However, he could give a new bond in connection with the new contract which is entered into, and this would remove the difficulty relative to the bond.

The only other question that remains to be considered is that of the rights of the taxpayers in the contemplated change. To remedy this matter the county commissioners have provided for the publishing of a notice for ten days in the Coshocton Tribune, giving the taxpayers the opportunity to appear before the board of county commissioners and offer objections, if any, to the proposed change of material. The commissioners have further provided that in the event there are no objections made against such proposed change in materials, said board of county commissioners will proceed to change the type of said improvement from waterbound macadam to brick. The only point to be considered is as to the sufficiency of this notice. The statutes do not make provision for such a procedure. The law is clear to the point that when a notice, not provided for by law, is given by publication, no one is bound by said notice. The notice receives its force and effect from the fact that the statute makes provision for same and that the parties shall be bound by the notice as set out in the statute.

Of course those taxpayers who actually read the notice and thus had the matter brought directly to their attention, might be estopped from raising an objection after the change in material was made, if they would not appear before the board of county commissioners on the day set and make their protest or objection. However, I doubt if a court would go to this extent. But those taxpayers who did not actually read the notice and thus have the matter brought to their attention, would not be bound by the notice proposed to be given. Hence, as stated in my former opinion, they would have the right to an injunction, because the county commissioners and township trustees are paying out public money for an improvement not

authorized by law, and in a greater amount than that which was called for in the contract which was entered into according to law. Such I take it is the law.

Of course the parties interested might proceed to the end of the improvement they are contemplating, without interruption, inasmuch as no taxpayer might care to assert the rights which he would have in law; but if the authorities proceed in the manner mapped out, they do so under the risk of being enjoined from paying out money under the new contract entered into with Thomas Norman & Son or with any other person, provided there should be a lower bidder than said Thomas Norman & Son.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1195.

TREASURER OF STATE IS CUSTODIAN OF BONDS PURCHASED OUT OF STATE INSURANCE FUND—HOW INTEREST COLLECTED—LIABILITY OF BANK WHEN INTEREST COLLECTED BY THAT METHOD.

The treasurer of state is designated by law as custodian of bonds purchased out of the state insurance fund; and it is made the duty of the treasurer of state to collect the interest on such bonds, as the same becomes due and payable, and also the principal thereof, and to pay the same when so collected into the state insurance fund. The method by which such collections shall be made is not prescribed by law and therefore the treasurer of state should follow the method in making such collections that would be followed by a prudent business man under similar circumstances.

If such collections are made through banks, the banks in the absence of an agreement to the contrary are not chargeable with interest until the money due on the bonds, either as principal or interest, is collected.

COLUMBUS, OHIO, May 6, 1918.

HON. CHESTER E. BRYAN, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—You have submitted the following request for my opinion:

> "The treasurer of state requests your advice regarding his rights and privileges concerning the collection of bonds and interest on same, which he holds as custodian of the state industrial commission funds.
>
> Quoting from section 11-103 O. L. 76, concerning state insurance funds in bonds.
>
> 'And all such bonds so purchased forthwith shall be placed in the hands of the treasurer of state, who is hereby designated as custodian thereof, and it shall be his duty to collect the interest thereon as the same becomes due and payable, and also the principal thereof, and to pay the same, when so collected, into the state insurance fund.'
>
> The following procedure for the collection of matured bonds and interest on bonds for the state insurance fund has been observed by this department since the treasurer of state has had such duties imposed upon him by statute:

The treasurer of state, acting as custodian of the funds of the state industrial commission collects bonds, when matured, also interest on bonds when due. Bonds and interest coupons representing these collections are deposited in the active depository banks as cash items, and are credited as such, by the said banks, on the same day when such deposits are made.

A matured bond is deposited and credit taken as above. Several days afterward the bank informs the state treasurer that payment on said bond has been refused: 'For want of funds.' Meanwhile the bank has been unjustly charged with interest on the amount of the bond deposited, as such interest is computed on a daily balance settlement between the bank and the treasurer of state.

The enclosed copy of two letters of the date of April 13, 1918, from an active depository for state industrial funds, refers to similar circumstances as pointed out above, and the bank asks this department to deposit such items on a collection account, i. e., that credit shall not be given by the bank on these items until the bank receives payment for same.

Question 1. Should the treasurer of state establish such an account for collecting maturing bonds and interest on bonds?

Question 2. If the collection account cannot be established, in what manner shall the treasurer of state proceed to collect such overdue bonds and interest; also how shall he adjust his balance with the active depositories, which have credited this department with the bonds and interest which were subsequently returned to them unpaid?

Question 3. May the treasurer of state hereafter, send maturing bonds and interest coupons for collection direct to the established office for payment of same, crediting the funds of the industrial commission, when payment is received by him? If this is done, from what appropriation should the expense of collection be paid, as this expense would have been incurred by the treasurer of state as custodian of state insurance funds and this department has no specific fund for that purpose? This expense consists of postage, registry and insurance and are now borne by the active depositories."

The letters which you enclose, show two instances, which I take it are illustrative of the situation, that on April 1st you deposited certain bonds and coupons aggregating $1,716.68 and were credited as if that amount had been deposited in cash, that on April 13th, $641.48 of said amount had not been paid so that the bank from the date of the deposit and up to April 13th was chargeable with interest on $641.48 not on deposit with it; the other instance shows a deposit of bonds and credit on April 1st, and no proceeds received by the bank up to April 13th, as no funds were available to the political subdivision owing the bonds with which to pay the same—so that the bank at least up to April 13th, was chargeable with interest on funds not on deposit with it.

I understand that all checks, drafts and other items collected by or sent to you calling for money due to the state insurance fund, are deposited in active depositories as cash items and bear interest from the date of deposit; in the same manner as checks, drafts and other items for moneys due the funds of the state.

The state insurance fund is accumulated "to provide an adequate fund for the compensation provided for in this act (Workmen's Compensation act), and to maintain a state insurance fund from year to year." It can be used for no other purpose.

Section 1465-56 G. C. provides that the treasurer of state shall be custodian of this fund and that all disbursements therefrom shall be paid by him upon proper voucher.

Other sections of the act provide for the payment to the treasurer of state of amounts due from employers to the state insurance fund.

Section 1465-57 provides for the deposit of this fund and reads as follows:

> "Sec. 1465-57. The treasurer of state is hereby authorized to deposit any portion of the state insurance fund not needed for immediate use, in the same manner and subject to all the provisions of the law with respect to the deposit of state funds by such treasurer; and all interest earned by such portion of the state insurance fund as may be deposited by the state treasurer in pursuance of authority herein given, shall be collected by him and placed to the credit of such fund."

The interest referred to in this section means the interest earned by the funds deposited and paid by the depository.

Section 1465-58 provides for investment by the liability board of awards (Industrial Commission) of the surplus or reserve of the state insurance fund in certain bonds, and for the duties of the treasurer of state in regard to the same. This section reads:

> "Sec. 1465-58. The state liability board of awards shall have the power to invest any of the surplus or reserve belonging to the state insurance fund in bonds of the United States, the state of Ohio, or of any county, city, village or school district of the state of Ohio, at current market prices for such bonds; provided that such purchase be authorized by a resolution adopted by the board and approved by the governor; and it shall be the duty of the boards or officers of the several taxing districts of the state in the issuance and sale of bonds of their respective taxing districts, to offer in writing to the state liability board of awards, prior to advertising the same for sale, all such issues as may not have been taken by the trustees of the sinking fund of the taxing district so issuing such bonds; and said board shall, within ten days after the receipt of such written offer either accept the same and purchase such bonds or any portion thereof at par and accrued interest, or reject such offer in writing. and all such bonds so purchased forthwith shall be placed in the hands of the treasurer of state, who is hereby designated as custodian thereof, and it shall be his duty to collect the interest thereon as the same becomes due and payable, and also the principal thereof, and to pay the same, when so collected, into the state insurance fund. The treasurer of state shall honor and pay all vouchers drawn on the state insurance fund for the payment of such bonds when signed by any two members of the board, upon delivery of said bonds to him when there is attached to such voucher a certified copy of such resolution of the board authorizing the purchase of such bonds; and the board may sell any of said bonds upon like resolution, and the proceeds thereof shall be paid by the purchaser to the treasurer of state upon delivery to him of said bonds by the treasurer."

This section makes it the duty of the treasurer of state to collect the interest on bonds owned by the state insurance fund when due and also the principal when due and to pay such collections into the state insurance fund. The method by which he is to make such collections is not prescribed, nor is any appropriation

made to cover the expense of such collections. In the absence of statutory direction it is the duty of the treasurer of state to make such collections in the most practicable and economical way. He cannot deposit the bonds or coupons as a part of the fund, but it is his duty to deposit the proceeds of such bonds or coupons in the fund. I know of no way in which a bank can be compelled to treat these bonds or coupons as cash and pay interest on the same when deposited by the treasurer of state for collection, and it is especially difficult to imagine any theory upon which a bank could be legitimately asked to pay interest on such items prior to the time the collection is actually made. Of course if the banks are willing to do this, there is every reason, in the interest of the insurance fund, to allow them to do so. But they cannot be compelled to do this, and, unless there is an express stipulation in their bids for deposits, they do not agree to pay interest on bonds and coupons deposited with them for collection, irrespective of whether the same are collected or not.

Answering your questions in their order—

1. The treasurer of state may establish a so-called "collection account" for collecting such coupons and bonds, if it is made certain that collections as soon as made, are turned into the state insurance fund. That is, he can deposit such bonds and coupons with a bank for collection, in the same manner as such items are collected through banks in the usual course of business. The duty of collecting is placed by law upon the treasurer of state, and it is also his duty to pay all such collections when made into the state insurance fund; how he shall make the collections is not prescribed—therefore he can adopt this method if he deems it best. I cannot determine whether he should adopt this method or not—that is for the treasurer of state to decide.

2. I have held, in answer to your first question, that such collection can be made through banks and this obviates answering the first part of your second question. Answering the second part of your second question—credit should be given a bank for principal and interest charged against it when the principal was not paid and consequently nothing was deposited with the bank.

3. The treasurer of state could, if he so desired, send matured bonds and interest coupons direct to the debtor, or to the established office for the payment of the same. It must be remembered, however, that it is the duty of the treasurer of state to collect such bonds and coupons and he is responsible therefor—if loss occurs on account of his negligence in the attempt to collect the same he would be responsible, and it is incumbent upon him to take every precaution in the manner of collection as well as the method adopted that would be taken by a prudent business man under similar circumstances.

The expenses incurred in such collections would have to be met out of the current appropriations for the use of the treasurer of state.

Yours very truly,

JOSEPH MCGHEE,

Attorney-General.

1196.

TEACHERS ENTITLED TO SALARY FOR TIME LOST ON ACCOUNT OF CONTAGIOUS DISEASE, WHEN.

Where a board of education employs a teacher for a fixed term at a definite salary and there is nothing in the contract or in the rules of the board on the question of absence on account of sickness, and such teacher is compelled to be

out of school with a contagious disease, and subsequently resumes teaching work for the board, the teacher is entitled to be paid for the time so necessarily lost on account of such sickness.

COLUMBUS, OHIO, May 8, 1918.

HON. S. L. GREGORY, *Prosecuting Attorney, Wilmington, Ohio.*

DEAR SIR:—In your request for my opinion you say:

> "One of the teachers in the New Vienna school of this county was out of school sick with a contagious disease for the period of 26 days. The school board requests me to write you for an opinion, and desires to know whether this teacher is entitled to pay for the time she was out of school, and, if not, whether or not the teachers who did her work during the time are entitled to receive her pay or the pay which would have gone to her."

Two questions are contained in your inquiry: First, are teachers who are compelled to miss school on account of being sick with a contagious disease entitled to pay for the time they are off? Second, can substitute teachers be paid from the wages which would have been paid to regular teachers had they taught?

A contract between a board of education and a teacher is one for personal service. It is a general rule of law that where a person contracts to perform personal services, he cannot recover upon said contract for services which he failed to perform. This rule settles your first question unless it is modified by a different rule in Ohio. The statutes in relation to the employment of teachers in Ohio may have some bearing upon said rule and they and the decisions applicable thereto will be next considered.

General Code section 7690, as amended in 107 O. L. 47, reads in part as follows:

> "Each board of education shall have the management and control of all of the public schools of whatever name or character in the district. * * * *Each board shall fix the salaries of all teachers, which may be increased, but not diminished, during the term for which the appointment is made. The teachers must be paid for all the time lost when the schools in which they are employed are closed owing to an epidemic or other public calamity.*

Section 4752 G. C. provides in part:

> "A majority of the members of a board of education shall constitute a quorum for the transaction of business. Upon a motion to adopt a resolution * * * *to employ a* superintendent or *teacher,* janitor or other employe * * * the clerk of the board shall publicly call the roll of the members composing the board and enter on the records the names of those voting 'aye' and the names of those voting 'no.' If a majority of all of the members of the board vote aye, the president shall declare the motion carried. * * * *Boards* of education of township schools *may provide for the payment of teachers monthly* if deemed advisable upon the presentation, to the clerk, of a certificate from the director of the subdistrict in which the teacher is employed, stating that the services have been rendered and that the salary is due; * * *"

Section 7691 G. C. reads:

"No person shall be appointed as a teacher for a term longer than four years, *nor for less than one year*, except to fill an unexpired term, the term to begin within four months of the date of the appointment. In making appointments teachers in the actual employ of the board shall be considered before new teachers are chosen in their stead."

Section 7705 G. C. provides in part:

"The board of education of each village and rural school district shall employ the teachers of the public schools of the district for a term not longer than three school years, to begin within four months of the date of the appointment. * * *"

Section 7595 G. C., as amended in 107 O. L., 623, provides in part:

"No person shall be employed to teach in any public school in Ohio for less than fifty dollars per month. * * *"

It may be claimed from the above quoted sections and parts of sections that the intent of the legislature was to make the contract between the board of education and the teacher "entire," as far as it was possible for it to do so. That is, when the legislature provided that no contract should be entered into for less than one year, except to fill an unexpired term, and that no contract should be entered into for the employment of teachers for a term longer than three years, and that no person shall be employed to teach for less than fifty dollars per month, and that the board might by resolution arrange for the payment of the salary of the teacher monthly, and that teachers must be paid for all time lost when the schools are closed in which they are employed owing to an epidemic or other public calamity, and that the salary of a teacher may be increased but not diminished during the *term* for which the appointment is made, it indicated as clearly as legislative intent could indicate that the contract was intended to be an entire one when entered into between the board and the teacher.

An entire contract is defined by Bouvier to be:

"That which is not divided; that which is a whole. When a contract is entire it must, in general, be fully performed before the party can claim the compensation which was to have been paid to him; for example, when a man hires to serve another for one year, he will not be entitled to leave him at any time before the end of the year and claim compensation for the time unless it be done by the consent or default of the party hiring."

And, likewise, when a contract has been entered into for a term certain, and nothing is said with reference to the time when payment thereunder shall be made, nothing is due until the contract is completed. The term "entire contract" is sometimes spoken of as a contract in "entirety" and where the said term "entirety" is hereinafter used, if used at all, it is meant to refer to the term "entire contract." That a contract for wages in Ohio may be an entire contract is clearly settled.

In the old and frequently cited case of Larkin v. Buck, 11 O. S. 561, B agreed to work for L on his farm "for six months certain, at $11.00 per month,"

no time being specified in the agreement when payment was to be made. B left the service of L at the expiration of the first month without cause, and against the wish of L, and brought suit to recover of L for the month's service: Held,

> "That the contract was *entire,* and that suit could not, under the circumstances, be maintained by L for such partial performance."

In that case it was contended that because payment was to be made at so much per month it was a contract from month to month instead of an entire one. The same contention, however, would be pertinent to our question because the term of hiring under the statute would be for one year and at not less than fifty dollars per month, and the payment of the salary, under the contract, may be made "by the month." Peck J., delivering the opinion of the court in Larkin v. Buck, supra, says on page 565:

> "The court below seems to have regarded such a contract as severable into months, or as six contracts, each for one month's service, in regular succession, and not as one entire contract for service for six months; * * * The court deduce this severable quality of the agreement from the words 'at the rate of $11 per month,' used in prescribing the compensation for the service; * * *
>
> The question, therefore, depends upon the effect which should be given to a stipulation of a specified rate per month, in an agreement to serve another *for a fixed period of time.* This is a mere question of construction as to the intention of the parties, and is to be gathered from the language employed, and the subject matter of the contract. The term of service is, itself, *entire.* It was 'for a period of six months certain' and also for a period of six months immediately thereafter, if the plaintiff did not go to Pennsylvania. It was for labor upon a farm, where the value of the service, and the amount of the compensation, vary with the season and the character of the work required, and a pro rata stipulation appended to an agreement, to render such service for six months or a year, could hardly have been intended as a precise and reasonable equivalent for any one month of that period, separate and disconnected from the other months; but would rather seem to have been stated, as an agreed average of the whole term, if fully served out. In other words, not as a stipulation to pay or receive that precise sum for any one month, but as a means of ascertaining the aggregate compensation for the whole term, expressed in a form simple, easily comprehended, and requiring no effort to compute or understand it."

After citing and commenting upon

> Lantry v. Parks, 8 Cow 63;
> Wright v. Turner, 1 Stewart (Ala.) 29;
> Decamp et al. v. Stevens, 4 Blackford 24;
> Badgley v. Heald, 4 Gillman (Ill.) 64;
> Mullen v. Gilkinson, 19 Verm. 503;
> Miller v. Goddard, 34 Maine 102;
> Davis v. Maxwell, 12 Metcalf 286.

the court on page 567 of said report says:

> "In all these cases, and in others which might be cited, the agreement was held to be *entire,* and *not severable,* even though there was a

rate per month specified in the contract for compensation for the labor to be performed. In the case last cited (12 Metcalf 286), Hubbard, J., in delivering the opinion, says: 'The plaintiff has argued that it was a contract for seven months, at twelve dollars per month, to be paid at the end of each month. But, however reasonable such a contract might be, it is not, we think, the contract proved. There is no time fixed for the payment, *and the law, therefore, fixes the time;* and that is, in a case like this, the period when the service is performed. It is one bargain; performance on one part, and payment on the other; and not part performance and full payment for the part performed. The rate per month is stated, as is common in such contracts, as fixing the rate of payment in case the contract should be given up by consent, or death *or casualty* should determine it before its expiration, without affecting the rights of the party. Such contracts for hire, for definite periods of time, are reasonable and convenient, are founded in practical wisdom, and have long received the sanction of the law.'"

It is said in LaBatt's Master and Servant, section 519, that the doctrine above mentioned is "unsatisfactory for the reason that in numerous instances it must operate unfairly either for the employer or the employee." But while admitting the truthfulness of the author's statement, our courts in Ohio have not accepted it because the doctrine set forth in Larkin v. Buck has been followed many times by our Ohio courts.

In Stein v. Steamboat Prairie Rose, 17 O. S. 471, the first syllabus reads:

"Where the captain of a steamboat hired a barge and executed to the owner thereof a contract in the name of the boat, 'for the sum of ten dollars per day, until delivered back in Cincinnati, in like good order as received,' but no time was mentioned when the barge should be returned, or the money paid, held: That the barge was to be returned in a reasonable time under the circumstances of the service for which it was hired; that the amount due for the hire of the barge would then be payable; *that the contract is entire and not divisible;* and that a recovery in an action brought thereon, after the expiration of such reasonable time, for the amount then due for the hire of the barge at the rate specified in the contract, is a bar to a subsequent action on the same contract for the hire of the barge, accruing after the period embraced in the judgment recovered in the former action."

In Goldsmith v. Hand, etc., 26 O. S. 101, a contractor entered into a written contract with a lot owner to build a house on his lot. Trouble arose in relation to payment therefor and Gilmore, J., delivering the opinion of the court in that case, referred to the case of Larkin v. Buck, as follows:

"In Larkin's case Judge Peck states the question to be: 'Whether a contract for service upon a farm for six months certain, at a specified rate per month, no time being expressed therein for its payment, confers upon him who renders the service the legal right to sue for a partial performance, when he voluntarily abandons such service, without justification or excuse, at the end of the first month.'

"The principle of law recognized by these cases is this: That the courts will not encourage the violation of agreements by relieving the defaulting party from the intentional and unjustifiable breach of his agree-

ment, and allowing him to recover pro tanto for the part performance of a contract that is entire; where the other contracting party is not in fault, and has waived a full performance by acceptance or otherwise."

In Koums v. Reiniger, 14 Cir. Dec., 116, the syllabus reads:

"Proceedings in aid of execution before justices of the peace, under section 6680-2 Rev. Stat. et seq., reach only to those debts that, whether due or not, are owing at the time of the service of process on the debtor of the judgment debtor and not to those subsequently arising and subsisting at the time of the hearing."

Summers, J., delivering the opinion of the court, on page 118 of said report says:

"It is well settled that the judgment debtor's right to recover the installment payable February 28 was conditioned upon his remaining until that time in the service of his employer. Larkin v. Buck, 11 Ohio St. 561."

Other cases might be cited showing that, without exception, whenever the said case of Larkin v. Buck has been mentioned by our courts, it is always with approval of the principle above quoted therefrom. The language used by Judge Peck is most applicable to our case.

Applying the same we have the following matters very similar to that case, viz., a contract for one year at a rate of service of not less than $50.00 per month, and it was for services to be performed as a teacher in the public schools. As the term proceeded, it was reasonable to presume that the services were of different value and would vary. The $50.00 per month was simply an agreed average per month for the whole term, not a stipulation to pay or receive said precise sum for any one month, but as a means of ascertaining the aggregate compensation for the whole term expressed in a form simple, easily comprehended and requiring no effort to compute or understand it. In other words, it was not within the contemplation of the board of education or the teacher, when the contract to teach was entered into, that the teacher should only teach for one month and that a new or another teacher might be employed for the next month, and so on during the entire school year, for the very necessities of the case demand that a teacher contract for a term certain and being the entire year, because the course of study which is arranged for the pupils and the manner in which the school work is planned demands that there shall be as little break as possible in the teaching force during said term. It takes some little time for teachers and pupils to be able to work together and with each other. If, at the end of each month of school, a new teacher was hired, it would be impossible for the school to progress along the outlined line of work in the same manner as with the same teacher remaining throughout the whole school year.

It is said in Labatt's Master and Servant, section 521:

"In order to entitle a servant to recover compensation under an entire contract, he must show that he had substantially performed his part of the agreement. *But he need not prove that his health was such, during the whole of his term, as to enable him to devote all of his time actively to his employer."*

Where a contract is not an entire one, it is conceded that a servant, who resumes work after having been temporarily disabled by sickness, is entitled to

recover only a proportionable part of the stipulated wages in respect to the services rendered by him before he fell sick. In other words, the master can demand some allowance on account of the absence of the servant because of sickness. But, it is held to be the rule in some of the older English text-books and decisions, *that if a servant falls sick, or is otherwise disabled by the act of God, the master must not abate any part of his wages during the time in which he was incapacitated.* The later authorities, however, show that this doctrine is frequently held to be subject to some limitations, as will be hereinafter noted.

In the case of Cuckson v. Stones (1859), 1 Ellis & Ellis, 248, plaintiff agreed to serve the defendant for the term of ten years in the capacity of a brewer. In consideration of the premises, and of the due, full and complete service of the plaintiff, the defendant agreed to pay him 20 pounds on execution of the agreement, to furnish him with a house and coals during the whole of the term of ten years, and to pay him the weekly sum of two pounds and ten shillings during the term. Some years after entering the service the plaintiff became ill and was confined to his room for about six months. His wages were paid for about three months and then suspended. After he was able to attend again personally to business, he was paid as before under the agreement. To an action by the plaintiff to recover wages for the period during which he had been ill, the defendant pleaded that the plaintiff was not, during any part of the time for which such wages were claimed, ready and willing or able to render, and did not, in fact, during any part of such time render, the agreed or any service. On showing cause against a rule to enter a verdict for the plaintiff on the plea, *it was held that the averment, that the plaintiff was not ready and willing or able, was not supported by his physical inability, for a time only, and not through his own default, to attend personally to the business;* and that, the contract not having been rescinded, the defendant was not entitled to suspend the weekly payments during that time; and the plaintiff was therefore entitled to the verdict. Lord Campbell, Ch. J., said:

> "The plaintiff could not be considered incompetent by illness of a temporary nature; but if he had been struck with disease so that he could never be expected to return to his work, we think the defendant ought to have dismissed him, and employed another brewer in his stead. Instead of being dismissed, he returned to the service of the defendant when his health was restored, and the defendant employed him and paid him as before. At the trial the defendant's counsel admitted that the contract was not rescinded. *The contract being in force, we think that here there was no suspension of the weekly payments by reason of the plaintiff's illness and inability to work.* It is allowed that under this contract, there could be no deduction from the weekly sum in respect of his having been disabled by illness from working for one day of the week; and while the contract remained in force, we see no difference between his being so disabled for a day, or a week, or a month."

In Warren v. Witringham, 18 Times L. R. (1902), the plaintiff entered the defendant's service for a period of five years at a yearly salary, the plaintiff undertaking to devote the whole of his time to defendant's business. During the period the plaintiff became temporarily ill and was in consequence prevented from performing his work. Held:

> "That the plaintiff was entitled to salary during the time of his illness."

Mr. Justice Bruce said on page 509 of said report, and in commenting upon the case of Cuckson v. Stones, supra, that:

> "He could not find that that decision had ever been questioned. In the present case the plaintiff was ready and willing to perform his work, and was only prevented by temporary illness. There must, therefore, be judgment for him for the amount claimed with costs."

In Dartmouth Ferry Commission v. Marks, 34 Can. S. C. 366 (1904), an action was brought by the plaintiff, a widow, as executrix of the last will and testament of her husband, the late John H. Marks, deceased. The said John H. Marks was, during his lifetime, in the employ of the Ferry Company, as captain of one of the Ferry steamers. He became ill after he had served as such captain for near two years, from which illness he died. Suit was brought for the amount of his wages from the time of his illness up to the time of his death. Davies, J., on page 374, uses the following language:

> "The law permits the latter (temporary sickness) on the ground of common humanity to be offered as an excuse for not discharging duty temporarily, and suffers the disabled party to recover wages for the time he is temporarily away from his work."

In Goode v. Downing, 5 Terr. L. Rep., 505 (1904), a bartender was employed by a hotel keeper at a monthly salary and he became temporarily incapacitated through illness on the 5th day of the month and returned to work on the 10th. He made claim for his wages from the 5th to the 10th but was refused. Suit was brought and it was held on appeal that he "was entitled to be paid the wages during the time he was temporarily ill."

In Hughes v. Toledo, Scale and Cash Register Co., 112 Mo. App. 91, it was laid down broadly, without any special reference to the length of the absence from work in the given instance (6 weeks out of a term of one year), that a person hired for a definite period is not entitled to recover wages for the time during which he is sick and unable to fulfill his contract. Commenting upon the above rule, Labatt, in his work on Master and Servant, Vol. 2, page 1499, note 4, says:

> "The general rule thus formulated was clearly opposed to the weight of authority. The case upon which the court relied (Patrick v. Putnam, 27 Vt. 759) was one in which plaintiff had left altogether after working thirty days out of the year for which he was hired, and was therefore not in point."

The same author says, on page 1502:

> "A servant whose contract covers a definite period is under no obligation to continue working after the expiration of the term in order to make up for time lost by reason of illness or conditions of weather which rendered it impracticable to perform his duties."

Many cases may be found which hold that where an employe loses time on account of temporary illness, he himself has a right to recoup any damages or deduct the sum required to remunerate himself for the amount necessary to employ a substitute. The principle upon which recovery is permitted in those cases

is upon *quantum meruit* or *assumpset*. But in our state, as noted above, it is settled that where there is a special contract, there can be no recovery in *quantum meruit*.

Upon what theory can failure to pay be justified for temporary illness, where the contract is entire. Sickness of an employe is regarded as an act of God which excuses performance, so that a recovery may be had for services actually performed. 25 Cyc. 1044, citing many cases. It was no fault of the teacher that he became ill with a contagious disease any more than it would be his fault if the schoolhouse would burn down or if the same should be destroyed by a storm or any other casualty which might exist and which is considered an act of God and excuse part performance. I believe the legislature intended that such teacher should be paid as long as the contract was not rescinded by the board. The teaching profession is one in which the employment begins and ends at definite periods and if a teacher is not to be paid during temporary illness—in other words, if temporary illness is excuse sufficient to warrant a board in breaking the contract as to payment—then it would be sufficient to warrant the breaking of the contract as to teaching. The latter proposition surely would not be claimed; that is, it would not be claimed that because a teacher was temporarily ill for a few days that such teacher should, on that account, be permitted to break the contract and compel the board to get another teacher for the remainder of the term. The contract being an entire one, the teacher is held the same as the board would be and therefore if the contract cannot be broken by the teacher, its terms as to payment cannot be broken by the board.

Another observation might be made right here. It is a matter of much comment, and has been expressed in judicial opinions, that the teaching profession is one of the poorest paid professions we have; that in the ordinary case, the amount that is paid a teacher for his services is needed by him for the support of himself and his family. The legislature no doubt realized this condition when it enacted that part of section 7691, which reads that teachers' salaries "may be increased *but not diminished* during the *term* for which the appointment is made." If the legislature had intended that the salary could be diminished by the amount of time lost on account of temporary illness, it could have said so just the same as what it did say.

In opinion No. 278, Annual Report of the Attorney-General, 1912, Vol. 1, page 226, one of my predecessors had under consideration this same question. The Bureau of Inspection and Supervision of Public Offices, in its request, said:

> "Mr. A. was paid for the full time he was out. * * * Was the payment illegal? * * *"

That official held on page 228:

> "As to teacher 'A,' if the board of education granted him full pay for his term, the effect of it in law was an increase in salary, *and no finding can be made against him.* While the action of the school board in allowing full compensation is to be carefully scrutinized, yet, when they act within reason and with evidence of good faith, it is the opinion of this department that no findings are to be made."

In Elliott on Contracts, Vol. 3, section 1903, the author says:

> "While sickness is generally an excuse for non-performance of such a personal contract, still the sickness must generally be such as could not

have been foreseen and provided against. Thus where a contract was made for the personal services of a man and his wife for the period of one year, at a specified sum, and four months thereafter the wife left the service in anticipation of her confinement, it was held that she could have provided against this contingency, which could have been foreseen, and that the employer was justified in discharging both without pay. * * * But the inability of an apprentice to work caused by sickness without his fault has been held no breach of his father's covenant in the indenture of apprenticeship that he "well and faithfully serve them and give and devote * * * his whole time and labor * * * to his master; *nor is it ground for abatement or diminution of wages, which, in consideration of such a covenant, the master agreed to pay him weekly during the whole term of apprenticeship.*"

The contract of a teacher to teach a school for a given term of several months at a given rate per month is an entire contract and if the teacher leaves before the term is finished, without sufficient cause, there can be no recovery for services up to the time of leaving.

Voorhees on Schools, section 64.

While the inquiry does not disclose the language of the contract of employment of the teacher in question, nor whether the board of education has adopted any rules regarding absence with or without leave, I assume that there is a total absence of any such rules and that the contract in question is the ordinary form, contracting for the teacher's services in conformity to law. Such a contract I think must be conceded to be an entire contract, for in the Ohio law the term of service could not be for less than one year nor more than three years.

Our statutes further prescribe that the salary of teachers shall not be less than fifty dollars per month, which may be made payable monthly, and further that such compensation shall not be decreased during the term of service.

While a teacher's contract is such as to make employment purely contractual, and while the parties are governed by the terms of their contract, their rights and duties being obtained and enforced under the law as other contracts, still it is plainly evident that the legislature has recognized the profession and services of teaching as of a somewhat special character, in that it has prescribed the minimum and maximum term, as well as the minimum salary, and provided that such salary, while it might be increased, could not be diminished during term of the service.

The Ohio constitution, in the bill of rights, among other things lays down the proposition that knowledge being essential to good government, a duty devolves upon the legislature to pass suitable laws to encourage schools and the means of instruction. The legislature has passed such laws and has evidenced a recognition of the fact that education is a state and not a municipal function.

School teachers have been favored, possibly, but there is a reason for such concession. The members of this profession as a class are compelled to undergo a long and thorough course of preliminary training. They are obliged to meet severe qualifying tests and to pass the prescribed examinations, before a certificate to teach will be issued.

It can be readily seen that it is of utmost importance to the state that such public servants, once entering upon such vocation, should remain and make that service to the state their life's work. Common knowledge tells us that with added experience comes higher efficiency, and the continued service of a teacher makes

her or him more valuable to the welfare and training of the pupil, as well as to the state itself.

This, then, is the reason that inducements are held out to them; that they are granted in a measure a permanency of tenure; that teachers' pension laws are enacted and that they receive protection otherwise, under special laws passed for the benefit of the teaching profession.

Coming then to a specific answer to the question, and confining my opinion to this case or cases closely allied, it is my view that this entire contract should receive a liberal construction and that this teacher, who was out of school temporarily, by reason of contagious disease, should receive pay for the time so absent.

Inasmuch as it is my opinion that the teacher is entitled to pay for the time lost by reason of sickness, there is no necessity of my answering your second question as to whether or not the substitute teacher is entitled to receive the pay which would have gone to the regular teacher. Assuming that the board has a contingent fund out of which to provide for emergencies, the compensation for such emergency employe should be taken from that fund, in case there is not sufficient money in the tuition fund to pay same.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1197.

APPROVAL OF ARTICLES OF INCORPORATION OF THE BOND FIRE INSURANCE ASSOCIATION.

COLUMBUS, OHIO, May 8, 1918.

HON. WILLIAM D. FULTON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have carefully examined the corrected articles of incorporation of the Bond Fire Insurance Association, and finding the same to be in accord with the requirements of sections 9593 et seq. of the General Code relating to the incorporation of associations of this kind, and that said articles are not inconsistentent with the constitution and laws of the state of Ohio or of the United States, the same are hereby approved.

I am returning to you check for $25.00 submitted with your letter.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1198.

APPROVAL OF LEASES OF CANAL LANDS TO THE B. F. GOODRICH CO., AKRON; THE INDEPENDENT CO., MASSILLON; F. W. WORK, AKRON; JOHN E. WARD, NEWCOMERSTOWN; DAVID OLDHAM, SIDNEY; F. W. WAGNER, COLDWATER.

COLUMBUS, OHIO, May 8, 1918.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of May 2, enclosing the following

leases of canal lands (in triplicate), and in which you ask my approval of the same:

	Valuation.
To The B. F. Goodrich Co., lease for pole line purposes, over the towing path embankment of the Ohio canal, for a distance of about 3.6 miles, south of Akron	$5,000.00
To The Independent Company, of Massillon, Ohio, lease for 34 feet of the berme bank of the Ohio canal in the city of Massillon	400.00
To F. W. Work, of Akron, Ohio, lease for boat-house and dock landing purposes, at Long Lake in Summit county, Ohio	300.00
To John E. Wood, Newcomerstown, Ohio, for a small portion of the outer slope of the Ohio canal in the village of Newcomerstown, Ohio	200.00
To David Oldham, of Sidney, Ohio, a small portion of the outer slope of the towing path embankment of the Sidney Feeder, in Sidney, Ohio	200.00
To F. W. Wagner of Coldwater, Ohio, lease of two acres of land adjacent to Lake St. Marys, in Mercer county, Ohio	166.66

I have carefully examined these various leases, find them correct in form and legal, and am therefore endorsing my approval thereon and forwarding them to the governor of Ohio for his approval.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1199.

HOW DISTANCE MEASURED FROM PUPIL'S RESIDENCE TO SCHOOL HOUSE—RIGHT OF WAY—WHERE SAME MAY BE ACQUIRED.

Distance from the residence of pupils to the school house to which they are assigned may be measured along public highways, rights of way, lanes, paths or walks, if they are at all times practicable, that is, serviceable, and accessible to such pupils.

Rights of way can only be acquired from public highways to school house grounds and not from school house grounds across private property to the residence of the various pupils.

COLUMBUS, OHIO, May 9, 1918.

HON. E. E. LINDSAY, *Prosecuting Attorney, New Philadelphia, Ohio.*

DEAR SIR:—Your request for my opinion reads as follows:

"On the twenty-fifth day of May, 1916, you rendered an opinion found in volume 1, page 1622, of the Attorney-General's Reports, in reference to the right of a board of education to acquire rights of way through private property for the use of pupils who are required to be transported, and on the nineteenth day of March, 1917, in opinion No. 123, you rendered me an opinion upon practically the same subject-matter.

These opinions were in reference to section 7731 of the General Code and this section being amended in volume 107, Ohio Laws, at page 625, I

desire now to ask you what effect this amendment has upon the question involved in those two opinions, especially when you construe this section with section 7620 of the General Code."

Upon my request for additional information you say:

"There are many cases in the several school districts of our county where the pupils must be transported to school if the distance from the residence to the school must be measured by the public roads, while if the boards of education have the power to acquire convenient rights of way over private property, then the pupils will be within the two mile limit and the boards of education will thus save considerable expense in transporting such pupils."

The question propounded in opinion No. 1622, found in Opinions of the Attorney-General for 1916, Vol. 1, page 930, reads as follows:

"May a board of education of a rural school district expend school funds in acquiring a 'right of way' through private property for school children, thus relieving the district of transportation charges for pupils attending the public schools of such district?"

The conclusion reached by my predecessor in said opinion is found in the syllabus, as follows:

"The board of education of a rural school district may not expend the funds of the district in acquiring a 'right of way' through private property for the use of pupils residing in the district and living more than two miles from the nearest school in said district, for the purpose of relieving itself of the duty of providing transportation for such pupils under provision of section 7731 G. C., 104 O. L. 140."

Your request upon which my opinion No. 123 was rendered to you on March 19, 1917, and found in Opinions of the Attorney-General for 1917, Vol. 1, page 295, reads as follows:

"Section 7731 of the General Code and the opinions of your office relating thereto are to the effect that boards of education must provide transportation for pupils who reside more than two miles from the school house to which they are assigned, measured along the most direct public highway.

We have several instances in our county where, by reason thereof, boards of education are required to transport pupils, yet such pupils live much less than two miles from such schools by crossing private premises.

Has a board of education the power to obtain a private right of way across private premises for such pupils where it can be done at a cost less than the costs of transportation, and thus avoid the costs of transportation or save money by so doing?"

The conclusion reached by me, in answer to the above request, and as found in said opinion No. 123, is "that the distance being measured by the most direct *public highway* route, the board of education has no power to deprive pupils of the means of conveyance if a private way could be obtained across private premises."

I am satisfied that the conclusion reached in both of said opinions above mentioned is correct, for at the time said opinions were rendered the statute governing the same, viz., General Code section 7731, as enacted in 104 O. L. 133, read in part as follows:

> "In all rural and village school districts where pupils live more than two miles from the nearest school, the board of education shall provide transportation for such pupils to and from such schools. Transportation for pupils living less than two miles from the school house, *by the most direct public highway,* shall be optional with the board of education. * * *"

The fact that it was necessary to measure the distance "by the most direct public highway" made it impossible, under the language quoted from said section, for the board of education to consider any route of travel for the pupils to the schools of a district other than by a public highway route, and thus relieve itself of transportation expenses. Hence the conclusion reached in both of said opinions seems to me to have been irresistible.

But, on March 31, 1917, and after my opinion to you (No. 123), the legislature amended section 7731 to read in part as follows:

> "In all rural and village school districts where pupils live more than two miles from the nearest school, the board of education shall provide transportation for such pupils to and from such school. The transportation for pupils living less than two miles from the school house, *by the nearest practicable route for travel accessible to such pupils,* shall be optional with the board of education."

There were other parts of said section amended, but nothing, I think, which would affect the matter under consideration.

It will thus be noted that the material change made by the last legislature, and which would affect your inquiry, is the substitution of the words "by the nearest practicable route for travel accessible to such pupils" instead of "by the most direct public highway" as it existed theretofore. In the construction of said statute both this department and the court have given consideration to the fact that it was necessary to make measurements in calculating the distance a pupil lived from school by the "public highway" route. Now that those words are changed and that the measurements may now be made by the nearest practicable route for travel accessible to such pupils, can it be said that it was the intention of the legislature to permit such route to be measured by a right of way, path or lane through private property instead of along a public highway? Ordinarily, when we speak of the word "travel," we mean public travel. To travel means to go from place to place. In this instance the route for travel would be the route over which the pupils pass from their several homes to the school house and return. If there were more than one route, the distance would be measured by the "nearest practicable" one. That is, it must not only be the nearest route, say "as the crow flies," but it must be a route practicable for travel and accessible to such pupils for travel to and from the school. It may be either a route that is open to the public for travel or a practicable route of travel accessible only to such pupils.

There is a question, however, whether or not a board of education, in determining the distance which pupils live from the public schools, can, under any circumstances, compute such distance over routes other than public highway routes. Some light in relation thereto may be gathered by a consideration of section 7735

G. C. and the decisions in relation thereto, for the question of what shall be considered the "nearest" school has been considered by said decisions. Said section provides that:

> "When pupils live more than one and one-half miles from the schools to which they are assigned in the district where they reside, they may attend a nearer school in the same district, or, if there be none *nearer* therein, then the *nearest* school in another school district in all grades below the high school."

In Board of Education v. Board of Education, 23 O. D. 698, the plaintiff sought to recover from the defendant compensation by way of tuition for three pupils who resided in the district of the defendant and who, for a series of months stated in the petition, attended the school maintained by the plaintiff. The agreed statement of facts disclosed that the distance from the school house to the home of the children "as the crow flies" is less than one and one-half miles, but that the distance from the school house to said home, measured along the most direct public highway, path or lane, is more than one and one-half miles, and the question was, which route should be taken in calculating the distance from the nearest school to the residence of said pupil. Woodmansee, J., on page 699, says:

> "It would not be proper to measure the distance on a straight line 'as the crow flies,' across the fields, as the children, without the consent of the owners of the fields, would thereby become trespassers. Besides, under the provisions of the statutes of Ohio, children who reside in school districts in the country, living more than one-half mile (now one and one-half miles) from the school, and residing at not a greater distance than one-half mile from a public highway (now one-half mile from the entrance to the premises) are entitled to be carried to school in a public conveyance, at the expense of the school fund in the district. Necessarily they would be carried thus along the highway. And, whether the children go by public or private conveyance, or whether they walk to and from school, they are expected to go by the most direct and convenient highway, and the length of that course determines the distance from home to school."

It is thus noted that the reasoning of the court turns upon the question of transportation and that because in that instance the child would be entitled to transportation along "the most direct *public highway*," the court holds that the distance must be measured by the same route in determining the nearest school. If section 7731 had read at the time of Judge Woodmansee's decision as it now reads, viz., by the nearest practicable route for travel accessible to such pupils, in other words, if the said section instead of containing the words "by the most direct public highway" had contained the words "the nearest practicable route for travel accessible to the pupils," it is very doubtful if the conclusion would have been reached that the measurement should have been made along public highways, because the court also says that said measurement shall include any distance which the pupils are compelled to travel by path or lane. So that, if a path or lane would be a practicable route of travel from the home of said pupil to the school and the section on transportation then had read as it now reads, I am quite sure that whatever path, lane or private right of way the pupil could have used to make the route the nearest practicable route, would have been the course of measurement in ascertaining the distance to the nearest school. Said case is also reported in 34 O. C. C. Rep. 213, wherein the court says:

"In determining the distance a pupil of a public school must travel under General Code section 7735, *the measurement should be made from the door of the school house along the center of the most direct public highway to the nearest point of the curtilage of the pupil's residence, including in said measurement the distances from the school house door and said point in the curtilage respectively, BY THE MOST DIRECT WALK, LANE or PATH to the center of the highway.*"

Here the court makes it plain that whatever path, lane or walk is used by the child must be taken into consideration in figuring the distance from its residence to school.

The same view was taken in the case of Board of Education v. Board of Education, 15 O. C. C. (n. s.) 521, later affirmed in 88 O. S., the syllabus of which case reads:

"In assigning pupils to the public school nearest to their residence, *the distance should be measured by the most direct path* from the school house door to the middle of the highway and then to said residence."

If, then, distance in tuition cases, or under section 7735, is to be measured by the most direct private right of way, lane, walk or path, it would also seem to follow what distance under section 7731 should be measured in the same manner if such private right of way, path, lane or walk is the nearest practicable route for travel accessible to such pupils.

Reasoning from the above, then, I must conclude that distance from the residence of pupils to the school house may be measured not only along public highways, but along rights of way, lanes, paths or walks, provided such rights of way, lanes, paths or walks are practicable for travel and are accessible for the use of such pupils. The word "practicable" is defined as "that which is used for an intended purpose; *serviceable;* as, a practicable route." It cannot be said that a path or walk which would lead through dangerous woods or across flooded fields would be practicable. It must be such a route which can be used at all times by the pupils in as serviceable a manner as they could use a public highway.

Another and more difficult question probably now arises and that is, has a board of education a right to provide a right of way across private property and thus establish a route for pupils to and from school. Boards of education are permitted to acquire, hold, possess and dispose of real and personal property (section 4749 G. C.) and under certain circumstances are permitted to appropriate private property for the use of the school. The section which permits such appropriation is section 7624 G. C., which reads:

"When it is necessary to procure or enlarge a school site, or to purchase real estate to be used for agricultural purposes, athletic field or play ground for children or for the purpose of providing an outlet to dispose of sewage from a school building or school grounds, and the board of education and the owner of the property needed for such purposes, are unable to agree upon the sale and purchase thereof, the board shall make an accurate plat and description of the parcel of land which it desires for such purposes, and file them with the probate judge, or court of insolvency of the proper county. Thereupon the same proceedings of appropriations shall be had which are provided for the appropriation of private property by municipal corporations."

It is clear that under the provisions of said section the board could not establish a right of way across private property and appropriate the same for that purpose. But, suppose a right of way can be secured by the board without resorting to the appropriation thereof, that is, suppose the board could enter into a contract with the owner to permit a right of way to be established across his property, from the residence of the pupil to the school house, keeping always in mind that the same must be made practicable and that it must be accessible to the pupils.

Section 7620 provides that a board of education has the right, among other things, to purchase or lease rights of way to school houses and to make all other necessary provisions for the schools under its control. Said section reads:

> "The board of education of a district may build, enlarge, repair and furnish the necessary school houses, purchase or lease sites therefor, or rights of way thereto, or purchase or lease real estate to be used as play grounds for children, or rent suitable school rooms, provide the necessary apparatus and make all other necessary provisions for the schools under its control. It, also, shall provide fuel for schools, build and keep in good repair fences inclosing such school houses, when deemed desirable, plant shade and ornamental trees on the school grounds, and make all other provisions necessary for the convenience and prosperity of the schools within the subdistricts."

The question as to whether or not the above provisions are sufficient to permit a board of education to secure a right of way across private property has been considered by this department several times. For instance, in opinion No. 777, Annual Reports of the Attorney-General, 1914, Vol. 1, page 247, the question was as to whether or not the board of education could construct a bridge on a private road which led to a school house, and after finding that such bridge could not be constructed by the county commissioners and township trustees, it was held that the power conferred upon a board of education by section 7620 G. C. is a very broad one and specifically includes that to "furnish * * * rights of way" to school houses and to make "all necessary provisions for the schools under its control," and this authority is further supplemented with "to make all other provisions necessary for the convenience and prosperity of the schools within the subdistricts." And, in Opinion of the Attorney-General found in the Annual Reports of the Attorney-General for 1907, page 249, it was held that the board of education may construct a foot bridge for the convenience of pupils under authority of section 3987 R. S., which is now section 7620 G. C.

In both the aforesaid instances the "rights of way" led "to the school house;" that is, from the public highway to the school house grounds. The statute does not say that the board of education may purchase rights of way generally, but that it may purchase or lease "rights of way thereto," meaning to the school house. To illustrate, if a school house is located on a public highway, I do not understand by the language of said section that the board could provide a right of way to said school house other than along the public highway, but if a school house is located off a public highway, or if the public highway upon which a school house is located should be abandoned, then and in that event the board of education could purchase or lease a right of way thereto.

Answering your several questions, then, I advise you that:

(1.) Distance from the residence of pupils to the school house to which they are assigned may be measured along public highways, rights of way, lanes, paths or walks, if they are at all times practicable, that is, serviceable, and accessible to such pupils.

(2.) Rights of way can only be acquired from public highways to school house grounds and not from school house grounds across private property to the residences of the various pupils.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1200.

ROAD IMPROVEMENT—WHEN SURETY COMPLETES THE WORK FOR PRINCIPAL IT IS ENTITLED TO THE RIGHTS AND PRIVILEGES OF PRINCIPAL IN THE PAYMENTS BASED UPON ESTIMATES MADE BY HIGHWAY COMMISSIONER FROM TIME TO TIME.

When the state highway commissioner decides to take over a contract under section 1209 *G. C.* (107 *O. L.* 126) *and the surety of the contractor elects to complete the work for the principal contractor and proceeds so to do, the surety is entitled to payments based on estimates made from time to time by the state highway commissioner, just as the principal would have been entitled to the same had he completed the work in accordance with the terms of his contract.*

COLUMBUS, OHIO, May 11, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your communication of April 23, 1918, in which you request my opinion on the following question:

> "When a contract for any reason is turned over to the bondsmen for completion, to whom shall estimates be paid which may become due from time to time as the work progresses?"

The answer to the question suggested by you is to be found in the consideration of sections 1208, 1209 and 1212 G. C. (107 O. L. 126-127), together with the application of one equitable principle. While the answer would be the same, whether based upon these sections as they existed in the Cass highway act or as found in the White-Mulcahy law, I shall quote from the sections as they appear in the White-Mulcahy law.

Section 1208 provides in part as follows:

> "* * * Before entering into a contract the commissioner shall require a bond with sufficient sureties, conditioned that the contractor will perform the work upon the terms proposed within the time prescribed, and in accordance with the plans and specifications thereof, * * *."

This provision of course would be embodied in the contract of suretyship signed by the surety company.

Section 1212 G. C. provides in part as follows:

> "* * * The payment of the cost of the construction of such improvement shall be made as the work progresses upon estimates made by the

engineer in charge of such improvement, and upon approval of the state highway commissioner. Except as hereinafter provided no payment by the state, county or township, on account of a contract for any improvement under this chapter shall before the completion of said contract exceed eighty-five per cent of the value of the work performed to the date of such payment, and except as hereinafter provided, fifteen per cent of the value of the work performed shall be held until the final completion of the contract in accordance with the plans and specifications. In addition to the above payments on account of work performed, the state highway commissioner may also, if he deems it proper, allow and pay to a contractor a sum not exceeding eighty-five per cent of the value of material delivered on the site of the work but not yet incorporated therein, provided such material has been inspected and found to meet the specifications. * * *"

Under this section it is the duty of the state highway commissioner to pay the contractor upon estimates allowed by him from time to time as the work progresses, not to exceed eighty-five per cent of the value of the work done at any particular time, and also, if he deems it best, eighty-five per cent of the value of the material delivered upon the site of the work but not yet incorporated therein.

Section 1209 G. C. reads in part as follows:

"If, in the opinion of the state highway commissioner, the contractor has not commenced his work within a reasonable time, or does not carry the same forward with reasonable progress, or is improperly performing his work, or has abandoned, or fails or refuses to complete a contract entered into under the provisions of this chapter, the state highway commissioner shall have full power and authority to enter upon and complete said improvement either by contract, force account or in such manner as he may deem for the best interest of the public, paying the full costs and expense thereof from the balance of the contract price unpaid to said contractor, and in case there is not sufficient balance to pay for said work, the state highway commissioner shall require the contractor or the surety on his bond to pay the cost of completing said work. * * *"

We will consider the steps which may be taken in an improvement. First, the contractor of course proceeds with the improvement and is paid under section 1212 G. C.; but under section 1209, if the contractor does not commence his work within a reasonable time or does not carry the same forward with reasonable progress, or is improperly performing his work, or has abandoned it or failed or refuses to complete a contract, the state highway commissioner has authority to enter upon and complete said improvement.

If the state highway commissioner should decide that any of the conditions set out in section 1209 G. C. obtain and it is his opinion he should proceed with the completion of the contract as provided in said section, then in fair treatment to the contractor he should so notify him of his determination to proceed to complete the work, and state his reasons for so doing.

It is also my view that before entering upon said work to complete it under section 1209, the state highway commissioner should also give notice to the person or persons or company obligated as surety upon the bond of the contractor for the faithful performance of the contract in accordance with the plans and specifications, and by so doing give the surety the right to complete the contract, in accordance with the plans and specifications, if it should so desire to do. If the surety on the bond proceeds with the completion of the contract according to the plans and specifi-

cations, the state highway commissioner would not proceed to complete it under section 1209 G. C.

If the surety company simply steps into the place, as it were, of the original contractor, and completes the work according to the plans and specifications, to whom shall the estimates, that are made from time to time and approved by the state highway commissioner, be paid? Shall they be paid to the original contractor with whom the state has contracted, or to the surety company which takes the place of the contractor and is completing the work under the terms of the contract?

Without discussing the matter at any great length, it is my opinion that the surety company would be subrogated to the rights of the original contractor in the matter of the estimates allowed by the state highway commissioner from time to time, and that these estimates should be paid to the surety company in the same manner they would have been paid to the original contractor had he proceeded to complete the contract according to its terms and specifications; that is, from time to time estimates would be made of the work done by the surety company and eighty-five per cent of the work so done at any time would be payable to the surety company. If the surety company performs the work for the principal on the bond, it is entitled to the rights and privileges of the principal in the payments based upon estimates made by the state highway commissioner from time to time.

In arriving at this conclusion I am considering only those cases in which the surety on the bond steps into the place of the original contractor who is principal on the bond, and completes the work as the agent of the principal on the bond, and thus renders it unnecessary for the state highway commissioner to complete it under section 1209 G. C.

To be sure, if the state highway commissioner should complete the work in accordance with section 1209 G. C. and in so doing should enter into a contract with the surety on the bond, as he might do under said section, then the rights of the surety would be entirely controlled by the terms of the new contract so entered into and section 1212 G. C. would not apply as to payments.

I am not passing upon the rights of the contractor and the surety in and to the fifteen per cent of the contract price which must be retained by the state highway commissioner until the final completion of the contract, but simply upon the rights of these parties in the payments based upon estimates made from time to time during the progress of the work. I am not considering whether the surety would be entitled to all or a part of the fifteen per cent of the contract price so retained by the state highway commissioner, inasmuch as your question does not cover same.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1201.

APPROVAL OF BOND ISSUE OF SOUTH NEWBURGH VILLAGE SCHOOL DISTRICT—$40,000.00.

COLUMBUS, OHIO, May 14, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of South Newburgh village school district, in the sum of $40,000.00, to erect and equip a new school building in said school district.

I have carefully examined the corrected transcript of the proceedings of the board of education of South Newburgh village school district relating to the above bond issue, and find said proceedings to be in conformity to the provisions of the General Code of Ohio relative to bond issues of this kind.

I am therefore of the opinion that properly prepared bonds covering the above issue will, when executed by the proper officers and delivered, constitute valid and subsisting obligations of said school district, to be paid in accordance with the terms thereof.

The bond form submitted with the transcript is not satisfactory and I am accordingly retaining the transcript until receipt of proper bond form.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1202.

APROVAL OF BOND ISSUE OF BARBERTON CITY—$8,000.00.

COLUMBUS, OHIO, May 14, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of the city of Barberton, Ohio, in the sum of $8,000.00, for the purpose of purchasing automobile fire apparatus and equipment.

I have carefully examined the corrected transcript of the proceedings of the city council and other officers of the city of Barberton, Ohio, relating to the above bond issue, and find said proceedings to be in conformity to the provisions of the General Code of Ohio relative to bond issues of this kind.

I am therefore of the opinion that bonds properly prepared according to the bond form submitted will, when signed by the proper officers and delivered, constitute valid and subsisting obligations of the city of Barberton, Ohio, to be paid according to the terms thereof.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1203.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN BUTLER, ATHENS, FAIRFIELD AND HIGHLAND COUNTIES.

COLUMBUS, OHIO, May 15, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of May 8, 1918, enclosing, for my approval, final resolutions for the following improvements:

Oxford-Millville road, I. C. H. No. 182, Sec. "C-1," Butler county. (Types "A," "B" and "C.")

Logan-Athens road, I. C. H. No. 155, Sec. "L," Athens county.
Eaton-Middleton road, I. C. H. No. 184, Sec. "A-1," Butler county.
Lancaster-New Lexington road, I. C. H. No. 357, Sec. "G-1", Fairfield county.
Hillsboro-Piketon road, I. C. H. No. 261, Sec. "K," Highland county.

I have carefully examined said resolutions, find the same correct in form and legal, and am therefore returning them to you with my approval endorsed thereon, in accordance with section 1218 G. C.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

1204.

REFERENDUM ON ORDINANCE—WHEN ELECTION MUST BE CALLED WHEN A TEN PER CENT PETITION AND ALSO A TWENTY PER CENT PETITION HAVE BEEN FILED WITH BOARD OF EDUCATION.

Where a petition signed by ten per cent of the electors of a municipal corporation, asking for referendum on an ordinance has been filed and duly certified to the board of elections under the provisions of section 4227-2 G. C., and where there has also been filed a petition of twenty per cent of the electors under the provisions of section 4227-5 G. C., asking for referendum upon the same ordinance as asked under the petition first herein mentioned, it is the duty of the board of elections to call an election under the twenty per cent petition as provided for in section 4227-5 G. C.

COLUMBUS, OHIO, May 15, 1918.

HON. LEWIS F. HALE, *Prosecuting Attorney, Bellefontaine, Ohio.*

DEAR SIR:—You have asked for an official ruling upon the following state of facts:

"Lakeview village council passed an ordinance fixing the time for closing the saloon. Within the time fixed by the statute a petition was circulated and filed with the clerk of the village, containing the names of more than ten per cent of the voters, asking for a referendum vote on said ordinance at the time of the regular election. This petition was kept ten days by the clerk and then certified to the election board of Logan county, Ohio.

Another petition was circulated and filed with the village clerk subsequent to the filing of the petition above referred to, and containing the names of more than twenty per cent of the electors, asking for a referendum vote upon said ordinance at a special election.

The statute specifies the fifth Tuesday after the filing of the petition for such special election. Ten days have not yet expired since the filing of this second petition with the clerk, consequently it has not been filed with the election board.

If this second petition is certified to the election board under which petition shall the election board prepare for an election?"

The two referendum petitions in question were filed by virtue of the provisions of sections 4227-2 et seq. G. C. Section 4227-2 provides:

> "Any ordinance * * * shall be subject to the referendum except as hereinafter provided. No ordinance * * * shall go into effect until thirty days after it shall have been * * * passed by the council in a village, except as hereinafter provided.
>
> When a petition signed by ten per cent of the electors of any municipal corporation shall have been filed with the * * * village clerk * * * within thirty days after any ordinance * * * shall have been * * * passed by the council of a village, ordering that such ordinance * * * be submitted to the electors * * * such * * * village clerk shall, after ten days, certify the petition to the board of deputy supervisors of elections * * * and said board shall cause to be submitted to the electors * * * such ordinance, * * * at the next succeeding regular or general election, in any year, occurring subsequent to forty days after the filing of such peition. * * *"

One of the referendum petitions first referred to in your statement of facts was filed under the provisions of the above quoted section and upon its certificate to the board of deputy supervisors of elections it would be the duty of the election board to submit the question of approval or rejection of such ordinance to the electors at the next succeeding regular or general election occurring subsequent to forty days after the filing of the petition.

When the act providing for a referendum in municipal corporations was first enacted by the legislature, as found in 102 O. L. 521, section 2 of the act (section 4227-2 G. C.), provided for a single referendum when a petition signed by fifteen per cent of the electors petition for same, and the only time for election provided was at the "next regular election," provided that a thirty-day notice was given.

In 103 O. L. 211, certain sections pertaining to the initiative and referendum in municipal corporations were amended and in that act the legislature provided that a referendum petition might be filed with ten per cent of the electors thereon and that the election on the question should be submitted at the next succeeding regular or general election occurring subsequent to thirty days after the filing of the petition. This act likewise only provided for one referendum on an ordinance, to wit, a petition signed by at least ten per cent of the electors of the municipality.

In 104 O. L. 238 et seq., certain sections pertaining to initiative and referendum in municipalities were amended, and while section 4227-2 continued to provide for a referendum on petition signed by ten per cent of the electors, and for a submission of the question of the rejection or approval of the ordinance at the next succeeding regular or general election occurring subsequent to forty days after the filing of a petition, a revision was made in newly amended section 4227-5 for another and different referendum upon a petition of twenty per cent of the electors.

The reason for such legislative action is readily apparent. Under the provisions of section 4227-2, the election upon the referendum was postponed until the next succeeding regular or general election after the filing of the petition. If the electors only to the extent of ten per cent were interested in this matter, the legislative idea was that it was not of such importance as to call for the submission at an election prior to the next regular or general election. But as frequently the matters sought to be referended were of such importance as to require a sooner settlement, the legislature provided that whenever twenty per cent of the electors petitioned therefor, an ordinance might be submitted at a special election.

So under the law as it now stands an ordinance can be submitted to referendum in either of the two ways: A ten per cent petition can be filed and the question voted on at the next regular or general election occurring subsequent to forty days after the filing of the petition; likewise a twenty per cent petition can be filed and under the law the question of the rejection or approval of the ordinance must be submitted at a special election.

The mere fact that the ten per cent petition is filed would not militate against the right to file the twenty per cent petition. Both provisions of the law are available to the electors of the municipality. When, as in the instant case, a ten per cent petition has been filed and subsequently a twenty per cent petition is filed, then, if all the requisites of the law are fully complied with, the clerk after ten days should certify the same to the board of deputy state supervisors of elections and it becomes the duty of such board to submit the question at a special election to be held on the fifth Tuesday after the petition is filed, provided no regular or general election will occur within ninety days after the petition is filed.

So answering your question specifically, it is my opinion that the election in question should be held upon the second petition; that is, the twenty per cent petition, provided, of course, that such petition is regular under the law.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1205.

APPLICATION FOR DENTAL EXAMINATION MAY NOT BE FILED BY PERSON UNDER TWENTY-ONE YEARS OF AGE.

No person less than twenty-one years of age is permitted to file an application for an examination to practice dentistry in the state of Ohio.

COLUMBUS, OHIO, May 15, 1918.

HON. R. H. VOLLMAYER, *Secretary State Dental Board, Toledo, Ohio.*

DEAR SIR:—Your request for my opinion reads:

> "I am enclosing a letter I received this morning from Dr. H. M. Semans. I have had two other letters from other schools asking the same question. Our examination takes place the week of the 24th of June, but our preliminary practical examinations start the 20th of this month."

The letter from Dr. Semans, to which you refer, reads as follows:

> "We have four students in the senior class who will complete in a very satisfactory manner the requirements exacted of them, but will probably not be granted a diploma owing to the fact that they will not yet be of age. One of them, Mr. S., becomes of age on June 29. * * * Can your state board grant to him the practical examination in May and the written examination the end of June, provided we verify his graduation? This leaves three who will not be of age until after your July session is over. One of these, Mr. K., becomes of age on October 26, and his situation in relation to the October board meeting is the same

as Mr. S.'s is for the May board. These three men have taken the course recognizing that diplomas would not be given to them until they became of age. * * *"

The question in short is, can the state dental board file an application and grant examination under same to a person who is under twenty-one years of age and who is not a graduate of a state dental college or at least received his diploma therefrom?

Section 1321 G. C. provides:

> "Each person who desires to practice dentistry within this state shall file with the secretary of the state dental board a written application for a license and furnish satisfactory proof *that he is at least twenty-one years of age,* of good moral character, and present evidence satisfactory to the board *that he is a graduate of a reputable dental college,* as defined by the board. Such application must be upon the form prescribed by the board and verified by oath."

That is to say, before a person is permitted to take an examination before the state dental board for a certificate or license to practice dentistry in this state, such person must file with the state dental board an application therefor. In said application he must state that he is *at least* twenty-one years of age and of good moral character, and he must also present evidence satisfactory to the board that he is a *graduate* of a reputable dental college, as such colleges are defined by the board. There is nothing ambiguous about said language. To give it a meaning other than what it says would simply be usurping the authority of the legislature, for it is not intended in the use of said language that the person should be almost twenty-one years of age, or nearly twenty-one years of age, or in his twenty-first year, but that he shall be *at least* twenty-one years of age, and he must not only declare in the application that he is twenty-one years of age, but he must *furnish satisfactory proof* of the same to the said board. He must not only declare that he is twenty-one years of age and furnish satisfactory proof of the same, but upon the form prescribed by the board he must make an oath that he is twenty-one years of age. What has been said with reference to his being of age applies also to the fact of his graduation.

I must therefore advise you that, as a matter of law, no person less than twenty-one years of age is permitted to file an application to take an examination to practice dentistry in this state.

Very truly yours,

JOSEPH MCGHEE,
Attorney-General.

1206.

TOWNSHIP TRUSTEES MAY NOT, WHEN A FINDING HAS BEEN MADE AGAINST TOWNSHIP CLERK, PAY SUCH CLERK THE SAME AMOUNT FOR JANITOR SERVICES, WHICH WERE NEVER PERFORMED—OFFICES COMPATIBLE—TOWNSHIP CLERK AND JANITOR OF PUBLIC BUILDING.

Where a finding is made by an examiner of the bureau of inspection and supervision of public offices against a township clerk for a certain amount illegally drawn for services, it is unlawful for the board of township trustees to pay the same

amount to the said clerk as janitor services, which said clerk never performed, in order to return to him the same money which he paid under said findings.

There is nothing incompatible between the office of township clerk and the position of janitor of a public building.

COLUMBUS, OHIO, May 15, 1918.

The Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Your request for my opinion reads:

> "We are requesting your written opinion upon the following matter:
>
> We are calling your attention to opinion of the attorney-general, page 869, of 1915 annual reports, under authority of which we made findings for recovery against a township clerk, which findings were further upheld by your opinion No. 429 of 1917. We are informed that the township trustees are considering the plan of having the clerk repay the amount into the township treasury and then make up bills for services as janitor and thereby enable the township trustees to again turn the money over to the township clerk, being purely a plan to circumvent the law as laid down and embodied in such findings under authority of attorney-general's opinion. We are calling your attention to section 286 G. C., in part as follows:
>
> 'No claim for money or property found to be due to any public treasury or custodian thereof in any such report shall be compounded or compromised, either before or after the filing of civil action, by any board or officer or by order of any court unless the attorney-general shall first give his written approval thereof.'
>
> *Question* 1. Would such payment for janitor services in this case described be legal?
>
> *Question* 2. Can a township clerk receive compensation for janitor services in addition to compensation fixed by law as clerk?"

Opinion No. 415, Annual Reports of the Attorney-General for 1915, Vol. 1, page 869, holds:

> "For the services rendered by the township clerk in the performance of duties required by the statutes governing the aforesaid plan (road improvement matters), said clerk is entitled to a reasonable compensation not to exceed $100.00 in any one year, to be allowed by the township trustees under authority of section 6999 G. C., and said compensation is in lieu of any allowance for said services under authority of section 3308 G. C., and is subject to the limitation of $150.00 a year provided by said section."

And in opinion No. 429, Annual Report of the Attorney-General for 1917, Vol. 2, page 1176, it is held:

> "The township clerk is entitled to receive as his compensation for any one year the sum of not to exceed $150.00. An amount received over and above $150.00 by the township clerk should be returned to the township treasury."

In your request you say that in order to compromise the finding which was made by your examiner, the township trustees are ordering the same amount to be paid to the clerk, as janitor services; that is, the same amount which the examiner found had been illegally drawn from the township treasury by said clerk. In other

words, the clerk had performed no janitor service but simply to find a way for him to receive said amount of money the board orders him paid said amount for services performed as janitor. This, of course, would be illegal. The board of trustees is endeavoring to do indirectly what they are not permitted to do directly, but the act of allowing a voucher for something never received is the grossest kind of fraud on the part of any board.

Answering your first question, then, I advise you that under such circumstances the payment for janitor services would not be legal.

In your second question you ask if a township clerk may receive compensation for janitor services in addition to compensation fixed by law as clerk. There is nothing incompatible between the two positions. As clerk he can only receive the sum of $150.00. If he performs services as janitor *under a proper contract,* he may be paid for such services.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1207.

APPROVAL OF BOND ISSUE OF FAIRFIELD TOWNSHIP RURAL SCHOOL DISTRICT, HURON COUNTY—$10,000.00.

COLUMBUS, OHIO, May 16, 1918.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of Fairfield township, rural school district, Huron county, Ohio, in the sum of $10,000 for the purpose of enlarging, repairing and furnishing the high school building in said school district.

I have carefully examined the corrected transcript of the proceedings of the board of education and other officers of Fairfield township, rural school district, Huron county, Ohio, relating to the above issue of bonds, and find said proceedings as corrected to be in substantial conformity to the provisions of the General Code of Ohio relating to bond issues of this kind.

I am therefore of the opinion that properly prepared bonds covering the above issue will, when the same are properly executed and delivered, constitute valid and subsisting obligations of said school district payable according to the terms thereof.

The bond form submitted with and as a part of the transcript of the proceedings relating to this bond issue is not entirely satisfactory to me, and I am therefore accordingly holding the transcript submitted until a satisfactory bond form of the bonds covering this issue is submitted for my approval.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

1208.

BOND ISSUE—WHEN BOARD OF EDUCATION MAY ISSUE BONDS WITHOUT VOTE OF ELECTORS FOR IMPROVEMENT OF SCHOOL PROPERTY.

Boards of education have authority to issue bonds to improve school property without a vote of the electors of the school district if the amount to be raised for such purpose does not exceed that amount which could be raised by a levy of two mills upon the tax duplicate of such district for the year next preceding such issue.

If the amount of money to be raised from a bond issue for the improvement or repair of school property exceeds two mills on the tax duplicate of the district for the year next preceding such issue, the question of so issuing such bonds must first be submitted to the electors of such district.

COLUMBUS, OHIO, May 16, 1918.

HON. T. R. ROBISON, *Prosecuting Attorney, Mansfield, Ohio.*

DEAR SIR:—Your request for my opinion reads:

> "A state inspector condemned and ordered certain repairs to be made on a certain school building in the village of Shelby, this county. The board has not sufficient funds to make said repairs and must issue bonds.
>
> *Question*: Have they the authority to do this without first submitting same to a vote of the people?"

The funds for improvements or repairs to be made on school buildings are provided in one of two ways: First, by a levy and collection of taxes, and, second, by the sale of bonds therefor. Bonds may be sold with or without a vote of the electors, depending upon the circumstances in each individual case.

Section 7625 G. C. provides that when the board of education of any district determines that for the proper accommodation of the schools of such district it is necessary to repair a school house and that the funds at its disposal, or that can be raised under the provisions of section *7629* are not sufficient to accomplish that purpose, and that a bond issue is necessary, then the board shall make an estimate of the probable amount of money required for such purpose and submit to the electors of the district the question of issuing bonds for the amount so estimated, at a general election or at a special election called for that purpose.

Section 7629 G. C. provides that the board of education of any school district may issue bonds to improve school property and in anticipation of income from taxes for such purpose, levied or to be levied, it may from time to time, and as the occasion requires, issue and sell bonds under the restriction and bearing a rate of interest as specified in section 7626 and section 7627 of the General Code, provided, however, that no greater amount of bonds be issued in any year than would equal the aggregate of tax at the rate of two mills *for the year next preceding such issue.* So that, if the board determines that it is necessary to repair said building as is suggested in the order of the deputy inspector of public buildings, and there is not sufficient money in the treasury for that purpose, then the board must first look to section 7629 G. C. and ascertain if sufficient money can be raised under the provisions of that section. That is, if it will take more than the amount which would not exceed a two mill levy calculated on the tax duplicate of the year next preceding such issue. If the amount of the estimate does not exceed that which would be the

amount of two mills calculated on the tax duplicate of the year next preceding, then the bonds may be issued without a vote of the people. But, if the amount does exceed an amount of two mills on the duplicate for the year next preceding, then it is necessary to proceed under section 7625 et seq. of the General Code.

Answering your question then, I advise you, first, that if the estimate of repairs is less than the amount of two mills upon the tax duplicate for the year next preceding, no vote is necessary; second, if the amount of the estimate is more than two mills for the year next preceding the issue, including any money for that purpose which is in the treasury, then a vote must be taken. It might be suggested, however, that if a vote is taken and the order of condemnation is placed by the chief inspector of workshops and factories, the provisions of section 7630-1 could be incorporated in the resolution and the same is then proper within the emergency statutes, so-called, and the tax may exceed the fifteen mill limitation.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1209.

ROADS AND HIGHWAYS—COUNTY COMMISSIONERS MAY CONTRIBUTE TO MAINTENANCE IN VILLAGES.

Under section 7467 G. C. the board of county commissioners of a county may contribute toward the maintenance and repair of the roads located within a village.

COLUMBUS, OHIO, May 16, 1918.

HON. JOHN L. CABLE, *Prosecuting Attorney, Lima, Ohio.*

DEAR SIR:—I have your communication of April 29, 1918, in which you enclose copy of opinion rendered by you to the county commissioners of your county. You wish to know whether I agree with the opinion as rendered by you. Said opinion is to the effect that under section 7467 G. C. the board of county commissioners may contribute either money or stone toward the maintenance and repair of roads within a village, but not within a city, and that the contribution toward the maintenance and repair of the roads of a village should be limited to what is strictly known as roads within a village and not to those highways which were laid out and established by the village as streets.

I have carefully examined this opinion and in the main consider it to be correct. However, there are a few statements therein made about which some question might be raised. You suggest that the commissioners of your county may contribute, either in money or stone, to the repair and maintenance of the roads within the village of Bluffton. This may be correct, but it is my view that the contribution provided for in section 7467 G. C. would be money, rather than stone or any other material. This would enable the officers of the village to assume entire control and oversight of the work, while if the commissioners furnished stone, instead of the funds with which to purchase same, questions might arise between the commissioners and the village authorities. However, I do not consider this to be so very vital.

You state in a postscript attached to your opinion that sections 6949 et seq. G. C. (107 O. L. 107) pertain merely to a permanent improvement. This may be applying a rather strict construction to section 6949.

I have held in a number of opinions that sections 6949 to 6953 inc. G. C. (107 O. L. 107-109) are merely a part of the general scheme of road building by county commissioners, which begins with section 6906 and runs on through to and including section 6953. In considering section 6906, it is seen that the general scheme of road improvement by county commissioners includes constructing, improving, reconstructing *or repairing* any existing public road or part thereof.

But even with this suggestion you are mainly correct, in that a proceeding as set forth in these sections is formal; that is, step after step must be taken in reference to the improvement, the steps all being provided for in said sections; while the mere maintenance or repair of roads as provided in section 7467 would not be carried on under the steps set out in sections 6906 et seq. G. C.

I believe the conclusions you have drawn are correct, and the above suggestions are merely limitations upon some of the reasoning you have used in arriving at your conclusions, with the possible exception of the suggestion as to the contribution of the county commissioners being in money rather than in stone.

I am enclosing copy of opinion No. 723 rendered by me on October 18, 1917, to Hon. Sumner E. Walters, prosecuting attorney at Van Wert, which to some extent relates to the same question you have under consideration.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1210.

COLLATERAL INHERITANCE TAX—BEQUEST TO THE ELYRIA MEMORIAL HOSPITAL NOT SUBJECT TO SAME.

A bequest to the Elyria Memorial hospital generally or to it to be held as a part of its endowment fund, not subject to the collateral inheritance tax, as such institution is one of public charity only.

COLUMBUS, OHIO, May 16, 1918.

HON. H. C. WILCOX, *Probate Judge, Elyria, Ohio.*

DEAR SIR:—In your letter of April 27th you ask me to advise you as to whether or not the Elyria memorial hospital is "an institution in this state for purpose only of public charity" within the meaning of section 5332 of the General Code, so that a bequest to it generally or to it to be held as a part of its endowment fund, the income to be used for its general purposes, would be exempt from the collateral inheritance tax.

It appears that the Elyria memorial hospital is a corporation not for profit organized under the laws of Ohio, and that according to a declaration of principles promulgated at the time of its dedication it is open to all sick, injured or disabled persons residing in Elyria or Lorain county, without distinction as to race, nationality, color, sex or religious opinion, subject to reasonable rules and regulations to be adopted by the board of trustees. That these rules provide that patients who are able to pay are charged and those who are unable to pay are cared for free of charge; and that the hospital is actually operating at a loss on account of the large percentage of charity patients or those cared for at reduced rates, the deficiency being raised by donation.

Of course, I may remark that if it should happen actually to run at a profit for a time the case would not be altered, as the profits could not be distributed.

Unquestionably this institution is one of public charity only, and bequests of the kind described would be exempt from the collateral inheritance tax.

The only point requiring any consideration is the fact that the benefits of the hospital are limited to residents of a given area. This point does not change the charitable nature of the institution.

Zanesville Canal & Mfg. Co. v. City of Zanesville, 20 Ohio 483.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1211.

SINGLE COUNTY DITCHES—SALARY OF CHAINMEN, RODMEN AND AXEMEN WORKING ON SUCH DITCHES.

There is no provision of law which would warrant the payment of a greater sum than two dollars per day to chainmen, axemen and rodmen in the construction of single county ditches.

COLUMBUS, OHIO, May 16, 1918.

HON. GEORGE F. CRAWFORD, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR:—I have your communication of April 24, 1918, in which you request my opinion as follows:

> "I wish to have your opinion on section 6530 of the General Code. Conditions have arisen which make it next to impossible for efficient men to be employed for the services mentioned in the section of the code at the price therein named, and this condition has become so serious in this county as to necessitate a suspension of ditch work unless some method is devised to overcome it."

I find as much difficulty in coming to a solution of your problem as you seem to have had in attempting to solve it. It is my opinion there is no remedy for the unfavorable situation, other than that which can be granted by the legislature.

The statutes providing compensation to chainmen, axemen and rodmen, in the construction of single county ditches, are so plain and specific that it leaves no opportunity for placing a construction thereon other than that which plainly appears upon their face.

Section 6523 G. C. provides:

> "For services actually rendered under the provisions of this chapter, the county commissioners, each, shall receive three dollars per day. All other officers and persons shall receive compensation for such services as provided in this subdivision of this chapter."

Section 6530 G. C. is very explicit and provides as follows:

> "Each chainman, axeman and rodman shall receive two dollars per day for the time actually employed."

Section 6535 G. C. provides:

> "Fees under this chapter shall be paid out of the county treasury as soon as the bill of items thereof is examined and allowed by the county commissioners, and the auditor shall issue orders therefor on such allowance. * * *"

Not only are fees specifically and definitely mentioned, but the county commissioners must pass upon the same before they are paid by the county treasurer.

There is no other provision of the General Code, with which I am familiar, that would make it legal to pay a greater sum than that provided in section 6530 G. C.

Therefore, as hereinbefore stated, I am of the opinion that the only body which can render any aid in the matter is the general assembly of the state.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1212.

COUNTY COMMISSIONERS MAY ENTER INTO AN AGREEMENT FOR EMPLOYMENT OF COUNTY AGENTS AND CONTRIBUTIONS FOR CO-OPERATIVE AGRICULTURAL EXTENSION WORK—EFFECT OF SAME.

County commissioners are authorized by section 9921-1 *et seq. of the General Code to enter into an agreement for the employment of county agents and contributions for co-operative agricultural extension work, which has the effect of binding them to make contributions for more than one year. Such statutes are therefore inconsistent with section* 5660 *of the General Code, and being of later enactment than said section the latter does not apply to the agreement.*

COLUMBUS, OHIO, May 16, 1918.

HON. W. O. THOMPSON, *President Ohio State University, Columbus, Ohio.*

DEAR SIR:—I am in receipt of a letter from Mr. O. M. Johnson, leader of county agents, requesting my opinion upon certain questions raised by Hon. Dean E. Stanley, prosecuting attorney of Warren county, relative to the operation of the sections of the act passed in 1915 providing for co-operative agricultural extension work to be participated in by the Ohio state university and the several counties, etc. With Mr. Johnson's communication he encloses copy of proposed memorandum of agreement for the employment of a county agricultural agent in Warren county. This agreement recites that its object is to promote the agricultural interests of the county through demonstrations and other educational means planned by the executive committee of the county farm bureau association and the county agricultural agent in conference with the agricultural college extension service of the Ohio state university; that this object shall be furthered by a county agricultural agent giving his full time to work in Warren county under the supervision of the Ohio state university, it being his duty to assist in carrying out plans made by the executive committee of the county farm bureau association in conference with a representative of the Ohio state university.

The memorandum proceeds to witness that it is understood by the parties to the agreement that each shall contribute annually to the support of the work the cash sums, the supplies and the services indicated by a schedule, which schedule pledges the county farm bureau association to bear $300.00 of the expenses of the service, the board of county commissioners the sum of $1,500.00 toward salary and expenses "to be placed in next budget," and the Ohio state university the sum of $1,600.00 toward salary and expenses, together with supervision, publications, special lectures, expert advice and assistance, franking privilege and envelopes.

The memorandum is intended to be signed by the county agent leader, the chairman of the board of county commissioners, the president of the county farm bureau association, and the director of agricultural extension service of the Ohio state university.

The questions raised by Mr. Stanley are as follows:

> "The board of county commissioners of Warren county, Ohio, has before it for consideration the question of appropriating money as provided by section 9921-4 of the General Code for the maintenance, support and expenses of the county agricultural agent. No levy was made for this purpose in 1917 and it was not included in the general appropriations made on the first of March, 1918.
>
> 1. Can the county commissioners enter into the usual form of contract with a county farm bureau association and the Ohio state university involving the expenditure of $1,500 on the part of the county at the present time or does section 5660 G. C. prohibit such a contract?
>
> 2. If a levy were made by the county commissioners this June, how soon thereafter could a contract be entered into by them for this purpose?
>
> 3. What effect would a resolution passed by the board of commissioners at the present time, stating an intention to make such a levy, have?
>
> 4. Would the following be a proper form for such resolution (if one should be passed)?
>
> 'Be it resolved by the board of county commissioners of Warren county, Ohio, that
>
> Whereas it is the desire of said board of county commissioners to cooperate as provided by law in the matter of maintenance, support and expenses of a county agricultural agent for Warren county, Ohio, and
>
> Whereas funds for that purpose are not now in the treasury of said county,
>
> Be it resolved that said board of county commissioners hereby declare it to be their intention to levy taxes at the rate which will produce $1,500 on the 1918 tax duplicate for such purpose and further declare it to be their intention to appropriate such funds, to wit, said $1,500, so to be levied at the proper times for such purpose.'
>
> 5. If such a resolution is passed, how soon would it be legal for an agent to be appointed and could this be done before the funds provided by such contemplated tax levy became available?"

I may say that while I have examined the federal act approved May 8, 1914, providing for co-operative agricultural extension work between the agricultural colleges of the several states and the United States department of agriculture, I am convinced that nothing in that act bears in any way upon the questions now raised.

Section 9921-1 G. C., as enacted in the act of May 25, 1915 (106 O. L. 356), provides that the federal moneys received under this act of congress shall be set

aside in the state treasury as "the agricultural extension fund" and used in accordance with the provisions of this act for the extension service of the college of agriculture of the Ohio state university.

Section 9921-2 as therein enacted provides as follows:

> "From moneys appropriated by the state for the employment of agricultural agents, not to exceed three thousand dollars in any one year, shall be expended for any county that shall raise at least one thousand dollars for the support of an agricultural agent for one year, and shall give satisfactory assurance to the trustees of the Ohio state university that a like sum shall be raised for a second year, or shall establish and maintain a county experiment farm as provided in the statutes. To secure this aid from the state, the board of county commissioners of any county shall agree to the employment of an agricultural agent approved by the dean of the college of agriculture of the Ohio state university."

Section 9921-4 provides:

> "Each and every county of the state is authorized and empowered to appropriate annually not to exceed fifteen hundred dollars, for the maintenance, support and expenses of a county agricultural agent, and the county commissioners of said county or counties are authorized to set apart and appropriate said sum of money and transmit the same to the state treasurer who shall place it to the credit of the agricultural extension fund to be paid for the purposes aforesaid, on warrant issued by the auditor of state in favor of the Ohio state university. If for any reason it shall not be used as contemplated in this act before the expiration of two years, it shall revert to the county from which it came."

Section 9921-5 provides for referendum vote of the electors of a county in the event that the county commissioners of any county shall not make provision for an agricultural agent; an affirmative vote is to have the effect of requiring the commissioners to make the necessary appropriations for the employment of an agent. The section concludes with the following paragraph:

> "After having established this county agent work in any county, the county commissioners of such county shall continue to make such annual appropriations for said work as the trustees of the Ohio state university may direct, not exceeding fifteen hundred dollars annually, for a period of five years."

It is apparent from a consideration of these provisions that the act of the county commissioners which binds the county to co-operate with the Ohio state university in its extension service is that described in section 9921-2, as follows:

> "To secure this aid from the state, the board of county commissioners of any county shall agree to the employment of an agricultural agent approved by the dean of the college of agriculture of the Ohio state university."

On the other hand, the same section requires that in order to justify the expenditure of state and federal moneys in the county it must "raise at least one thousand dollars for the support of an agricultural agent for one year, and * * *

give satisfactory assurance to the trustees of the Ohio state university that a like sum shall be raised for a second year, or * * * establish and maintain a county experiment farm as provided in the statutes."

The last paragraph of section 9921-5 seems to give to this initial action the effect of binding the county commissioners to make annual appropriations for the work for a period of five years. The position in which this provision is found might give rise to the belief that the five-year provision does not apply unless the county agent work is established by a referendum vote. I think, however, that the contrary is the case, and that the arrangements which the statute contemplates are to cover a period of five years. I reach this conclusion in spite of the fact that section 9921-2 refers to "a second year" only. The law is somewhat confused at this point, to be sure, and I do not attempt in this opinion to decide this subordinate question finally either way. It is sufficient to state that the commissioners of a county are expressly authorized to enter into an arrangement which will bind them and their successors to make appropriations for not less than two nor more than five years, and to point out that the law does not contemplate a new contract or agreement for each year.

This being the case, it is difficult to see how section 5660 of the General Code can apply. This section in effect invalidates all contracts, agreements or other obligations involving the expenditure of money and resolutions for the expenditure of money made, entered into or passed by county commissioners, unless the auditor of the county first certifies that the money required to discharge the agreement on the part of the county is in the treasury and not appropriated for any other purpose. It is an old section which has not been recently amended. It has not the force of a constitutional provision. If, therefore, a statute subsequently passed expressly authorized the making of an agreement by the county commissioners which would bind them to make appropriations in a succeeding year, it is manifest that such statute would be wholly inconsistent with section 5660, because at the time of making the agreement so authorized it could not be certified that the money required to perform the agreement on the part of the county is in the treasury and not appropriated for any other purpose. In other words, we have the case of an agreement expressly authorized by statute and involving the expenditure of moneys in future year or years.

This being the case, I come to the conclusion that none of the points raised by Mr. Stanley presents any serious difficulty. The later statute, being inconsistent with the earlier one, must prevail, and to the extent of such inconsistency must be regarded as constituting an exception to the general rule laid down in the earlier law.

The scope of the exception is such that the county commissioners may, in my opinion, enter into the agreement authorized by section 9921-2 of the General Code, whether they have any money in the treasury which can then be appropriated or not.

The commissioners should indeed, as suggested by Mr. Stanley, act by resolution duly passed and spread upon their journal. The resolution as drafted by him would, however, be open to criticism, in that it binds the county commissioners to make but a single levy, whereas under the law they are required to make at least two annual contributions, and possibly five. The resolution should recite an agreement on the part of the commissioners to the employment of an agricultural agent approved by the dean of the college of agriculture of the Ohio state university, and an assurance on their part that the county will raise the agreed sum for one year and a like sum for a second year, or so long as the co-operative agreement shall remain in force under the law. I have indicated merely the general outlines

of the agreement without attempting to dictate its phraseology. Such agreement may be entered into at any time and has the effect of a binding agreement.

In passing I may say that I am unable to find any statutory warrant for the existence of a "county farm bureau association." The scheme of co-operative agricultural extension outlined in sections 9921-1 et seq. of the General Code does not provide for any such agency, nor for the participation on the part of voluntary associations of individuals in the scheme of co-operative extension. Some authority to co-operate with voluntary associations seems to be conferred upon the university by section 7974 of the General Code, as amended 107 Ohio Laws 559. Inasmuch as my opinion is not invited as to this point, however, I express none upon it.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1213.

JOINT SCHOOL SYSTEM—BOARD OF EDUCATION OF OHIO CANNOT UNITE WITH AN INDIANA BOARD TO OPERATE.

A board of education in Ohio cannot unite with a board of education in Indiana for the operation of a joint school system.

COLUMBUS, OHIO, May 16, 1918.

HON. F. B. PEARSON, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—In your request for my opinion you say:

> "Union City is situated partly in Ohio and partly in Indiana. Two separate school systems are being maintained.
> Can these two systems be legally consolidated into one system?"

The public school system of Ohio is solely one of statute. Article 1, section 7 of the Constitution, provides that knowledge being essential to the government, "it shall be the duty of the general assembly to pass suitable laws * * * to encourage schools and the means of instruction." The general assembly has passed laws as intended by said constitutional provision and under the laws so passed the schools of Ohio are being operated. There is no law in Ohio which permits a union of a board of education of this state and a board of education of another state or a union of school districts for the operation of the schools located on or along the state line. Boards of education have only those powers which are specifically granted or those which are necessary to carry into effect those specifically granted, and therefore having no authority to so unite, I must advise you that the Union City board of education of Ohio cannot unite with the board of education of the city of the same name in Indiana in the operation of the schools.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1214.

TRAFFIC LAWS—DEPUTY SHERIFF MAY PATROL IMPROVED ROAD OF COUNTY TO ENFORCE.

Under the provisions of section 2833 G. C. a deputy sheriff can be assigned by the sheriff to the duty of patrolling the improved roads of a county, with a view to arresting on sight those whom he finds violating the traffic laws of the state.

COLUMBUS, OHIO, May 16, 1918.

HON. JOHN L. HEISE, *Prosecuting Attorney, Circleville, Ohio.*

DEAR SIR:—I have your communication of April 24, 1918, which reads as follows:

> "The state highway commissioner and the commissioners of Pickaway county, last fall, resurfaced and repaired the pike leading from Columbus to Chillicothe, Ohio. It was put in very good shape, but ever since that it has been used, very largely, as a speed way and over speeding is being practiced daily by many persons using large and heavy automobiles and motor trucks, which are doing much damage to the highway in making it almost impossible to keep this highway in good condition. The same is true of other highways in the county on which the county commissioners have expended much money and put in good condition.
>
> The county commissioners want to employ a motor patrolman and put him on the highways of the county to stop this over speeding and save and maintain the good condition of our pikes and roads. They would like to employ a patrolman, at a fair salary, by the year.
>
> Please inform me the method of procedure to employ such patrolman and clothe him with sufficient police authority and pay him a sufficient salary for his work. Under what sections of statute shall we proceed?"

There is no provision in our statutes, with which I am familiar, which directly authorizes the employment of a patrolman by the county commissioners of a county, the duties of said patrolman being to patrol the improved roads of a county with a view to preventing the misuse of the same by motor vehicles.

Section 1221 G. C. (107 O. L. 131, 132) contains a provision permitting the state highway commissioner to employ patrolmen for the maintenance and repair of intercounty highways and main market roads of the state, but said patrolmen therein provided have not the duties referred to by you in your letter.

Hence it will be necessary for us to ascertain whether any other officer of the county already provided for would be authorized to perform the duties which you have in mind. From your request I take it that it is the desire of the county commissioners to place a patrolman upon the improved roads of your county, to arrest upon sight those persons whom he finds violating the traffic laws of the state. It is my opinion that the sheriff or his deputies would have such authority.

Section 2833 G. C. reads in part as follows:

> "Each sheriff shall preserve the public peace and cause all persons guilty of breach thereof, within his knowledge or view, to enter into recognizance with sureties to keep the peace and to appear at succeeding term of the common pleas court of the proper county and commit them to

jail in case of refusal. He shall return a transcript of all his proceedings with the recognizance so taken to such court and shall execute all warrants, writs and other process to him directed by proper and lawful authority. * * *"

From this section it is fairly evident that the sheriff or his deputy would have authority to arrest, upon his own knowledge or view, those persons whom he finds violating the traffic laws of the state. From the provisions of this section it is my opinion that the sheriff could place a deputy of his office upon the highways of your county, instructing him to patrol the same, with a view to the arrest and punishment of those who violate the traffic laws.

To be sure, this would require additional deputies and would necessitate a greater allowance by the county commissioners for the sheriff's office, than he would otherwise need. But if the commissioners are desirous, as you suggest, of having the improved roads of the county patrolled, it is fair to assume that they will be willing also to grant the sheriff a sufficient allowance to enable him to employ a deputy for the purposes set out in your communication.

There is no provision, other than that found in section 2833, supra, with which I am familiar, that would authorize any officer to patrol the improved roads of a county for the purpose of arresting those persons who are found violating the traffic regulations of the state.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1215.

BLUE SKY LAW—PERJURY—VENUE.

Under section 6373-20 the offense of making "a false statement of fact in any statement or matter of information required by this act to be filed with the commissioner" is completed when such statement or matter of information is actually filed with the commissioner, and the venue of such offense is therefore in Franklin county.

COLUMBUS, OHIO, May 16, 1918.

HON. P. A. BERRY, *Commissioner of Securities, Columbus, Ohio.*

DEAR SIR:—On April 25, 1918, you addressed the following communication to this office:

"Following you will find an inquiry from the prosecuting attorney of Miami county addressed to this department.

'I have been requested to bring to the attention of the grand jury on April 29, the question of indicting a man who filed with your department a statement of the condition of his company, which these men claim to be false, and the question that arose in my mind was whether or not the offense was committed in the county where the affidavit was made or whether it was necessary for the same to be filed before the offense was completed, in other words, whether the venue would be in Miami county where the affidavit was made or in Franklin county where it was filed.

Are you able to state whether or not the question has ever been raised and determined? I do not find any construction of the section covering that point.'

Kindly advise us in the premises so that we will be able to reply to Mr. Kerr's letter."

The section of the blue sky law fixing penalties for its violation is 6373-20, which is as follows:

"Whoever knowingly makes any false statement of fact in any statement or matter of information required by this act to be filed with the 'commissioner,' or in any advertisement, prospectus, letter, circular or other document, containing an offer to dispose or solicitation to purchase, or commendatory matter concerning, such securities or real estate, with intent to aid in the disposal of the same, or whoever knowingly violates any of the provisions of sections 12, 14 or 15 of this act, or for the purpose of aiding in the disposal of any security or real estate, knowingly makes any false statement or representation concerning any license or certificate issued under the provisions hereof, shall be fined not less than one hundred dollars nor more than five thousand dollars, or imprisoned in the penitentiary not more than one year, or both; and whoever violates any of the other provisions of this act shall be fined not less than fifty dollars nor more than one thousand dollars, or imprisoned in the county jail or workhouse not more than sixty days, or both."

The penalties above described are provided for a number of different acts, most of which, like any ordinary offense against the laws, might be committed in any county in the state. It seems different, however, with the particular one about which you inquire, which is a "false statement of fact in any statement or matter of information required by this act to be filed with the commissioner." This refers to the different statements required to be filed either for the purpose of securing a license as a dealer or, as it is commonly called, registering a particular security. This statement, by the requirement of the act, is to be filed with the commissioner. It has no other destination, and there is no other purpose in making it excepting as it may be used by or through the office of the commissioner of securities. Until it is so filed, it is only, so to speak, in a formative or incomplete stage; it only acquires efficacy, only becomes a public document when it reaches the destination provided for it by law. This is made apparent by an observation of the apparent purpose of the law itself, or if not that, the purpose of the machinery and procedure for enforcing the law. This law is enforced by and through the department. Its benefits are secured by requiring compliance with its provisions by and through the department.

The object of these statements is to secure license or permission to transact business. This license or permission can only be secured from the commissioner, and by the issue of this license and its revocation and supervision afforded thereby over this character of business by the department, is the security which the act endeavors to give the public against deceit and fraud.

The statement is only for the purpose of securing the authority to transact the business; the statement itself is in no manner to be used in the transaction of business or as an inducement to anyone to purchase securities. It therefore only comes to maturity, is only effective, when so filed.

Although the language is "a statement of facts, etc., required by this act to be filed," yet, that is only a means used to point out what statement it is to which

the penalty applies, and that statement is found to be the one described above, which is not, within the meaning of the statute, a statement until it is so filed. It then becomes a statement which may be the basis of action by the department; before that it is not.

Therefore, it follows that in this respect the offense can only be committed in the county in which said statement is to be so filed, which is Franklin county.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1216.

APPROVAL OF BOND ISSUE OF WARREN COUNTY—$2,750.00.

COLUMBUS, OHIO, May 16, 1918.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In Re: Bonds of Warren county, Ohio, in the sum of $2,750, for the purpose of paying the respective shares of said county, Franklin township, and of the owners of benefited property assessed for the improvement of section A, Cincinnati-Dayton road, intercounty highway No. 19, in said township and county.

I have carefully examined the corrected transcript of the proceedings of the board of county commissioners of Warren county, Ohio, and of other officers, relating to the above issue of bonds, and find said proceedings to be in conformity with the provisions of the General Code of Ohio relating to bond issues of this kind.

I am, therefore, of the opinion that properly prepared bonds covering said issue will, when the same are executed and delivered, constitute valid and subsisting obligations of Warren county, Ohio, to be paid according to the terms thereof.

The bond form submitted with, and as a part of said transcript is not entirely satisfactory, and I am, therefore, holding the transcripts until a satisfactory bond form for the bonds covering said issue is prepared and approved.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1217.

APPROVAL OF BOND ISSUE OF WARREN COUNTY—$20,250.00.

COLUMBUS, OHIO, May 16, 1918.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of Warren county, Ohio, in the sum of $20,250 to pay the respective shares of said county, Franklin township, and of the

owners of benefited property assessed for the improvement of section B, Cincinnati-Dayton road, intercounty highway No. 19, in said county and township.

I have carefully examined the corrected transcript of the proceedings of the board of county commissioners of Warren county, Ohio, and of other officers, relating to the above issue of bonds, and find said proceedings to be in conformity with the provisions of the General Code of Ohio relating to bond issues of this kind.

I am, therefore, of the opinion that properly prepared bonds covering said issue will, when the same are executed and delivered, constitute valid and subsisting obligations of Warren county, Ohio, to be paid according to the terms thereof.

The bond form submitted with, and as a part of said transcript is not entirely satisfactory, and I am, therefore, holding the transcripts until a satisfactory bond form for the bonds covering said issue is prepared and approved.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1218.

APPROVAL OF BOND ISSUE OF WARREN COUNTY—$15,000.00.

COLUMBUS, OHIO, May 16, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In Re: Bonds of Warren county, Ohio, in the sum of $15,000.00, to pay the respective shares of said county, Franklin township, and of the owners of benefited property assessed for the improvement of section A, Hamilton-Middletown road, intercounty highway No. 179, located in said county and township.

I have carefully examined the corrected transcript of the proceedings of the board of county commissioners of Warren county, Ohio, and of other officers, relating to the above issue of bonds, and find said proceedings to be in conformity with the provisions of the General Code of Ohio relating to bond issues of this kind.

I am, therefore, of the opinion that properly prepared bonds covering said issue will, when the same are executed and delivered, constitute valid and subsisting obligations of Warren county, Ohio, to be paid according to the terms thereof.

The bond form submitted with, and as a part of said transcript is not entirely satisfactory, and I am therefore, holding the transcripts until a satisfactory bond form for the bonds covering said issue is prepared and approved.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1219.

VAGRANCY—SECTION 13409 CONSTITUTIONAL.

Section 13409 G. C. may be treated as constitutional and operative for the punishment of vagrancy.

COLUMBUS, OHIO, May 16, 1918.

HON. ROBERT M. NOLL, *Prosecuting Attorney, Marietta, Ohio.*

DEAR SIR:—In your letter of May 9, 1918, you request an opinion from me as to the validity of section 13409 G. C. That section reads:

> "Whoever being a male person able to perform manual labor, has not made reasonable effort to procure employment or has refused to labor at reasonable prices, is a vagrant or common beggar and shall be fined not more than fifty dollars and sentenced to hard labor in jail until the fine and costs are paid. For such labor he shall receive credit upon such fine and costs at the rate of seventy-five cents per day."

You also call attention to the decision of Dickson, J., in the case of Ex Parte Frank Smith et al., 13 O. N. P. (n. s.) 278, in which the court held the above quoted section to be void as against the bill of rights, article 1, section 1.

I desire also to call your attention to opinion No. 696, Annual Report of the Attorney-General for 1915, Vol. 2, page 1437, in which my predecessor had under consideration the question as to whether or not a person who was sent to jail, as provided by section 13409, should be credited at the rate of seventy-five cents per day, or sixty cents per day as was provided by section 12387. On page 1441 of said opinion the following language is found:

> "Before proceeding to the determination of the question which you ask, I would call your attention to the case of in re Smith, 13 O. N. P. n. s.) 278, wherein the court of common pleas of Hamilton county decided that section 13409 G. C. was void for uncertainty. *I shall not express any opinion herein as to the correctness of the decision of Judge Dickson,* in the Smith case, but shall proceed on the assumption that section 13409 is constitutional and operative."

If ever there was a time when the "tramp laws" (13408) and the "vagrant laws" (13409) should be enforced, that time is now. There is no occasion for a male person, who is able to work, to go from place to place and beg or ask subsistence by charity or enter a dwelling house, or yard or enclosure about a dwelling house, without the permission of the owner or occupant thereof, or do any of the other things provided in section 13408, neither is there any occasion at this time for a person to be a vagrant, no matter how said term is defined, and while I do not desire to say that the decision of Judge Dickson is wrong, I am inclined to the conclusion that another court of equal jurisdiction might easily arrive at a different decision.

I therefore advise you that it is my opinion that you may proceed to punish violators on the assumption that section 13409 is constitutional and operative.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1220.

BOARD OF DEPUTY STATE SUPERVISORS OF ELECTIONS—POWER TO MAKE RULES RELATIVE TO TRANSFER AND REGISTRATION OF ELECTORS BEFORE PRIMARIES.

The board of deputy state supervisors of elections, in municipalities where registration of electors is required by law, is authorized under section 4975 G. C., prior to any primary election, to make such provision as may be necessary and reasonable for the transfer and registration of electors made necessary for the primary.

COLUMBUS, OHIO, May 16, 1918.

HON. JOSEPH T. MICKLETHWAIT, *Prosecuting Attorney, Portsmouth, Ohio.*

DEAR SIR:—You have asked an official opinion upon the following:

> "Have not the deputy state supervisors of elections in counties in which cities requiring registration of electors are located, the right and authority to fix the days and prescribe the hours for the registration and for the transfer of registered electors before the primary election held in the month of August each year and in the month of April in each presidential year, without being governed by any provisions of law, except such as are provided in section 4975 of the General Code?"

Section 4975 G. C. provides:

> "The board of deputy state supervisors in municipalities where registration of electors is required by law, shall, prior to any primary election, make such provision as shall be necessary and reasonable for the transfer upon the registration books and the registration of all persons, not previously registered, who may qualify themselves to vote at the ensuing November election. No person shall be admitted to vote at any primary election, in such municipalities, unless he shall have caused himself to be registered as an elector therein, in the manner provided by law for the registration of electors."

Said section is found in Ch. 6, Tit. XIV, part first, G. C., which is composed of sections 4948 to 4991-1 inc. G. C., and entitled "Primary Elections," and has to do with all matters pertaining to primary elections, even including compensation of election officers.

Said section 4975 provides that in the registration in municipalities the board of deputy state supervisors, *prior to any primary election,* shall make such provision as shall be necessary and reasonable for the transfer upon the registration books and the registration of all persons not previously registered, who may qualify themselves to vote at the ensuing November election. Further provision is made that no person, other than those registered in the manner provided by law for the registration of electors, shall be entitled to vote at the primary.

Under this section it is my opinion, concurring with the one expressed by you, that the deputy state supervisors are authorized to make such rules as are necessary and reasonable and so fix the days and hours for the registration and for the transfer of registered electors becoming necessary before a primary election.

You call attention to section 4900 G. C., which reads as follows:

"In cities in which a general registration of electors is required at presidential elections only, at all other state or other public elections, those electors who have been duly registered at such general registration and have not removed from the precinct in which they then registered at such general registration in such city shall not be required to register. But at such state or other public elections, at the times hereinbefore provided for registration days, only those electors of such city shall be required to register as may be new electors or who have moved into a precinct of such city since a general registration and have not been registered therein, except that at such public election, other than presidential and state, such registration shall take place on Friday and Saturday in the third week before any such election. If an elector removes from the precinct in which he has so registered into another precinct of the city in which he resides, he shall apply in person to the registrars of the precinct in which he has so registered for a 'removal certificate,' as herein provided in other cases."

This section is found in Ch. 5 of the same title and part hereinbefore mentioned and is headed "Registration of Electors." This chapter contains the general registration laws that were in force long before the passage of the general primary act. Inasmuch as section 4900 makes provision for a situation "at such state or other public elections," and at the time of the enactment of this section there was no general primary act, it is my view that state and other public elections would not necessarily include a primary election, and when the legislature, in adopting the primary law, specifically provided as it has in section 4975 G. C. for certain provisions as to registration "prior to any *primary election*," I think it is reasonably clear that it did not intend the general registration provisions to apply to primary elections, but that the special provision made in section 4975 G. C. should apply.

Therefore, it is my view that in providing for registration prior to a primary election, the board of deputy state supervisors acts under section 4975 G. C. and may in its sound discretion make such necessary and reasonable provisions for transfer and registration as it deems proper.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1221.

APPROVAL OF DEED OF TRACT OF LAND IN THE CITY OF AKRON TO THE STATE FOR ARMORY PURPOSES.

COLUMBUS, OHIO, May 17, 1918.

HON. GEORGE H. WOOD, *Adjutant General of Ohio, Columbus, Ohio.*

DEAR SIR:—You have submitted to this department a deed whereby the city of Akron grants and conveys in fee simple to the state of Ohio for armory purposes the following described real estate:

"Situated in the city of Akron, county of Summit and state of Ohio, and known as being a part of block 26, King's addition, and further de-

scribed as follows: Beginning at the intersection of the southerly line of Quarry street with the easterly line of High street, thence southerly along the easterly line of High street 146.93 feet to a point; thence easterly at right angles to the easterly line of High street to a point in the westerly line of Broadway; thence along the westerly line of Broadway to the intersection of said line with the southerly line of Quarry street; thence along the southerly line of Quarry street to the northeast corner of a tract of land deeded by the city of Akron to the state of Ohio by deed recorded in Vol. 505, page 428 of the Summit County Records of Deeds; thence southerly along the easterly line of said tract to the southeast corner thereof; thence westerly at right angles to the easterly line of said tract 204.00 feet to the southwest corner of said tract; thence northerly at right angles to the southerly line of said tract 145.00 feet to the northwest corner thereof and the southerly line of Quarry street; thence westerly along the southerly line of Quarry street 80 feet to the place of beginning. Reserving the right to the city of Akron to use a strip fifteen feet in width along the south side of the above described property for a driveway in common with the grantee, which the grantee shall improve and keep in repair."

Said deed being dated April 26, 1918, and signed by the mayor and director of public service. At the same time you transmitted certified copies of the legislation under which the deed was made.

I have examined said legislation and deed and finding the same to be in compliance with law hereby advise you that said deed may be accepted on behalf of the state of Ohio. The said deed should not only be recorded in Summit county, but also filed with the auditor of state.

I am herewith returning you the deed and the certified copies of the legislation referred to; also the plat of the property handed us by Mr. Elliott, your architect.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1222.

APROVAL OF DEED FROM THE STATE TO JOHN KERR.

COLUMBUS, OHIO, May 17, 1918.

HON. JAMES M. COX, *Governor of Ohio, Columbus, Ohio.*

DEAR SIR:—Mr. John Kerr, through J. Walter Wright, attorney at law of Bucyrus, Ohio, has made application to the auditor of state for a deed for property situated in the township of Scott, Marion county, Ohio, being the east half of the northwest quarter of section 16, township 4, range 16, stating that he is the owner of the said premises and that the final certificate of purchase issued to John Beckley has been lost or destroyed and cannot be found after the exercise of due diligence.

Section 8525 of the General Code provides in part as follows:

"* * * when a certificate of the purchase of land sold at a land office of this state, * * * has been lost or destroyed by accident or

otherwise, or when from any cause the owner of such land, by the use of due diligence, cannot find such certificate, * * * when satisfied that the original purchase money for such land has been fully paid, the governor shall execute a deed therefor in the name of the original purchaser which must recite the facts authorizing its making. Such deed shall be duly recorded in the office of the auditor of state, and such auditor must transmit it to the present claimant."

From the facts submitted it appears that the land described was granted by the United States to the state of Ohio for use of schools, and under an act of the general assembly, passed January 29, 1827, said land was authorized to be sold. From records found in the office of the auditor of state it appears that one Constant Bowen purchased in 1828 the east half of the northwest quarter of section 16, township 4, south in range 16, and paid $25.00 thereon; that one Thomas Beckley paid the second installment in 1831 in the sum of $26.50; that John Beckley paid the last two installments in 1832 and 1833 respectively, each in the sum of $26.50, but there is no record of the deed ever having been made for such property. In view of that fact it would appear that you would be authorized, under section 8525 of the General Code, to make a deed to said premises.

In an examination of the title to said property it appears that John Beckley and wife deeded the premises in question to John Roberson in 1833, and that said Roberson deeded the same to John Welker in 1834. The auditor's duplicate shows that the property was in the name of John Walker in 1837, and Johnston Kerr in 1838. Deeds of record in Marion county show that *Robert* Kerr deeded said property to Johnston Kerr in 1837. There is nothing to show how the property passed from John Walker to Robert Kerr. In view of that fact I do not believe that the provisions of section 8526 should be invoked. But since the title seems clear from the deed of Robert Kerr to Johnston Kerr in 1837 to the present claimant, and since it appears that no deed from the state has ever been made, it would be proper to make a deed from the state directly to John Beckley, who appears to be the original purchaser.

I herewith hand you a deed from the state of Ohio to John Beckley for execution should you come to the conclusion that such a deed should be made.

I am also handing you the abstract and correspondence relative to the matter.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1223.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN LAKE AND MONTGOMERY COUNTIES.

COLUMBUS, OHIO, May 17, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your two letters of May 13, 1918, enclosing, for my approval, final resolutions on the following improvements:

Euclid-Chardon road, I. C. H. No. 34, Sec. "B," Lake county.

Dayton-Troy road, I. C. H. No. 61, Sec. "R," Montgomery county (types "A" and "B").

Dayton-Greenville road, I. C. H. No. 62, Sec. "P," Montgomery county (types "A" and "B").

Dayton-Lebanon road, I. C. H. No. 64, Montgomery county (types "A" and "B").

Dayton-Indianapolis road, I. C. H. No. 28, Montgomery county (types "A,, and "B").

I have carefully examined said resolutions, find the same correct in form and legal, and am therefore returning the same to you with my approval endorsed thereon in accordance with section 1218 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1224.

ROAD IMPROVEMENT—LIMITATION UPON LEVY TO PROVIDE FUND FOR PAYMENT OF TOWNSHIP'S PORTION OF COST.

For the purpose of providing a fund for the payment of the cost and expense of a road improvement to be borne by a township, a levy not exceeding two mills may be made without submitting the matter to the people, subject only to the limitation of fifteen mills for all taxes.

COLUMBUS, OHIO, May 17, 1918.

HON. ROY R. CARPENTER, *Prosecuting Attorney, Steubenville, Ohio.*

DEAR SIR:—I have your communication of May 8, 1918, in which you make inquiry as follows:

> "The state highway department, in conjunction with the commissioners of Jefferson county and the township trustees of Saline township, have planned the construction of a gap under the directions of the state highway department, which gap connects the improved road at New Somerset with an improved road at Hammondsville. The state has agreed to pay something like $22,500.00; the county commissioners a certain per cent, the township trustees a certain per cent, and the abutting property owners a certain per cent.
>
> The township trustees propose that their proportion be levied by virtue of section 1222 of the General Code, their levy not to be in excess of two mills. The present tax rate levy is 10½ mills. The question that arises with me in advising them is whether they have the right to levy any amount over ten mills without the vote of the people."

Your question arises under the provisions of the highway law which have to do with the improvement of highways over which the state highway commissioner assumes jurisdiction. The question pertains particularly to the construction which should be placed upon section 1222 G. C. (107 O. L. 132), which is a part of the chapter containing the highway provisions above referred to. Said section covers a levy to provide a fund for the payment of the proportion of the cost and expense to be paid by the township for the construction of highways under said chapter. The part of the section relating to your inquiry reads as follows:

"Sec. 1222. * * * For the purpose of providing a fund for the payment of the proportion of the cost and expense to be paid by the interested township or townships for the construction, improvement, maintenance or repair of highways under the provisions of this chapter, the county commissioners or the township trustees are authorized to levy a tax not exceeding two mills upon all taxable property of the township in which such road improvement or some part thereof is situated. Such levy shall be in addition to all other levies authorized by law for township purposes and shall be outside of the limitation of two mills for general township purposes, and subject only to the limitation upon the combined maximum rate for all taxes now in force. Where the improvement is made upon the application of the county commissioners said county commissioners shall levy the tax and where the improvement is made upon the application of the township trustees said township trustees shall levy the tax. A county or township may use any moneys lawfully transferred from any fund in place of the taxes provided for under the provisions of this section."

You state the township trustees propose to make their levy under section 1222, supra; that the tax levy is already up to ten and one-half mills, and the question is whether the township trustees can make an additional two mill levy, without a vote of the people, under this section.

First let me suggest that the township trustees cannot make a levy for the purposes indicated, under the provisions of any other section than section 1222, supra, and further that under the provisions of this section the township trustees are authorized to make the levy in only those cases in which they make application to the state highway commissioner for state aid. When the county commissioners make application for state aid, they, and not the township trustees, must levy the tax to take care of the township's share of the cost and expense of the improvement. These are merely observations and do not go directly to the answer to your question.

The answer to your question is to be found in this provision of section 1222, supra:

"* * * Such levy shall be in addition to all other levies authorized by law for township purposes and shall be outside of the limitation of two mills for general township purposes, and subject only to the limitation upon the combined maximum rate for all taxes now in force. * * *"

If this levy is subject only to the limitation upon the combined maximum rate, we will consider what is "the combined maximum rate" of a township. Had the legislature merely used the term "maximum rate," it might have referred to the ten mill limitation; that is, the limitation beyond which any taxing authority could not go without a vote of the people. But in using the term "combined maximum rate" it evidently intended that the only limitation which was to be placed upon this levy of two mills was the combined rates levied both with and without a vote of the people; otherwise there would have been no necessity for using the word "combined." Further, this seems to have been the general policy of the legislature in the matter of road building.

We find the above quoted sentence not only in section 1222, supra, but also in a number of other sections of the General Code; for example, sections 6926, 6927, 3298-15 and 3298-18 (107 O. L., pages 100, 101, 77 and 82). The exact language above quoted is used in all of these sections and it was evidently the

intention of the legislature that in levying taxes to provide a fund from which roads might be built, either by the townships, counties or the state, the only limit to said levy would be the fifteen mill limit.

Hence the only question which the budget commission would be compelled to consider year after year, in the matter of this levy, would be as to whether the same could be brought within the fifteen mill limitation and not whether it could be brought within the ten mill limitation, without a vote of the people.

Therefore answering your question specifically, it is my opinion that under section 1222, supra, in the levying of a tax of two mills for the purpose of providing a fund for the payment of the proportion of the cost and expense to be paid by a township for a road improvement, the limitation to be considered is the fifteen mill and not the ten mill limitation, without a vote of the people.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1225.

FOREIGN TELEPHONE COMPANY PURCHASING DOMESTIC COMPANY ENGAGING IN INTRA-STATE AND INTERSTATE BUSINESS NOT SUBJECT TO PROVISIONS OF SECTION 183 G. C.—EXCISE TAXES.

A foreign telephone company purchasing the plant of a domestic telephone company, and thereupon engaging in both intra-state and interstate business in Ohio, is not liable to compliance with section 183 *of the General Code.*

Such a transaction occurring prior to June 30 *of any year renders the purchaser company liable to make report and pay an excise tax based on receipts for the year ending on that date; but the receipts on which the tax is based would be the receipts accruing to the company itself during its ownership and management of the property, and would not include any part of the receipts of the vendor company during the year in question.*

COLUMBUS, OHIO, May 17, 1918.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your letter of April 17th requesting my opinion as follows:

> "The Chesapeake & Potomac Telephone Company, a corporation organized under the laws of West Virginia, purchased the Ohio property of The Central District Telephone Company, which it began to operate as a public utility April 1, 1918, having both intra-state and interstate receipts.
>
> (1) Is the company required to qualify under section 183 General Code?
>
> (2) Will it be liable for excise tax upon its gross receipts for 1918, and, if so, for what period will the company be required to report its receipts upon which such tax shall be based?"

The answer to your first question is furnished by section 188 of the General Code, which provides, in part, as follows:

"The preceding five sections shall not apply * * * to express, telegraph, telephone, railroad, sleeping car, transportation, or other corporations engaged in Ohio in interstate commerce; * * *"

It appears that the Chesapeake & Potomac Telephone Company entered the state for the purpose of doing a business which was at least partly interstate. It is therefore squarely within the terms of section 188 G. C. It is not necessary that a company should engage, or offer to engage, exclusively in interstate commerce in order to be brought within this exception.

Your first question is therefore answered in the negative.

Your second question is answered by the following sections of the General Code:

"Sec. 5470. Each public utility * * * doing business in this state, shall, annually, on or before the first day of August, * * * under the oath of the person constituting such company, if a person, or under the oath of the president, secretary, treasurer, superintendent or chief officer in this state, of such association or corporation, if an association or corporation, make and file with the commission a statement in such form as the commission may prescribe." (106 O. L. 571.)

"Sec. 5471. The statement, provided for in the preceding section, shall contain:

1. The name of the company.
2. The nature of the company, whether a person or persons or association or corporation, and under the laws of what state or country organized.
3. The location of its principal office.
4. The name and postoffice address of the president, secretary, auditor, treasurer and superintendent or general manager.
5. The name and postoffice address of the chief officer or managing agent of the company in this state."

"Sec. 5473-1. In the case of telegraph and telephone companies, such statement shall also contain (in) the entire gross receipts, including all sums earned or charged, whether actually received or not, for the year ending the thirtieth day of June, from whatever source derived, whether messages, telephone tolls, rentals, or otherwise, for business done within this state, including the company's proportion of gross receipts for business done by it within this state in connection with other companies, firms, corporations, persons or associations excluding therefrom all receipts derived wholly from interstate business or business done for the federal government. Such statement shall also contain the total gross receipts of such company, for such period, from business done within this state."

"Sec. 5475. On the first Monday of September the commission shall ascertain and determine the entire gross receipts of each * * * telegraph and telephone company for business done within this state for the year ending on the thirtieth day of June, excluding therefrom, as to each of the companies named in this section, all receipts derived wholly from interstate business or business done for the federal government."

"Sec. 5483. In the month of October, annually, the auditor of state shall charge, for collection from each * * * telephone * * * company, a sum in the nature of an excise tax, for the privilege of carrying on its intra-state business, to be computed on the amount so fixed and reported by the commission as the gross receipts of such company on its

intra-state business for the year covered by its annual report to the commission, as required in this act, by taking one and two-tenths per cent of all such gross receipts. * * *"

The excise tax law of this state does not provide for the case of a utility changing hands in the middle of the year, the receipts of which are to be reported. It does not cast upon the vendee company the duty of reporting anything excepting its own receipts. The privilege here is, as this department has held, that of doing the business for the year beginning on the first of July (Annual Report of Attorney-General for 1914, Vol. 2, page 1697; Express Co. v. State, 55 O. S. 69).

The receipts of the past year are used as a measure of the privilege to be enjoyed during the succeeding year, which is the thing taxed. It would have been perfectly competent for the legislature to have based the tax upon the receipts of the business for the past year, whether conducted by the company whose privilege for the succeeding year is taxed or not. In other words, consistently with the theory of the tax, the general assembly might well have required a company in the situation of the Chesapeake & Potomac Telephone Company to report not only its own receipts during the two months of the year ending on the thirtieth of June next succeeding the date on which it began business in Ohio, but also the receipts of its vendor, The Central District Telephone Company, during the ten months preceding the sale and transfer. Unfortunately, however, the legislature has failed to cover this case, as I have stated. I cannot read into section 5473-1 G. C. any requirement to the effect that anything other than the actual receipts of the reporting company shall be included in the statement.

In this connection I call attention to section 5417, which assumes further to define the term "gross receipts" as used in succeeding sections, like section 5473-1. Section 5417 provides as follows:

"The term 'gross receipts' shall be held to mean and include the entire receipts for business done *by* any person or persons, firm or firms, copartnership or voluntary association, joint stock association, company or corporation, wherever organized or incorporated, from the operation of any public utility, or incidental thereto or in connection therewith. The gross receipts for business done by an incorporated company, engaged in the operation of a public utility, shall be held to mean and include the entire receipts for business done *by* such company under the exercise of its corporate powers, whether from the operation of the public utility itself or from any other business done whatsoever."

It might be argued that the first of these two sentences would have the effect of casting upon the reporting company the duty of including in its statement of gross receipts the gross receipts of its predecessor in title from the operation of the public utility. I cannot yield assent to this view, however, and am of opinion that without more explicit provision than any which I am able to find in the statutes a company which has done business in this state for only two months preceding the thirtieth day of June has nothing to report excepting the intra-state receipts arising from its public utility business in that brief period of time.

I am of the opinion, therefore, in answer to your second question that the Chesapeake & Potomac Telephone Company will be liable for excise tax upon its gross receipts for the year 1918, and that, academically speaking, it will be required to report for the entire twelve months preceding the thirtieth day of

June, 1918; but inasmuch as the only intra-state receipts of the *company* in that period of twelve months will be those accruing after it began to do business in Ohio on April 1, 1918, those receipts only will constitute the basis of the assessment of the excise tax.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1226.

APPROVAL OF BOND ISSUE NANKIN SCHOOL DISTRICT, ASHLAND COUNTY—$26.000.00.

COLUMBUS, OHIO, May 20, 1918.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In Re: Bonds of Nankin school district, Ashland county, in the sum of $26,000 for the purpose of building, furnishing and equipping a new centralized school building therein.

I have carefully examined the corrected transcript of the minutes of the proceedings relating to the creation of the Nankin rural school district and proceedings of the board of education of said school district, and of other officers, relating to the above issue of bonds.

I find all of said proceedings, both those relating to the creation of the school district and the issue of said bonds to be in conformity to the provisions of the General Code of Ohio, and I am, therefore, of the opinion that properly prepared bonds covering said issue will constitute valid and binding obligations of said school district when the same are properly executed and delivered.

No bond form accompanied said transcript, and I am therefore holding the same until a proper bond form of the bonds covering said issue is prepared and submitted to this department for approval.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1227.

APPROVAL OF FINAL RESOLUTION FOR ROAD IMPROVEMENT IN SHELBY COUNTY.

COLUMBUS, OHIO, May 20, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your letter of May 10, 1918, in which you enclose, for my approval, final resolutions for the following improvement:

Shelby county—Sec. "E," Sidney-Wapakoneta road, I. C. H. No. 164, type "B."

I have carefully examined said resolution entered into by the county com-

missioners of Shelby county, Ohio, and find the same correct in form and legal. I am therefore approving it under the provisions of section 1218 G. C.

It is not necessary for me to pass upon the other question set out in your communication, for the reason that my predecessor, Hon. Edward C. Turner, and I have heretofore passed upon the same. Very truly yours,

JOSEPH MCGHEE,
Attorney-General.

1228.

MUNICIPAL UNIVERSITY—AUTHORITY OF CITY AUDITOR OVER EXPENDITURES AND APPROPRIATIONS THEREFOR—TAX LEVIES—APPROPRIATIONS—POWER OF DIRECTORS.

The city auditor of a city maintaining a municipal university exercises the same function respecting the expenditures of appropriations from levies for the support of such university or for the maintenance of astronomical observatory, or for other scientific purposes, as he does over the expenditures of any other municipal appropriation.

The council of such city may make the second levy mentioned in section 7908 G. C. exclusively for the maintenance of the observatory, exclusively for other scientific purposes pertaining to the university, or jointly for both. When made in any of these forms the proceeds of the levy should be appropriated generally, as the directors of the university have wide, though not absolute, discretion as to the expenditure of the funds so levied.

COLUMBUS, OHIO, May 21, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your letter of recent date, as follows:

> "We are referring you to the provisions of sections 7908, 4285, 5649-3d and 280 of the General Code, and are advising you that the city auditor has received vouchers from the trustees of the University of Cincinnati approving bills covering numerous books which have been purchased for the university library and are shown in the asset accounts of the university library, such books being of a miscellaneous nature, such as Shakespeare's works, poetical works, general works on the present war, etc., etc., for the general use of the university. These vouchers are drawn upon the funds of the observatory.
>
> *Question* 1: Has not the city auditor the same discretion relative to the laws previously mentioned against drawing on appropriations of one department for supplies or equipment of another department, in this case as he has on all other bills for various departments?
>
> *Question* 2: **Can observatory funds be used** for other purpose than those specifically set forth by statute for the observatory proper?"

The sections referred to by you, in so far as they are material, are as follows: Section 7908 General Code:

> "The council annually may assess and levy taxes on all the taxable property of such municipal corporation to the amount of five-tenths of

one mill on the dollar valuation thereof, less the amount necessary to be levied to pay the interest and sinking fund on all bonds issued for the university subsequent to June 1, 1910, to be applied by such board to the support of such university, college or institution and also levy and assess annually five one-hundredths of one mill on the dollar valuation thereof, for the establishment and maintenance of an astronomical observatory, or for other scientific purposes, to be determined by the board of directors and to be used in connection with such university, college or institution, the proceeds of which shall be applied by the board of directors for such purposes exclusively. * * *

The above tax levies shall not be subject to any limitations of rates of taxation or maximum rates provided by law, except the limitations herein provided, and the further exception that the combined maximum rate for all taxes levied in any year in any city or other tax district shall not exceed fifteen mills."

Section 4285:

"The auditor shall not allow the amount set aside for any appropriation to be overdrawn, or the amount appropriated for one item of expense to be drawn upon for any other purpose, or unless sufficient funds shall actually be in the treasury to the credit of the fund upon which such voucher is drawn. When any claim is presented to him, he may require evidence that such amount is due, and for this purpose may summon any agent, clerk or employe of the city, or any other person, and examine him upon oath or affirmation concerning such voucher or claim."

Section 5649-3d:

"At the beginning of each fiscal half year the various boards mentioned in section 5649-3a of this act shall make appropriations for each of the several objects for which money has to be provided, from the moneys known to be in the treasury from the collection of taxes and all other sources of revenue, and all expenditures within the following six months shall be made from and within such appropriations and balances thereof, but no appropriation shall be made for any purpose not set forth in the annual budget nor for a greater amount for such purpose than the total amount fixed by the budget commissioners, exclusive of receipts and balances."

Section 280:

"All service rendered and property transferred from one institution, department, improvement, or public service industry, to another, shall be paid for at its full value. * * *"

I refer you also to section 7909 General Code, which provides as follows:

"Such levies shall be made by the council at the time, and in like manner as other levies for other municipal purposes, and must be certified by it and placed upon the tax duplicate as other municipal levies. The funds of any such university, college or institution shall be paid out by the treasurer upon the order of the board of directors and the warrant of the auditor."

As a basis for the views which I shall express I refer you to my opinion of recent date respecting the control on the part of the budget commission and other levying authorities as regards the levies made under authority of section 7908 General Code. I held in that opinion that under sections 7908 and 7909 no special immunity from the provisions relative to the machinery for levying taxes, other than that expressed in the last paragraph of section 7908, is accorded to the levies therein provided for. In other words, these levies and appropriations therefrom are to be treated just the same as other levies made by the council of a municipal corporation for proper municipal purposes. All the sections above quoted, therefore, apply to the appropriation and expenditure of the proceeds of these levies.

Your first question is therefore answered in the affirmative; and your second question in the negative, with the qualification that the levy mentioned in section 7908 is to be not only "for the establishment and maintenance of an astronomical observatory," but also "for other scientific purposes;" which purposes are "to be determined by the board of directors," but the proceeds of which are to be "applied by the board of directors for such purposes exclusively."

The so-called "observatory levy" may, therefore, be so made by council as to be available for purposes other than maintenance of the observatory itself, provided they are scientific purposes. Council must appropriate the proceeds of the levy, but inasmuch as the directors are to determine the scientific purposes to which it shall be applied, it would seem that council's appropriation could be no more specific than the levy itself, and that the final discretion as to what scientific purposes the appropriation shall be expended for must be left to the board of directors. However, the fact that the board of directors has some discretion does not lead to the conclusion that the discretion is unlimited; the purposes for which the proceeds of the levy may be expended in the discretion of the directors must be "scientific purposes." It would seem that the purchase of literary and historical books could scarcely be designated as a scientific purpose.

I have said that the council may, in the first instance, make the levy so as to be available for purposes other than the maintenance of the observatory itself. The council is the levying authority. It may make the levy under section 7908 in any of three ways:

(1) For the maintenance of the observatory.

(2) For the maintenance of the observatory or for other scientific purposes, etc.

(3) For scientific purposes other than the maintenance of the observatory.

If the levy is in the first form then, of course, its proceeds may not be appropriated or expended save for the maintenance of the observatory proper; if it is made in the third form then the purposes for which it may be appropriated and expended must be scientific purposes other than the maintenance of the observatory. This is made clear by the fact that such purposes are "to be determined by the board of directors and to be used *in connection with such university*" (not in connection with such *observatory).*

If the levy is made in the second or third forms above suggested the appropriation thereof should be in the general form which I have stated above, and the directors would then have the broad discretion which I have described, save that they would have to exercise their discretion reasonably so as not to divert wholly from the maintenance of the observatory funds levied in part for that purpose.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1229.

CORPORATIONS—UNPAID SUBSCRIPTIONS TO CAPITAL STOCK AND SUMS DUE UNDER EXECUTORY CONTRACTS FOR PURCHASE OF SUCH STOCK MUST BE LISTED FOR TAXATION AS PERSONAL PROPERTY—HOW PROPERTY OF SOLDIER ABSENT FROM COUNTY IN THE ACTIVE MILITARY SERVICE OF THE COUNTRY LISTED FOR TAXATION.

Unpaid subscriptions to the capital stock of a private corporation and sums due under executory contracts for the purchase of such stock made with the corporation, are, in the hands of the corporation, assets constituting a part of its capital stock and are to be listed for taxation as "personal property" and not as "credits;" i. e., the debts of the corporation may not be deducted from them.

Tangible personal property of a soldier absent in the active military service of the country is to be listed by the soldier himself as owner, unless it has been left by him in the possession of an agent or trustee; if left in the mere custody of a servant, the soldier retaining constructive possession, the soldier must list the property; if left in the possession of a bailee the duty of listing is, under the statutes, not clear, the question being involved in a pending case and no opinion is expressed with respect thereto.

Intangible personal property of a soldier so absent is to be listed by him unless the evidences thereof are in the control of a trustee, agent, guardian or parent, with authority to manage the fund represented thereby. Parents and guardians have this authority as a matter of law; trustees and agents would have it only if conferred upon them by the soldier.

A soldier in active service has, theoretically, the capacity to change his domicile; but no change of domicile can be predicated upon presence at a given place in accordance with the requirements of the service alone. The evidence of such change of domicile by a soldier must be clear and unequivocal. Possible cases considered are presenting circumstances bearing upon change of domicile.

COLUMBUS, OHIO, May 21, 1918.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your letter of May 10th requesting my opinion as follows:

> "Corporations are in the habit of issuing certain portions of the stock of the company to their employes and deduct the unpaid subscriptions from the salary of the employe, on an installment plan basis. In some instances this subscribed but undelivered stock is carried as an asset, and the paid-up portion as a liability. In other instances they charge the face of the stock as though it were entirely paid-up, as a liability, and carry the unpaid subscriptions as accounts receivable and as assets. Is an unpaid subscription an account receivable, and should they be treated as such by the company in its return?
>
> Personal property located within the county, belonging to individuals now in the service of the United States, at various camps or bureau headquarters: Who has authority to list this property for the soldier? Can the auditor place it on as omitted property? If it consists of moneys, credits and other intangibles does it follow the residence of the owner; and if a soldier in the service of the government, can such soldier create any residence other than that where he last resided as a citizen?"

Unquestionably, an unpaid stock subscription is naturally a "credit," or, as you put it, an "account receivable" of the corporation. Upon the making of a subscrip-

tion to the capital stock of an incorporated company an obligation arises to pay the par value of the stock or such other sum as may be payable by the terms of the subscription. The relation of debtor and creditor exists. When stock is issued at a discount or for over-valued property it is frequently held that as between the corporation and the subscriber no more is due than the amount expressly agreed to be paid for the property turned over; but that subsequent creditors of the corporation dealing with it without knowledge of the circumstances surrounding the subscription may hold the subscribers, or their assignees with notice, for the difference between the true value of the assets turned over to the corporation and the par value of the stock. Even this doctrine, however, does not seem to be applicable to the case of a corporation which as a going concern and with assets impaired issues stock upon an agreement to pay what the said stock would be worth in the open market. Such a transaction is rather to be regarded as a sale of stock than as an original subscription, though it is not in reality such. This last doctrine is not universally accepted, and probably is not accepted in Ohio, but as between the corporation and the person to whom stock is issued such agreements are probably binding.

Peter v. Union Mfg. Co. et al., 56 O. S. 181.

I mention these rules in a very general way to show that it is not universally true that the credit which exists in favor of the corporation on account of the issuance of stock to a person who does not pay the full par value is to be measured, in the first instance, by the difference between the amount paid and the full par value of the stock. Your question does not go to the value of the thing to be taxed, however, but it is a question as to its nature as a subject of taxation. I might add in respect to the matter of value that, like any other credit, a claim for unpaid subscription installments would have to be listed at its actual value rather than its face value.

I have said that primarily a stock subscription, or an agreement to purchase, partly executory, is in the hands of the corporation *naturally* a "credit" or "account receivable." I mean by this that, without legislation classifying it otherwise for the purpose of taxation, it would fall into such classifications, but as a matter of Ohio statutory law it will not do to say that a thing is to be classified as a "credit" simply because it represents the obligation of a debtor to pay and the correlative right of the creditor to enforce payment. A bond does that, but it is separately classified as a subject of taxation; a note secured by mortgage is none the less a "credit" in its intrinsic character, but it is made "personal property" by section 5325 General Code; bank deposits give rise to the relation of debtor and creditor and nothing more, yet if payable on demand they are regarded as "moneys" and so defined by section 5326 General Code, although if the deposit were with an individual instead of with a bank it would be merely a "credit."

The same thing is true, in my opinion, of unpaid stock subscriptions considered as assets of the corporation. Section 5325 General Code provides, in part, as follows:

> "The term 'personal property' * * * includes * * * the capital stock, undivided profits, and all other means not forming part of the capital stock of every company, whether incorporated or unincorporated. * * * "

Unpaid stock subscriptions constitute a part of the capital stock of the corporation. It is upon this theory that subsequent creditors are entitled to enforcement of their payment and that the subscriber is not permitted to set off claims due him from the corporation against the claim on the unpaid subscription (Saw-

yer v. Hoag, 17 Wall. 610); though the doctrine does not apply while the corporation is a going concern but only when it becomes insolvent (Clark v. Bever, 139 U. S. 96); yet its application then is predicated upon the principle that in equity the debt of a subscriber is a part of the capital stock. See Niles v. Olszak, 87 O. S. 229, in which the application of the rule to building and loan association stock was denied, but in which the rule itself is recognized. (Gates v. Tippecanoe Stone Co., 57 O. S. 60.)

But if there were any doubt as to whether or not unpaid stock subscriptions are intended to be treated as "personal property" in contradistinction to "credits," arising in view of the provisions of section 5325 G. C. standing by itself, such doubt would be dispelled, I think, by consideration of section 5327, which defines the term "credits." That section provides, in part, as follows:

> "Sec. 5327. The term 'credits' as so used, means the excess of the sum of all legal claims and demands, whether for money or other valuable thing, or for labor or service due or to become due to the person liable to pay taxes thereon, including deposits in banks or with persons in or out of the state, other than such as are held to be money, as hereinbefore defined, when added together, estimating every such claim or demand at its true value in money, over and above the sum of legal bona fide debts owing by such person. In making up the sum of such debts owing, there shall not be taken into account an obligation to a mutual insurance company, *nor an unpaid subscription to the capital stock of a joint stock company,* nor a subscription for a religious, scientific, literary, or charitable purpose; * * *"

I do not believe that the phrase "joint stock company" as used in this context is employed in any technical sense; on the contrary, I think it is equivalent to the word "corporation." I make this statement in full view of the fact that in earlier provisions of the same subdivision of the same chapter, originally a part of the same section of the Revised Statutes (section 2730, 56 Ohio Laws 175) the phrase "association, corporation, joint stock company or other company" is used, from which the inference might arise that the general assembly in defining the term "credits" intended to distinguish between joint stock companies and corporations. The two terms seem to have been used interchangeably in the legislation extant in 1859, at the time the provisions under consideration became incorporated in our statutory law. Thus in Swan and Critchfield's Statutes of 1860, page 309, sections 92 and 93, we find it declared that "any joint stock company heretofore incorporated" may secure permission to complete an improvement which it has been organized to complete within a specified time "as is hereinafter provided;" the succeeding provisions are to the effect that—

> "upon petition being filed by the directors of any *corporation* in the court of common pleas of the county in which the principal office of such *corporation* is located certain proceedings shall be had."

Here there is a shift from the phrase "joint stock company" to the term "corporation" in the very same act of only two sections.

Again, by section 1 of the act passed March 14, 1853, entitled "An act supplementary to the act to provide for the creation and regulation of incorporated companies in the state of Ohio," it was provided:

> "That in all *joint stock companies,* other than railroad companies, which have been or which shall hereafter be organized under the provisions of the act to which this act is supplementary, any and all installments of stock which shall remain unpaid sixty days after payment of the

same shall have been required, * * * may be collected by a civil action, or the directors may sell the stock so unpaid, at public auction * * *."

Here we have the term "joint stock company" used in a sense naturally broad enough to include railroad companies, which, I think it will be conceded, must be considered to be "corporations" in a general sense and which indeed are referred to repeatedly as "corporations" in the sections of the acts then in force specifically dealing with railroad companies. (See Swan & Critchfield, page 271, section 19 et seq.)

Reading sections 5325 and 5327 together it is apparent that the legislature did not intend that unpaid subscriptions to the capital stock of a corporation should be regarded either as "credits" in the hands of the corporation or as "debts" of the subscriber subject to deduction from his other credits.

Of course, the only difference between "credits" and "accounts receivable" which are not credits is that debts may be deducted from the former, while they may not be deducted from the latter.

I am aware that section 5325 includes within the category of things which are to constitute "personal property" not merely the capital stock, but also all means not forming part of the capital stock of an incorporated company, and that section 5404 of the General Code requires a corporation, through its proper officers, to list for taxation, *inter alia,* its "credits."

I do not find it necessary in this opinion to decide the question thus suggested respecting the right of a corporation to deduct its debts from its general accounts receivable for the purpose of determining its taxable credits; but content myself with the statement, based as well upon section 5327 as upon section 5325, that unpaid subscriptions to the capital stock of a corporation are not to be treated as general credits of the corporation for the purpose of taxation.

I have interpreted the first part of your letter as calling for a determination of the question as to whether or not unpaid stock subscriptions are "credits." You use the term "accounts receivable" in your letter, but this term is not found in the taxation statutes. I answer your question therefore by saying that while, naturally, an unpaid stock subscription or an executory contract of purchase of the stock of a corporation is, in the hands of the company, an "account receivable" in the general sense, it should not be listed as "credits" subject to deduction of debts, but as "personal property" from which debts are not to be deducted. In passing I may say that the manner in which the corporation keeps its books is a matter of no concern so far as the taxation of its property is involved.

I find it necessary to consider your second question first on the hypothesis that a soldier's domicile continues to be in the county of his former residence in Ohio. As you apparently intend to inquire about all kinds of personal property in the broad sense, including intangibles and tangible personal property, I shall have to consider this hypothesis under two additional suppositions: First as to tangibles and, second as to intangibles.

If a soldier, either by enlistment or through draft, enters the service in the army of the United States and leaves at his home articles of tangible personal property, it will not, of course, be assumed that he has abandoned such property. On the contrary, it must be presumed in each case that he has left the property in the care, and indeed in the full legal possession, of some one as his agent or trustee for that purpose. He knows where the property is and he has consented that somebody shall have the care, if not the use of it, during his absence in the army. The dominion thus resigned by him to the other party would probably be more than mere custody; so that if the person in whose charge the property were left as agent or trustee should convert it to his own use he would be guilty of embezzlement and not of larceny. On the other hand, if the relation of master

and servant had existed between the custodian with whom the property was left and the soldier, and the latter went away without intending in any way to alter the legal relations that had theretofore existed between the parties, it might be that the servant's dominion would be no more than custody. At the other extreme, it might be that the departing soldier would have left the goods in the possession of one as bailee. The point I make is that in no case could the property be regarded as abandoned by the soldier.

Coming now to the statutes, we find that section 5372-1 of the General Code, which apparently is still in force, provides as follows:

> "Personal property, moneys, credits, investments in bonds, stocks, joint stock companies or otherwise in the possesion or control of a person as parent, guardian, trustee, executor, administrator, assignee, receiver, official custodian, factor, agent, attorney, or otherwise, on the day preceding the second Monday of April in any year on account of any person or persons, company, firm, partnership, association or corporation, shall be listed by the person having the possession or control thereof and be entered upon the tax lists and duplicate, in the name of such parent, guardian, trustee, executor, administrator, assignee, receiver, official custodian, factor, agent, attorney or other person, adding to such name words briefly indicating the capacity in which such person has possession of or otherwise controls said property, and the name of the person, estate, firm, company, partnership, association or corporation to whom it belongs; but the failure to indicate the capacity of the person in whose name such property is listed or the name of the person, estate, firm, company, partnership, association or corporation to whom it belongs shall not affect the validity of any assessment thereof."

Section 5370:

> "Each person of full age and sound mind shall list the personal property of which he is the owner, and all moneys in his possession, all moneys invested, loaned, or otherwise controlled by him, as agent or attorney, or on account of any other person or persons, company or corporation, and all moneys deposited subject to the order, check, or draft; all credits due or owing any person or persons, body corporate or politic, whether in or out of such county; and all money loaned on pledge or mortgage of real estate, although a deed or other instrument may have been given for it, if between the parties, it is considered as security merely. The property of a ward shall be listed by his guardian, of a minor child, idiot, or lunatic having no guardian, by his father, if living, if not, by his mother, if living, and if neither father nor mother is living, by the person having such property in charge; of a person for whose benefit property is held in trust, by the trustees; of an estate of a deceased person, by his executor or administrator; of corporations whose assets are in the hands of receivers, by such receivers; of a company, firm, or corporation, by the president or principal accounting officer, partner or agent thereof; and all surplus or undivided profits held by a society for savings or bank having no capital stock, by the president or principal accounting officer."

Section 5369:

> "A person or party so listing property, or other items named in the statement described in the next preceding section, shall take and subscribe an oath or affirmation according to law, to be administered by the assessor, to the effect, adapting the form to the capacity in which the person

making the return acts, that the statement contains, as he verily believes, a true account of all the taxable personal property, moneys, credits, and investments in bonds, stocks, joint-stock companies, annuities or otherwise, owned or controlled by such person for his own use, or as parent, guardian, trustee, executor, administrator, receiver, accounting officer, factor, agent, or otherwise, * * *"

There are other statutes in which the same catalogue of representatives or custodians is repeated. Without quoting them suffice it to say that if one person has the possession or control of the tangible personal property of another in any of the capacities mentioned in the statute, it is the duty of the first person to list the same for taxation; but if property is in the manual custody of another otherwise than in one of these enumerated capacities the true owner of the property must list the same under section 5370 of the General Code.

Clearly, if the soldier's property were left in the mere custody of a servant, he at all times retaining the constructive possession—which he would exercise if he chose by directions given to the servant by letter or otherwise—section 5372-1 would not apply and it would be the legal duty of the soldier to make the return.

Equally as clearly, if the property were left in the possession of a trustee or agent, or parent or guardian (in case the soldier were under age), it should be listed by the person with whom it was left.

A more difficult question is furnished by the case of a bailee. Suppose, for example, the tangible personal property of the soldier is left in the possession of a warehouseman with whom it is stored. The identical question as to whether or not a warehouseman is within the terms of section 5372-1 G. C. is involved in a case now pending in the court of appeals of Hamilton county and entitled *Pagels v. Beaman, Auditor.* The court of insolvency of Hamilton county had held that the section does not apply to warehousemen. Decisions from other states are to the same effect. This office is making an effort to secure an opposite ruling, and I would not care to express an opinion at this stage of the proceedings in that case otherwise than to say that I entertain grave doubt as to whether or not a mere bailee is compellable to list for taxation property left in his possession.

The rule as to intangibles (still assuming the legal residence of the soldier to be in the county which he left to join the army) is based upon different tests. Intangibles not being choses in possession the test of possession drops out and that of *control,* as suggested by section 5372-1 G. C., becomes applicable. As a matter of Ohio law it has been held that the control here involved must be such as to enable the representative to exercise control over the fund represented by the chose in action, so that he would have not only authority to collect it, or the income derived from it, but also to apply the proceeds by way of reinvestment or otherwise.

Lee v. Dawson, 8 C. C. 365;
Myers v. Seaberger, 45 O. S. 232;
Grant v. Jones, 39 O. S. 506;
McKnight v. Dudley, 103 Fed. 918.

Of course, a guardian or trustee would have this authority as a matter of law, but an agent or attorney could only have it if in fact it had been delegated to him. If securities such as stocks or bonds were left in a safety deposit box at a bank the bank would not be required to list them for taxation because, obviously, it would have no control over them in the sense in which I have just defined that term. In all such cases the person in whose possession the evidences of indebtedness or certificates of interest might be left would not be required to list them

for taxation; the duty of so listing them would remain with the soldier as the owner.

The question now arises as to whether or not the county auditor, in case the soldier being under a duty to list either tangible or intangible property for taxation fails to do so, has authority to place same on the duplicate as omitted property. Unquestionably he has this authority. Congress by act of March 8, 1918, has acted to a certain extent for the protection of soldiers in active service; but this legislation does not interfere with the taxing laws of the state except to prevent the sale for taxes of real property occupied by the family of a soldier as a home (see section 500 of that act). I know of no common law exception in favor of soldiers as against the duty to submit to the taxing laws of the country. However, it would be going too far, I think, to advise as a matter of administration that the auditor should proceed upon the basis that there has been, in the case of a soldier, a *wilful* failure to return or list his property for taxation. His service to the country should at least absolve him from the charge of a wilful violation of the law. On the contrary, the case seems to come squarely within the provisions of sections 5392 and 5397 of the General Code, which provide as follows:

> "Sec. 5392. When the failure to make or verify such statement is occasioned by the sickness or *absence* of the person who should make or verify it, * * * the assessor, if unable to obtain positive evidence of the items or value, may make the statement from general reputation and his own knowledge of facts and circumstances."
>
> "Sec. 5397. When any person has been prevented from making or verifying a statement of property for taxation, by sickness or *absence,* and the assessor has made a statement for him, at any time before the assessment of taxes thereon by the county auditor, such person may make, verify and file with the auditor the proper statement. In such case before the auditor shall receive the statement the person making it must add to the ordinary affidavit, a statement to the effect that his failure to give to the assessor or verify the statement at the proper time was occasioned by sickness or absence. On the filing of such statement the auditor shall correct the statement made by the assessor."

In a proper case this procedure might be followed. It would seem unfair, however, under present circumstances to permit the assessor to guess at the value of the property which should have been returned by the absent soldier, inasmuch as the difficulty of obtaining a correct return from the soldier before the assessment of taxes will no doubt be insuperable. I suggest, rather, the procedure outlined in section 5401 of the General Code, which is in form one for the correction of the return of the assessor. The placing of omitted property on the duplicate by this provision is not attended by penalties of any sort, and is to be based only upon positive information under oath. It affords, to my mind, the best available statutory provision for getting the property about which you inquire on the duplicate without doing injustice to the soldier.

The last question which you ask relates, as you correctly assume, only to the situs of intangibles, which according to the law of this state take the situs of the residence of the owner. You inquire whether or not a soldier in the service of the government can create any residence other than that where he last resided as a citizen.

The mere fact that he is a soldier does not make him a person of abnormal status, incapable of acquiring a domicile of choice; nor, on the other hand, does the fact that he has physically left his former home in order to comply with the requirements of the service in which he is enlisted constitute a change of domicile.

For present purposes a "domicile of choice" may be defined as a place chosen by a person as his abiding place with the intention of remaining there permanently or indefinitely. There is a doctrine in England to the effect that when a person abandons a home without the intention of returning to that place, his domicile of origin, i. e., the place where his parents lived when he was born, reverts and becomes his domicile for the time being until he shall have acquired a new domicile of choice. (Udny v. Udny, L. R. 1 H. L. Sec. 441.) So far as I am able to ascertain this doctrine has not been accepted in this country. (Borland v. Boston, 132 Mass. 89. See Barhydt v. Cross, 40 L. R. A. n. s. 986 and note.)

Perhaps the rule with respect to soldiers is as well stated in 14 Cyc., 849, as anywhere. It is as follows:

> "In general it can be said that a domicile is neither gained nor lost during military service, and although a soldier, if both the fact and intent concur, can establish a new domicile during his term of enlistment, this will not be deemed to have occurred in the absence of the clearest and most unequivocal proof. No domicile will be acquired merely from having been stationed in the line of duty at any particular place."

If a soldier, required by the lawful orders of his superior to go in the line of his active service to a particular place, should become enamored of that place and move his family there, with the intention of making that his permanent residence, I have no doubt that an effectual change in domicile would thereby take place. If he were a single man, however, it would be very difficult to show by any convincing proof that any such change of domicile had taken place. Contemporaneous declarations included in letters would go far toward establishing such a change, but, as the text cited states, the proof must be clear and unequivocal. This is because, though a soldier retains his normal status and is under no real legal incapacity, he is in point of fact under a species of quasi incapacity because his will is not entirely free. That is to say, his will to go from place to place is circumscribed. He cannot be absent from his command without leave, and the quarters in which he abides are not selected by his choice but by the choice of the proper superior military authority. In this latter respect there is perhaps some difference, under certain circumstances, between the case of a private soldier or non-commissioned officer and that of an officer who, though required to be at a post of duty, is sometimes permitted to live in his own quarters. So long as the intention as related to the place is thus circumscribed it would be pretty hard to show in an individual case that the requisite fact and intent necessary to constitute a change of domicile had concurred. In the case of a private soldier the fact would be lacking because while living in quarters he would not be abiding in a home selected by himself; so that, unless he had a family which he could establish in a new home, his own situation could with difficulty form the predicate of the necessary *factum*. In the case of both a soldier and an officer the continuing obligation to be where the necessities of the service and the orders of superior officers require would be a fact to be taken into consideration in connection with the intent that is requisite to establish a new domicile.

In view of these considerations I can only answer your question by saying that it is legally possible for a soldier in the service of the government to create a residence other than that where he last resided as a citizen; but that every presumption is against such a change of residence and is to be rebutted only by clear and unequivocal proof. No safe rule for the solution of all possible cases can therefore be laid down.

Very truly yours,

JOSEPH MCGHEE,
Attorney-General.

1230.

APPROVAL OF BOND ISSUE OF THE VILLAGE OF CHAGRIN FALLS, CUYAHOGA COUNTY, $7,500.00.

COLUMBUS, OHIO, May 23, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE:—Bonds of the village of Chagrin Falls, Cuyahoga county, Ohio, in the sum of $7,500.00, for the purpose of paying the cost and expense of procuring additional water rights and to install additional equipment and machinery and to build an additional reservoir to furnish and supply the inhabitants of Chagrin Falls, Ohio, necessary water for domestic use and for protection of property against loss or damage by fire.

I have carefully examined the transcript of the proceedings of the council of the village of Chagrin Falls, Ohio, relating to the above issue of bonds. Said issue is not in excess of any limitation imposed by law and the proceedings relating to said issue, both as to the purpose thereof and otherwise, are, in my opinion, in conformity with the provisions of the General Code of Ohio.

With respect to the purpose of said issue, I am quite clearly of the opinion that under paragraphs 11 and 12 of section 3939 General Code bonds may be issued by a municipality for the purpose of securing a source or means of water supply, as well as for the purpose of procuring machinery and other equipment for the purpose of effecting a distribution of such water. The securing of a source or means of water supply is within the enumerated powers of municipal corporations (see sections 3619 and 3677 G. C.); and under the above noted provisions of section 3939 General Code it seems quite clear that a municipality has authority to issue bonds necessary to carry into effect the specific power granted it by sections 3619 and 3677 G. C. with respect to water-works (see Akron v. Dobson, 81 O. S., 66, 74, 75).

In line with this view I note that my predecessor, Hon. Timothy S. Hogan, in an opinion by him under date of August 14, 1913 (Annual Report of Attorney General for 1913, volume II, page 1662), held that a village may issue bonds under the Longworth act to meet the expenses of drilling wells for the purpose of extending, enlarging, improving or securing a more complete water-works system.

As above indicated, my views are in accord with those of my predecessor in the opinion just referred to, and with reference to the bond issue here under consideration I am of the opinion that the village has authority to issue bonds for the purpose of procuring necessary additional water rights and for the purpose of building an additional reservoir to secure the necessary source or means of water supply, as well as for the purpose of installing additional water-works machinery and equipment.

I am, therefore, of the opinion that said bond issue is in every respect in conformity to the provisions of law, and that bonds covering said issue properly prepared according to the bond form submitted will, when the same are properly executed and delivered, constitute valid and subsisting obligations of the said village, to be paid in accordance with the terms thereof.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1231.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN FAYETTE COUNTY.

COLUMBUS, OHIO, May 24, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—Your letter of May 14, 1918, enclosing, for my approval, final resolutions on the following improvements, received:

Fayette County—Section "K," Springfield-Washington road, I. C. H. No. 197.

Fayette County—Section "O," Hillsboro-Washington road, I. C. H. No. 259.

I have carefully examined said resolutions, find the same correct in form and legal, and am therefore returning them to you with my approval endorsed thereon, in accordance with section 1218 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1232.

RURAL SCHOOL DISTRICT—SEPARATE SUPERVISION.

A rural school district which is not wholly centralized cannot be continued as a separate supervision district under section 4740, *as amended in* 107 *O. L.*, 622.

COLUMBUS, OHIO, May 24, 1918.

HON. ROBERT M. NOLL, *Prosecuting Attorney, Marietta, Ohio.*

DEAR SIR:—My opinion is requested by you on the following statement of facts:

> "Washington county had four (4) separate supervision districts created under authority of section 4740 G. C., prior to the amendment of this section in 1917. Such districts have not been placed under district supervision since the amendment.
>
> I have examined opinion of your office No. 767, given November 7, 1917, and I find myself unable to advise our county school superintendent definitely as to the effect of this amendment.
>
> I would therefore be pleased to have you give me your opinion stating whether or not the four districts should be placed under district supervision at this time."

In order to arrive at a thorough understanding of the matters which brought about your inquiry, it will be necessary to note under what circumstances supervision districts of a county school district are formed and also under what circumstances or conditions a district may be continued or established as a separate district under section 4740 G. C.

Supervision districts of the county school district were first provided for in 1914 in what is commonly called the new school code. It was provided in section 4738

thereof that the county board of education shall, within thirty days after such county board of education was first organized (that is, 1914), divide the county school district into supervision districts and that each district was to contain one or more village or rural school districts. Certain other limitations not material to this opinion were also provided for and authority was given the county board of education "upon application of three-fourths of the presidents of the village and rural district boards of the county" to redistrict the county into supervision districts in any year. Supervision was thus provided for every school district of the county school district. At the time of the enactment, however, of said original section 4738, there existed numerous districts in the state which already had employed superintendents who had been so employed under authority of section 7705 G. C., as said section existed prior to the enactment of the new school code, and so that such districts might retain their superintendents who had theretofore been employed and might not be under the jurisdiction of the district superintendent, there was enacted at the same time original section 4738 was enacted another section, No. 4740, which read as follows:

> "Any village or rural district or union of school districts for supervision purposes which already employs a superintendent and which officially certifies by the clerk or clerks of the board of education on or before July 20, 1914, that it will employ a superintendent who gives at least one-half of his time in supervision, shall upon application to the county board of education be continued as a separate supervision district so long as the superintendent receives a salary of at least one thousand dollars and continues to give one-half of his time to supervision work. Such districts shall receive such portion of state aid for the payment of the salary of the district superintendent as is based on the ratio of the number of teachers employed to forty, multiplied by the fraction which represents that fraction of the regular school day which the superintendent gives to supervision. The county superintendent shall make no nomination of a district superintendent in such district until a vacancy in such superintendency occurs. After the first vacancy occurs in the superintendency of such a district all appointments shall be made on the nomination of the county superintendent in the manner provided in section 4739. A vacancy shall occur only when such superintendent resigns, dies or fails of re-election.
>
> Any school district or districts, having less than twenty teachers, isolated from the remainder of the county school district by supervision districts provided for in this section shall be joined for supervision purposes to one or more of such supervision districts, but the superintendent or superintendents already employed in such supervision district or districts shall be in charge of the enlarged supervision district or districts until a vacancy occurs."

Said section in effect provides that, subject to the conditions and limitations therein provided, the county board of education may designate certain districts as "separate supervision districts" and when so created the superintendent therein was named as and paid in the same manner as other district superintendents. He was in fact a district superintendent for said separate supervision district. Said section however, was amended in 1915, 106 O. L., 439, to read as follows:

> "Any village or rural school district or union of school districts for high school purposes which maintains a first grade high school and which employs a superintendent shall upon application to the county board of education before September 10, 1915, or before June 1st of any year thereafter, be continued as a separate district under the direct supervision of the county superin-

tendent. Such district shall continue to be under the direct supervision of the county superintendent until the board of education of such district by resolution shall petition to become a part of a supervision district of the county school district. Such superintendent shall perform all the duties prescribed by law for a district superintendent, but shall teach such part of each day as the board of education of the district or districts may direct. Such districts shall receive no state aid for the payment of the salaries of their superintendents, and the salaries shall be paid by the board employing such superintendents."

A marked change is noted in said amended section, last above quoted, from the way in which it originally read. The original section provided for three classes of districts, viz., village, rural and union of school districts for supervision purposes, which could become separate supervision districts. The amended section provided, in the place of the class "union of school districts for supervision purposes," a different class, viz., "union of school districts for high school purposes." Union of school districts for supervision purposes was provided for under section 7705, as it existed prior to the enactment of the new school code, but was not provided for under the new school code, and the former section 7705 was repealed and re-enacted as a new section, with said provision in relation to the union of school districts for supervision purposes being eliminated.

In original section 4740 it was provided that the application must be filed before July 20, 1914, but in the amendment last above noted the application was to be filed before September 10, 1915, or before June 1st of any year thereafter, and no district could be so continued without such application. It was provided in the original section under what conditions or limitations such district should continue as a separate supervision district, but in the 1915 amendment the conditions were changed and it was provided that "such district shall continue to be under the direct supervision of the county superintendent until the board of education of such district, by resolution, shall petition to become a part of the supervision district of the county school district." In the original section it was provided that the state should grant state aid to assist in the payment of such superintendent, that is, from what was commonly called state aid for supervision purposes, but in the amendment of 1915 it was provided that such district "shall receive no state aid for the payment of the salaries of their superintendents and the salaries shall be paid by the board employing such superintendents." There were other changes made by the amendment in 1915, but nothing, I think, which would be material to the question before us.

It seems to me, however, that we are forced to conclude that the legislature, in its 1915 amendment of said section, intended to deprive the superintendent of such a district of whatever position he occupied as a district superintendent, except that of simply performing the duties which usually devolve upon a district superintendent That is to say, when said section was so amended and made to read that the district should be under the direct supervision of the county superintendent, and that the superintendent of such district should be paid by the board of education of the district, and that the district should receive no state aid for supervision purposes, and that instead of being designated a separate supervision district it was only designated as a "separate district," then and for those reasons it seems to me that the district went out from under the supervision of a district superintendent and went under the supervision of the county superintendent. Said position is fortified further by the fact that the language used in the 1915 amendment permitted the district to continue to be under the direct supervision of the county superintendent until the board of education by resolution petitions the county board of education to become *"a part of a supervision district of the county school district."*

Districts which had existed prior to the amendment of 1915 as a union of school districts for supervision purposes could not take advantage of the provisions of said amended section and become a separate district. In other words, the only districts which could file a proper application to be continued as separate districts under the amendment of 1915 were village, rural and union of school districts for high school purposes.

Section 4740 was again amended in 1917, 107 O. L., page 622, to read as follows:

> "Any village or wholly centralized rural school district or union of school districts for high school purposes which maintains a first grade high school and which employs a superintendent, shall upon application to the county board of education before June 1st of any year be continued as a separate district under the direct supervision of the county superintendent until the board of education of such district by resolution shall petition to become a part of a supervision district of the county school district. Such superintendents shall perform all the duties prescribed by law for a district superintendent, but shall teach such part of each day as the board of education of the district or districts may direct."

Here again the classes of districts are changed, for instead of any rural district which employed a superintendent, etc., being eligible to be continued as a separate district under said last amendment, only "wholly centralized rural" districts are so eligible. So that the classes as they now exist, which may make application to be continued as separate districts, are a *village, wholly centralized rural, or union of school districts for high school purposes.*

It was held by this department in opinion No. 244, rendered under date of May 5, 1917, found in volume I of the Opinions of the Attorney-General for 1917, page 621, that the word "continued," as used in said section, should be read to mean "established" when it applied to districts making a first application thereunder, and the section is perfectly clear that there could be no establishment of separate districts other than those which would come within the three classes, last above mentioned. But, in your request you say that there existed four "separate supervision districts" which had been created under authority of section 4740 prior to the amendment in 1917, and inasmuch as the statute of 1915 used the term "separate districts" instead of "separate supervision district," as it was used in 1914, I am taking it that the districts you mention had been created as "separate supervision districts" in 1914 and that they were properly continued as separate districts in 1915, and that the only reason the question is now raised is, that the districts are not village or union of school districts for high school purposes, but that they are rural districts and that as such rural districts they are not wholly centralized, and your question resolves itself into the following, viz., can a rural school district, not wholly centralized, which existed as a separate district prior to the amendment of 1917, be continued as a separate district since said amendment?

As noted at the outset of this opinion, when the new school code was passed and the county board of education had been properly elected, and had qualified and organized, it was the duty of such board to divide the entire county district into supervision districts, taking into consideration, of course, any separate supervision districts which were at that time permitted.

Section 4738 was amended in 1915, 106 O. L. 396, to read as follows:

> "The county board of education shall divide the county school district, any year, to take effect the first day of the following September, into super-

vision districts, each to contain one or more village or rural school districts. The territory of such supervision districts shall be contiguous and compact. In the formation of the supervision districts consideration shall be given to the number of teachers employed, the amount of consolidation and centralization, the condition of the roads and general topography. The territory in the different districts shall be as nearly equal as practicable and the number of teachers employed in any one supervision district shall not be less than thirty. The county board of education shall, upon application of three-fourths of the presidents of the village and rural district boards of the county, redistrict the county into supervision districts. The county board of education may at their discretion require the county superintendent to personally supervise not to exceed forty teachers of the village or rural schools of the county. This shall supersede the necessity of the district supervision of these schools."

It is provided in said section that the county board of education shall divide the county school district "any year" into supervision districts and that such districts shall be as nearly equal as practicable, and that in case the county board of education shall receive an application of three-fourths of the presidents of the village and rural district boards, then the county board of education must redistrict the county into supervision districts. Said section also provides that the board of education of the county school district "may at their discretion require the county superintendent to personally supervise not to exceed forty teachers of the village or rural schools of the county" and that this shall supersede the necessity of the district supervision of these schools. That is, if for any reason territory is annexed to a county school district, and it is necessary to attach to some supervision district, or if, say a district, which had been existing as a separate district, should, by its board of education, pass a resolution petitioning the county board of education to become a part of a supervision district of the county school district, or if for any other reason it was necessary in the judgment of the board of education of the county school district, to redistrict the county, said section 4738 gives authority to the county board of education whereby said purpose may be accomplished. Or, if three-fourths of the presidents of the village or rural school districts of the county school district petition the county board of education to do so, the county board of education must redistrict said county into supervision districts. In making said supervision districts, the county board of education must include all territory of the county school district, except that the county superintendent may be compelled by the county board of education to personally supervise not to exceed forty teachers, and I am taking it that the territory in which said forty teachers are located, while being a part of the county school district, would not be a part of any supervision district in the county school district.

In ascertaining the territory of the county school district, which is to be assigned to the various supervision districts, the county board of education, in so redistricting the county school district, must ascertain whether or not there are any districts in the county which have been continued or established as separate districts, and whether or not they can qualify to so continue as such separate districts. If there exists any such district which has been continued as a separate district, which has failed to employ a superintendent, then such district could not longer continue as a separate district. So likewise, if it is found that there exists a separate district which does not come within the class of a wholly centralized rural district, it is my opinion that such district could not longer be continued as a separate district and such district would have to be assigned by the county board of education to a supervision district of the county school district, or the county board of education would have to require the county superintendent to personally supervise the teachers of such district, provided the number did not exceed forty in the entire county school district.

You say you have examined opinion No. 767, rendered by this department on November 7, 1917, and that you are unable to advise your county superintendent definitely as to the effect of the amendment since reading said opinion. There were three questions answered in said opinion: First, what is meant by a "wholly centralized rural school district;" second, are rural school districts, which are not wholly centralized, entitled to have separate supervision as now provided by section 4740 G. C., and, third, where the centralization of schools has been carried into effect, is it necessary that all the schools be centralized under one roof? Inasmuch as you have a copy of said opinion, it will not be necessary for me to enclose one herewith, and that, together with this opinion, will answer your inquiry.

Answering your question specifically, then, I advise you that a rural school district, which is not wholly centralized, cannot be continued as a separate supervision district under section 4740, as amended in 107 O. L. 622.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1233.

APPROVAL OF BOND ISSUE OF SANDUSKY COUNTY, $136,000.00.

COLUMBUS, OHIO, May 24, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of Sandusky County, Ohio, in the sum of $136,000.00, for the purpose of paying the respective shares of said county of York and Green Creek townships, and of the owners of benefited property assessed, of the cost and expense of improving the Fremont-Bellevue road, I. C. H. No. 274, section L-2.

I have made a careful examination of the transcript of the proceedings of the board of county commissioners of Sandusky county, Ohio, and of other officers relating to the above issue of bonds, and find said proceedings to be in all respects in conformity to the provisions of the General Code of Ohio relating to bond issues of this kind.

I am therefore of the opinion that properly prepared bonds covering said issue will, when properly executed and delivered, constitute valid and subsisting obligations of said county to be paid according to the terms thereof.

The bond form submitted with and as a part of said transcript is not entirely satisfactory to me and I am therefore holding the transcript of the proceedings relating to this bond issue until a bond form meeting my approval is prepared and submitted.

Very truly yours,
JOSEPH MCGHEE,
Attorney General.

1234.

NOTARY FEES—LEGAL CHARGE AGAINST CITY FUND FOR ACKNOWLEDGING CEMETERY DEEDS—CITY SOLICITOR.

Notary fees for acknowledging cemetery deeds are legal charges against the funds of the city. However, these fees may not be paid to or received by the city solicitor.

COLUMBUS, OHIO, May 24, 1918.

The Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I have your letter as follows:

"We refer you to section 4165 G. C., Opinions of the Attorney-General, page 223, of the 1913 reports, and page 405 of the 1915 reports.

Question: Are notary fees for acknowledging cemetery deeds a legal charge against the funds of the municipality?"

I note you refer to an opinion found in the Annual Report of the Attorney-General for 1913, Vol. 1, page 223, and to an opinion of the attorney-general found in the 1915 reports, Vol. 1, page 405. In the first of these opinions it was held:

"Under section 3808, General Code, which prohibits any officer of a corporation from having any interest in the expenditure of money on the part of the corporation other than his fixed compensation, under penalty of dismissal from office; and also under section 12912, General Code, which prohibits an officer from being interested in the profits of any services for such corporation, under penalty of fine or imprisonment and forfeiture of office, a city solicitor may not receive compensation in addition to his salary for taking acknowledgment of cemetery deeds as notary public."

In the second opinion it is held:

"A notary fee on an affidavit in proof of publication is not a public charge unless made so by statute, and the expense thereof is to be borne by the publisher."

In the first opinion the attorney-general seems to have assumed that the payment from the city treasury of a notary fee for acknowledgment of a cemetery deed was a proper charge against a municipality. In the second opinion the conclusion that a notary fee on an affidavit in proof of publication was not a public charge seems to have been arrived at because of the fact that the duty of furnishing the proof of publication was upon the publisher and not upon the city.

Section 4165, referring to cemetery lots, provides:

"The director (of public service) shall determine the size and price of lots, the terms of payment therefor, and shall give to each purchaser a receipt, showing the amount paid and a pertinent description of the lot or lots sold. Upon producing such receipt to the proper officer, the purchaser shall be entitled to a deed for the lot or lots described therein."

It will be seen from this section that the duty of furnishing the deed rests upon the city through the director of public service and it would seem that if the certificate of a notary is required to the deed the expense of that certificate must be met by the city for the same reason that the publisher was required to pay such expense

in connection with the proof of publication in the opinion of my predecessor, Mr. Turner, referred to.

Section 8510 G. C. provides as follows:

> "A deed, mortgage, or lease of any estate or interest in real property, must be signed by the grantor, mortgagor, or lessor, and such signing be acknowledged by the grantor, mortgagor, or lessor in the presence of two witnesses, who shall attest the signing and subscribe their names to the attestation. Such signing also must be acknowledged by the grantor, mortgagor, or lessor before a judge of a court of record in this state, or a clerk thereof, a county auditor, county surveyor, notary public, mayor, or justice of the peace, who shall certify the acknowledgment on the same sheet on which the instrument is written or printed, and subscribe his name thereto."

This section was originally section 4106 of the Revised Statutes and in the case of Sheehan, et al. v. Davis, 17 O. S. 571, it was held that it did not apply to municipalities. The same view was taken in the case of Young v. Commissioners, 53 Fed. 895, 7 O. F. D. 324. However, at the time these cases were decided the statute referred only to deeds executed by "any man or unmarried woman" and to deeds executed by "husband and wife." Since these decisions the statute has been amended to refer to deeds generally. It will be noticed that the section provides that the deed must be signed by the "grantor" and that "such signing be acknowledged by the grantor" in the presence of two witnesses, and that "such signing also must be acknowledged by the grantor." It might be argued that section 8510 G. C., in providing that "such signing also must be acknowledged by the grantor" refers to the signing by the grantor and that inasmuch as the deeds of a municipality are not signed by the grantor, but by an agent or representative of the grantor, the provision of said section 8510, requiring acknowledgment, is without application in the case of deeds by municipalities. However, inasmuch as it has been the universal custom to require these deeds to be acknowledged, I am not inclined to consider this contention and shall, in the absence of any judicial decisions to the contrary, assume that section 8510 G. C. applies to deeds by municipalities, as well as to deeds by private individuals.

This being so, and the duty of making the proper deeds to these cemetery lots being cast upon the city through the director of public service under section 4165, above quoted, it is my opinion that the payment of the notary fee is a proper charge against the city.

A somewhat similar view seems to have been taken by former attorney-general Hogan, in an opinion found in the Annual Report of the Attorney-General for 1912, page 162, Vol. I, in which he held:

> "It is not the intention of the statutes that sheriffs should pay notary fees for the execution of deeds out of his own pocket and therefore out of the $2.00 allowed the sheriff for executing deeds, he may deduct the forty cents notary expense and pay the balance into the fee fund."

However, although we hold that the payment of a notary fee in connection with the deed to the cemetery lot is a proper charge against a city, we feel it should be here stated that this department agrees with the holding of former attorney-general Hogan, quoted above, and found in the Annual Report of the Attorney-General for 1913, Vol. I, page 223, to the effect that such notary fees may not be paid to or received by the city solicitor.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1235.

CIVIL SERVICE COMMISSION HAS AUTHORITY TO MAKE RULES TO PREVENT ABUSE OF THE POWER TO SELECT EXEMPT EMPLOYES.

The civil service commission has authority to enact rules to prevent abuse of the power of selecting exempt employes conferred upon heads of departments by paragraph 8 of section 8 of the civil service law. Such rules must not interfere with the authority of the appointing power to select the exempt positions, and employes to fill the same, but may prevent abuses arising from arbitrary change of such selection of positions, or practices on the part of the appointing authority having a tendency to defeat the purpose of the civil service law.

COLUMBUS, OHIO, May 24, 1918.

Civil Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—On April 18, 1918, you communicated the following request to this office:

> "Under section 486-1 of the civil ervice law, the term 'civil service' is defined as including all offices and positions of trust or employment in the state, counties, cities and city school districts thereof.
>
> Section 406-8 of the law provides in part:
>
> 'The civil service of the state of Ohio and the several counties, cities, and city school districts thereof shall be divided into the unclassified and the classified service.'
>
> Then follows an enumeration of the positions which are specifically placed in the unclassified service or which may be exempted from competition. Paragraph 8 of this enumeration of exceptions provides as follows:
>
> 'Three secretaries, assistants or clerks and one personal stenographer for each of the elective state officers; and two secretaries, assistants or clerks and one personal stenographer for other elective officers and each of the principal appointive executive officers, boards or commissions, authorized by law to appoint such secretary assistant or clerk and stenographer.'
>
> Section 486-9 immediately following the section in which appears the paragraph quoted, provides, in part, as follows:
>
> 'As soon as practicable after the taking effect of this act, the commission shall put into effect rules for the *classification of offices, positions and employments in the civil service* of the state and the several counties thereof; etc.'
>
> From this wording it would appear that the commission is required to put into effect rules for the *classification* of the *civil service* of the state and counties as the *unclassified* and *classified* service.
>
> Your advice and opinion is respectfully requested as to whether or not this is the intent and purpose of the law and, if so, as to what are the commission's powers and duties, especially with relation to those exemptions provided for in paragraph 8 of section 486-8, above quoted.
>
> Heretofore, elective and principal appointive executive officers, boards and commissions, have been allowed to designate without restriction the exemptions to be claimed under paragraph 8, and to change such exemptions at will. This practice, as you will readily understand, might lead to serious injustices. The appointing power, finding a position exempted under this paragraph, and for which no eligible list exists, desiring to make an unrestricted appointment to a position falling within the classified service, might place

the position for which no list exists in the classified service and exempt the position to which it is desired to make an unrestricted appointment. In such case, it would be necessary for this commission to approve provisional appointment to the position thus placed in the classified service, and an employe qualified under the civil service law would be displaced to make room for the appointment of a person exempted from competition. Such exemptions might be shifted from time to time in such a way as to avoid making appointments from eligible lists prepared by the commission. It would seem to be the intent of the civil service law that the basis for such exemptions should be the confidential or fiduciary relationship existing, or which might logically be held to exist between the incumbents of positions exempted under this paragraph, and the appointing power.

Our commission is at a loss to know whether it has power to restrict the shifting of such exemptions or to require that they be made for satisfactory reasons or administration."

The matter about which you inquire presents great difficulty, and if the answer is barren, as it must be to some extent, the reason is the lack of clearness and definiteness in the civil service law as applied to this subject.

So far as the letter of the law is concerned, we are reduced to the most general considerations, and can only arrive at a conclusion by taking into account the spirit of the law more than its express requirements.

The purpose of the civil service law is obvious, and is deducible from all its provisions from beginning to end; and while in many respects the accomplishment of the purpose is worked out even to remote details, in some other respects it is not only left uncertain, but is even contradictory. This is especially true upon the subject of the unclassified service. We will note some of the provisions of the act. In its very first words it proposes to be all-embracing: it is as follows (486-1):

"1. The term 'civil service' includes all offices and positions of trust or employment in the service of the state, etc.

2. The 'state service' shall include all such offices and positions in the service of the state," etc.

Notwithstanding these positive declarations it transpires, upon further perusal of the act, that a very considerable portion of the offices and positions are not included within its regulatory terms. There is a direct contradiction as to the definition or the extent and limitation of the classified service, as for instance, in the first section of the act you have the following immediately after what is quoted above:

"3. The term 'classified service' signifies the competitive classified civil service of the state, etc."

Notwithstanding this restriction, we find in section 8 of the act:

"(b) The classified service shall comprise all persons in the employ of the state, the several counties, cities and city school districts thereof, not specifically included in the unclassified service, to be designated as the competitive class and the unskilled labor class."

This additional inclusion in the competitive class of a very large element excluded in the first definition is further carried out as follows in the same section:

"Vacancies in the labor class shall be filled by appointment from lists of applicants registered by the commission."

In reading the whole act through, only once is any authority mentioned of the commission over unclassified employes, which is found in section 18, and is as follows:

> "All officers and employes or subordinates in the state, the several counties, cities and city school districts thereof, *whether in the classified service or not*, shall promptly and correctly report to the commission any information required by the rules of the commission relative to the conduct, capacity, and efficiency of any officer, employe or subordinate in the classified service under his supervision."

This, strictly, does not give the commission control over the unclassified employe, but only imposes a duty upon the latter.

It should also be observed that the civil service law is binding in its requirements on the heads of departments of the civil service commission, and while the appointing authority is making an appointment, it is his duty on his oath to make it upon merit and fitness. The act makes no provision for him to do this by means of a competitive examination. All this administrative machinery is confided to the civil service commission for the obvious purpose of uniformity. It is the office and function of the commission to make the law effective; this is the reason of its existence. Its authority for this purpose is plenary and far-reaching. Its first duty is as follows:

> "The commission shall, First: Prescribe, amend, and enforce administrative rules for the purpose of carrying out and making effectual the provisions of this act."

It keeps rosters and records, it hears appeals from discharges, makes investigations "touching the enforcement and effect of the provisions of this act and the administrative rules of the commission prescribed thereunder." It makes a report to the governor, which, among other things, contains "recommendations for the more effectual accomplishment of the purposes of this act." With all this full control and minute detail the intent of the act seems to except the unclassified service from the control of the commission.

An attempt is made to expressly enumerate everything included in the unclassified service, section 8 beginning as follows:

> "(a) The unclassified service shall comprise the following positions which shall not be included in the classified service, and which shall be exempt from all examinations required in this act."

It is to be noted that it is exempt from examinations; it is not necessarily exempt from other powers of the commission, such as investigation, report, and so on. After giving twelve classes of employes in the enumeration of the unclassified service, the section proceeds:

> "(b) The classified service shall comprise all persons in the employ of the state * * * not specifically included in the unclassified service, * * *."

So that all others than those contained in this enumeration comprise the classified service, and are under the control of the civil service law, and of the commission, with one possible exception, not here necessary to refer to.

In the enumeration of these twelve classes under paragraph (a) of this section, No. 8 is as follows:

"Three secretaries, assistants or clerks and one personal stenographer for each of the elective state officers; and two secretaries, assistant or clerks and one personal stenographer for other elective officers and each of the principal appointive executive officers, boards or commissions, except civil service commissions, authorized by law to appoint such secretary, assistant or clerk and stenographer."

This particular exemption is peculiar in that it does not identify the position or persons holding positions who are exempt. It is just a number of three or two or one of the given positions that is so exempt. There is no express authority to anyone to make the selection. The practice has been uniformly that the selection be made by the appointing authority, and this is most probably the correct construction and meaning of the language. The words "secretaries, assistants or clerks" are so general and inclusive as to take in practically all the employes of a department, and I cannot find in the section the meaning you suggest as probable that the confidential, the fiduciary idea is to be applied to the exempted employes.

There is nothing in the language indicating it, although it is readily conceivable that the department might prefer, and the legislature might exempt such employes with confidential duties. Yet, they have not done so, even by inference; but on the contrary, looking to paragraph 9, the inference is the other way, because the employes holding the fiduciary relation are excepted in addition to those provided in paragraph 8; that is, deputies holding such fiduciary relations form a separate exempt class. It does not necessarily follow, however, from the fact that the appointing authority arbitrarily selects these exempt employes that it may do so in violation of the terms and spirit of the civil service law; for while this exemption is peculiar and differs from all others in that it is left to such arbitrary selection, the very fact brings it in touch with the classified service; that is, these persons so exempted would be in the classified service except for such selection.

Reverting in this connection to the powers of the commission again, we again note the authority to prescribe, amend and enforce administrative rules for the purpose of carrying out and making effectual the provisions of the act. If this power of selection were left to the mere caprice of appointing authority to the extent that at will, or at random, the exemption might be changed, the act would to that extent and in that respect, not be carried out and made effectual.

Noting section 9 of the act quoted by you, it does not seem in this respect to add any additional authority. The rule for the classification of officers, etc., cannot apply to the enumeration in section 8, for they are expressly the unclassified service, and while the thing is not impossible, it is clearly not intended to give the commission the power to classify the unclassified service. There is in the very section itself a classification of this unclassified service, but it is suggested that the classification is exclusive of any other, and that its designation of "unclassified" means that it is to remain so so far as the commission is concerned. So that the classification provided for by this section 9 means such classification as that which the commission has already made by which the employes in different departments are standardized and uniformity in the service produced, and discrimination between the same character or value of service in different departments is obviated.

What has been said above must all the time be borne in mind. The provisions of this law, like every other law, are left to human agency to carry out, and therefore it may be imperfectly done or entirely fail.

It is the duty of the appointing power to make these exemptions in accordance with the civil service law, and for the good of the service, and without injustice to employes. However, it is also confided to the civil service commission to make rules for the purpose of carrying out all parts of the act, and this commission is a department superimposed upon the other departments of the state government, without authority or power to interfere in the management of any department, but with power

in reference to all departments under the terms of the act to look after the enforcement of the civil service law.

I therefore hold that the state civil service commission may make rules to prevent abuses in this respect, which rules would probably consist of prohibition of arbitrary change of selection; but here the greatest difficulty of the situation arises. The rule must be such as not to interfere with the authority and discretion of the appointing power properly and lawfully exercised, as above described, but must stop at the prevention of the abuse of such power.

I do not wish to advise or suggest any rule that might meet this nice balance, as that is beyond the scope of the duties of this department, and I yet realize that what is above stated is very indefinite and unsatisfactory as a guide to the commission. This, as previously stated, arises from the nature of the case and the indefiniteness of the law in this particular.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

1236.

SCHOOL DISTRICTS UNION HOW FORMED—EFFECT ON DISTRICT EXISTING UNDER SECTION 4740 G. C.—TO WHAT DISTRICTS THE PHRASE "WHICH MAINTAINS A FIRST GRADE HIGH SCHOOL" APPLIES.

When districts are united for high school purposes, that act alone does not unite such districts for supervision purposes.

A district which exists under section 4740 G. C. and which unites with an adjoining district for high school purposes, cannot longer exist under said section 4740.

Supervision districts are formed by the county board of education.

The phrase "which maintains a first grade high school" in section 4740 applies to village, wholly centralized rural and union of school districts for high school purposes.

COLUMBUS, OHIO, May 24, 1918.

HON. R. A. KERR, *Prosecuting Attorney, Troy, Ohio.*

DEAR SIR:—Your letter in which you request my opinion reads as follows:

> "I desire to direct your attention to section 7669 of the General Code, providing for the union of village and of rural school districts for high school purposes, and to inquire whether or not a union for high school purposes unites the two districts for all purposes. The situation concerning which I wish your opinion is as follows:
>
> Newton and Newberry townships of Miami county compose one supervision district under the supervision of a district superintendent. Covington, which is located in Newberry township, maintains a high school. The boards of Newberry township of Covington wish to unite Newberry township and the village of Covington for high school purposes. The question that arises in my mind is as to the effect this would have on the grade schools in Newberry township and in Covington; in other words, would the superintendent of the Newberry-Newton district have supervision of the grades in Covington after such union and would he have supervision of the high

school of the two districts, or would the grade schools of Covington remain under the jurisdiction of the county superintendent? Furthermore, if the grade schools of Covington remain under the jurisdiction of the county superintendent, could the two boards arrange for the present superintendent of Covington high school to give a portion of his time to the grade schools and the remainder to the high school of the two districts?

Newberry township would not unite with Newton and Covington as there is a high school located in Newton township at Pleasant Hill.

The section of the code covering the question of supervision is section 4740. A doubt was raised in my mind as to the effect of this union for high school purposes on the grade schools by the ruling of the attorney-general, 1911-12, page 1042, where the statement is made:

'When a joint school district is formed for high school purposes by a township school district and an adjoining village district, such district becomes one district and taxes for the support of same, etc.'

I did not construe section 7669 to mean that it intended union for any other than high school purposes, but this language being general and the remainder of the opinion throwing no light on it, I thought I might be wrong in my construction.

These boards wish to pass on this matter so as to get the budgets prepared and submitted on the basis of the united district and for that reason an early reply would be greatly appreciated."

Since receiving said letter I have received the following letter through the superintendent of public instruction in relation to your matter:

"Two townships in this county, Newberry and Newton, having thirty-one teachers or more constitute a supervisory district under Mr. W. F. Deeter. Lying within Newberry township is the village of Covington, having '4740 supervisory district' of its own and by virtue of the fact it maintains a first grade high school, the village superintendent being Mr. C. H. Detling.

Now Newberry township and the village of Covington are thinking of forming a joint high school district for the purpose of the better supervising of the high school now located at Covington. This will provide for an increase in the teaching force and make possible transportation of rural pupils to high school when living outside the four-mile limit.

However, puzzling questions regarding supervision have arisen:

(1) Would it be possible for Covington to continue as a '4740 supervisory district' while Newberry remains a member of the Newberry-Newton supervisory district?

(2) Which superintendent would have control of the high school, Mr. Detling or Mr. Deeter?

(3) Would the high school, if the condition mentioned in question number (1) were maintained, be under the joint supervision of these two men?

I rather think the prosecuting attorney intends to take this case up also with the attorney-general, but I believe it ought to come to your attention also. Mr. Detling and Mr. Deeter are good friends and I think we can make any plan work, but I believe it is very important that we follow only such course as may prove to be strictly legal, for it appears that a union of this kind is intended by the law to be permanent.

The two communities are on the best of terms with each other and I think the prospects are that the enrollment of the high school would increase

from one hundred and ten to one hundred forty or fifty, provided we can find the right way to make the union and get all parties to agree to it."

Several questions are contained in said request which will be answered separately herein.

The first question I shall determine is, when school districts are united for high school purposes, does such act also unite said district for supervision purposes. The statutes which provide for the union of school districts for high school purposes are sections 7669 et seq. of the General Code. Section 7669, as amended in 107 O. L. 624, reads in part as follows:

> "The boards of education of two or more adjoining rural or village school districts or of a rural and village school district, by a majority vote of the full membership of each board, may unite such district for high school purposes. * * *."

Section 7670 G. C. provides that any high school established as provided by section 7669 shall be under the management of a high school committee consisting of two members from each of the boards which go to make up such joint district. Section 7671 G. C. provides that the funds for the maintenance and support of such *high school* shall be provided by appropriation from certain funds of each district "in proportion to the total valuation of property in the respective districts," and further provides that said funds must be placed in a separate fund in the treasury in the district in which the school house is located and paid out by the high school committee for the maintenance of such high school. It is plain, it seems to me, from the language of the above mentioned sections, that the districts are united for high school purposes only and that for supervision purposes, whether the same be joined or not, it will be necessary to look to other statutes.

In your statement you say that the districts of Newton and Newberry townships form a supervision district and I am taking it, for the purpose of this opinion, that both of said townships compose rural school districts and that therefore the supervision district, as at present constituted, is made up of Newton and Newberry rura school districts of your county and that said supervision district is under the supervision of a district superintendent. You further state that Covington, which I shall assume for the purpose of this opnion is a village school district, is located in Newberry township in said county and that said Covington maintains a high school, which I shall assume for the purpose of this opinion to be a first grade high school. You mention that Covington is supervised as is provided in section 4740 G. C. That section, as last amended, 107 O. L. 622, reads as follows:

> "Any village or wholly centralized rural school district or union of school districts for high school purposes which maintains a first grade high school and which employs a superintendent shall upon application to the county board of education before June 1st of any year be continued as a separate district under the direct supervision of the county superintendent until the board of education of such district by resolution shall petition to become a part of a supervision district of the county school district. Such superintendents shall perform all the duties prescribed by law for a district superintendent, but shall teach such part of each day as the board of education of the district or districts may direct."

That is to say, before the district of Covington could continue as a separate district under the provisions of the above quoted section, it would be necessary that

such district comply therewith. But just what provisions thereof must be complied with by the district? Covington being a village district, is it necessary that it maintain a first grade high school and employ a superintendent, or do those provisions apply to a union of school districts for high school purposes only?

It will take the history of this section to solve the above question. When section 4740 was first enacted, 104 O. L. 141, that part of the section read:

> "Any village or rural district or union of school districts for *supervision* purposes which already employs a superintendent and which officially certifies by the clerk or *clerks* * * * shall upon application to the county board of education be continued as a separate supervision district * * *."

It will be noted that in said original section the three classes of districts were village, rural and union of school districts for supervision purposes,, and that said section provided if any of such districts already employed a superintendent, etc., it might be continued as a separate supervision district. So that the phrase "which already employs a superintendent" modified not only "union of school districts for supervision purposes," but also modified the words "village" and "rural." When the section was amended in 1915, 106 O. L. 439, one of the classes of districts was changed. That part of the amended section reads:

> "Any village or rural school district or union of school districts for *high school* purposes which maintains a first grade high school and which employs a superintendent * * *."

That is, the class of districts which were united for supervision purposes was eliminated and in its place was added that class of districts which united for high school purposes, and besides hiring a superintendent, a new condition was placed upon each district, viz., that it must maintain a first grade high school. The section does not mean that the union of school districts for high school purposes is the only district which must maintain a first grade high school, for the section reads, "which maintains a first grade high school and which employs a superintendent," showing that the phrase "which maintains a first grade high school" modified the same words as the phrase "employs a superintendent."

The section was again amended in 1917, 107 O. L. 622, and that part of the section reads:

> "Any village or *wholly centralized* rural school district or union of school districts for high school purposes which maintains a first grade high school and which employs a superintendent * * *."

So that, here again the class of districts was changed by substituting only "wholly centralized rural school district" for any "rural school district" and leaving the other provisions as to the maintaining of the first grade high school and the hiring of the superintendent the same as found in the 1915 amendment. There is but one conclusion that can be reached from the above and that is, that the phrase "which maintains a first grade high school" applies to all the districts mentioned in said section, whether the same be village, wholly centralized, rural or union of school districts for high school purposes. So that, when the Covington district and the Newberry district unite for high school purposes, it could not be said that the Covington district would continue to maintain a first grade high school. While the districts jointly would be maintaining a first grade high school, yet they would not be maintaining the same individually, and provision is made for a separate supervision district to be formed from a union of school districts for high school purposes. Therfore, when

Covington unites with Newberry township for high school purposes, it no longer can be a separate supervision district under section 4740 because it cannot comply with the provisions thereof. This, then, will not of itself unite said district with any other district for supervision purposes because supervision districts are formed by the county board of education and it would be for the county board of education to say whether said district should be united with the Newberry and Newton district for supervision purposes or whether there should be new districts formed for supervision purposes. In any event, it is a matter for the county board of education and not for the local boards which unite for high school purposes.

Answering your first question, then, I advise you that the union of school districts for high school purposes does not necessarily unite such districts for supervision purposes.

In the letter from the superintendent the question is asked whether or not the Covington district would continue as a 4740 district. What I have said above answers that question and you are advised that when Covington and Newberry districts are united for high school purposes, the Covington district will not continue as a separate district under section 4740 G. C.

Answering your question, then, I advise you:

(1) When districts are united for high school purposes, that act alone does not unite such districts for supervision purposes.

(2) A district which exists under section 4740 G. C. and which unites with an adjoining district for high school purposes, cannot longer exist under said section 4740.

(3) Supervision districts are formed by the county board of education.

(4) The phrase "which maintains a first grade high school" in section 4740, applies to village, wholly centralized rural and union of school districts for high school purposes.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

1237.

SCHOOL BUILDINGS—WHEN BOARD OF EDUCATION MAY LET CONTRACT FOR SAME WITHOUT ADVERTISING FOR BIDS—URGENT NECESSITY.

Where a school building is destroyed by fire and there are no other buildings in the district in which the schools can be conducted, and a new building can be completed before the new school term if advertisement under section 7623 is dispensed with, but canno be completed if time for advertisement is taken, then and in that case there would be a case of urgent necessity and the board may proceed to let the contract without advertising for bids for a period of four weeks.

COLUMBUS, OHIO, May 25, 1918.

HON. CHARLES L. BERMONT, *Prosecuting Attorney, Mt. Vernon, Ohio.*

DEAR SIR:—You request my opinion on the following statement of facts:

"Sometime during the year 1917 the school building in the Blandensburg rural school district was destroyed by fire. The board of education then rented two halls, in which school was conducted during the school year of 1917 and 1918.

On March 7, 1918, an order was made by the industrial commission, by which order the board of education is prohibited from using said buildings for school purposes any longer.

As these two halls were the only available places for holding school, it looks as though no school could be held in Blandensburg until a new school building is erected, unless the order of the industrial commission is modified.

It seems to me that a case of 'urgent necessity' exists in this district so that the provisions of section 7623 G. C., providing for advertising for bids, might be dispensed with.

Please let me have your opinion in this matter."

Section 7623 G. C., which provides in what cases a board of education may build, repair, enlarge or furnish a school house or make improvements or repairs thereon without advertising for bids, as is provided in said section, reads as follows:

"When a board of education determines to build, repair, enlarge or furnish a schoolhouse or schoolhouses or make any improvement or repair provided for in this chapter, the cost of which will exceed in city districts, fifteen hundred dollars, and in other districts five hundred dollars, except in cases of urgent necessity, or for the security and protection of school property, it must proceed as follows:

1. For the period of four weeks, the board shall advertise for bids in some newspaper of general circulation in the district, and two such papers, if there are so many. If no newspaper has a general circulation therein, then by posting such advertisement in three public places therein. Such advertisement shall be entered in full by the clerk, on the records of the proceedings of the board.

2. The bids, duly sealed up, must be filed with the clerk by twelve o'clock, noon, of the last day stated in the advertisement.

3. The bids shall be opened at the next meeting of the board; be publicly read by the clerk, and entered in full on the records of the board.

4. Each bid must contain the name of every person interested therein, and shall be accompanied by a sufficient guarantee of some disinterested person, that if the bid be accepted, a contract will be entered into, and the performance of it properly secured.

5. When both labor and materials are embraced in the work bid for, each must be separately stated in the bid, with the price thereof.

6. None but the lowest responsible bid shall be accepted. The board in its discretion may reject all the bids, or accept any bid for both labor and material for such improvement or repair, which is the lowest in the aggregate.

7. Any part of a bid which is lower than the same part of any other bid, shall be accepted, whether the residue of the bid is higher or not; and if it is higher, such residue must be rejected.

8. The contract must be between the board of education and the bidders. The board shall pay the contract price for the work, when it is completed, in cash, and may pay monthly estimates as the work progresses.

9. When two or more bids are equal, in the whole, or in part thereof, and are lower than any others, either may be accepted, but in no case shall the work be divided between such bidders.

10. When there is reason to believe that there is collusion or combination among the bidders, or any number of them, the bids of those concerned therein shall be rejected."

The question of what is a case of urgent necessity is one of fact rather than law. The word "urgent" is defined as that which is characterized as being pressing; especially demanding prompt action or attention, that which is imperative or forcible, as an urgent want. "Necessity" is defined as that which is necessary; that which is indispersably requisite to an end desired; that which is especially needful to do. "Urgent necessity" is defined in Mueller v. Board of Education, 11 O. N. P. (n. s.) 113, 120, as follows:

> "Urgent necessity is a very strong expression. It means more than convenience and more than ordinary necessity. It is something that requires immediate action; something that cannot wait. When pleaded as an excuse for failure to comply with any statutory requirement it must be decided by the circumstances of the particular case in which it arises. An illustration of a case which might arise under the statutes referred to would be where there is a single school building of which a number of pupils would be prevented from occupancy for a considerable time, and left without any chance for instruction pending the construction or repair of such building."

On September 6, 1917, Hon. Addison P. Minshall, Prosecuting Attorney, Chillicothe, Ohio, submitted to this office the following request:

> "The board duly passed a resolution submitting to the electors of the district the question of the issuance of bonds for the erection of a high school building. The bonds were issued after the election had been held and the question favorably passed upon. Plans and specifications were prepared, advertisement for bids duly made, but no bids within the estimate were received. A high school has been in operation for several years in a building wholly unfit for such purposes. Under section 7623 of the General Code of Ohio can the board now proceed to enter into contracts for the construction of the building costing about $8,000.00 without advertising for bids, and is this a case of 'urgent necessity' such as will permit of dispensing with the advertisement?"

After reviewing the language of the statutes and the decisions in relation thereto, as found in my opinion No. 594, Annual Reports of the Attorney-General for 1917, Vol. II, page 1672, I advised that it being impossible to complete the building prior to the time it would be necessary to use the same for school purposes, and either the old building would have to be used or arrangements made for the convenience of the high school pupils elsewhere, and that ample time would exist for the compliance with the provisions of section 7623, before the new term of school would commence, a case of urgent necessity did not exist in the matter in the above inquiry.

On April 20, 1917, Hon. Fred. W. McCoy, Prosecuting Attorney, Carrollton, Ohio, submitted the following request for my opinion:

> "The board of education of Orange township, this county, sold bonds to the amount of $8,000.00 for the purpose of building a new school house at Sherodsville, Ohio, and after a number of efforts on the part of said board they have received a bid of $13,000.00 to furnish material and erect said school house. In your opinion would it be proper for the board to contract * * * without advertising in a statutory manner?"

Again, after considering the language of the statutes amd the decisions in relation thereto, I was compelled to advise that a case of urgent necessity did not exist under

the statutes. Said opinion is No. 1161, Annual Reports of the Attorney-General for 1918.

Your case, however, seems to me to present a different statement of facts from any that I have been called upon to consider, and seems to fall within the limits of the language used in the Mueller case, above mentioned. That is, on account of the buildings in which school was held after the school building had been destroyed by fire being condemned by the deputy inspectors of public buildings, and no other buildings being available for that purpose, it seems as though it is more than convenience and more than ordinary necessity that the building should be built at once. It seems that it is something which requires immediate action, something that cannot wait; that the pupils would be left without a chance for instruction pending the construction of said building, and if prompt action can be taken by the board, the building can be completed before the new school year begins. All these, however, are matters for the board of education to determine, and if, after due and careful consideration thereof the board of education finds that there are no other buildings in which the schools of said district can be conducted, and that the buildings which have been used cannot longer be used for school purposes and that the new building can be completed if the contract is let at once, and that it cannot be completed if time is taken to advertise, as provided by section 7623 G. C., then and under such circumstances the board of education would be warranted in declaring a case of urgent necessity to exist and proceed to let said contract without advertising for bids for a period of four weeks, as is provided by said section. If, on the other hand, the board of education cannot find any or all of the above facts to be true, then I would have to hold that a case of urgent necessity did not exist.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1238.

CENTRAL COMMUNITY HOUSE—BOARD OF EDUCATION HAS NO AUTHORITY TO BUILD.

A board of education of a township which has centralized its schools has no authority to build a "central community building" for the accommodation of the teachers and superintendents of such schools, at which building teachers and superintendents may room and board during the school year.

COLUMBUS, OHIO, May 25, 1918.

HON. P. A. SAYLOR, *Prosecuting Attorney, Eaton, Ohio.*

DEAR SIR:—In your letter of May 14, 1918, you request my opinion as follows:

> "Dixon township, a few years since, voted on the question of centralization, and it carried. In furtherance of said plan, they purchased a site and erected a school building thereon, costing about forty-five thousand dollars. The site is the mathematical center of the township. There is not a village or a hamlet in this township, and the school building is situated in such a place that it is impossible for the teachers to secure rooms and board, or houses, in the immediate vicinity of the school building. In fact, all the teachers are compelled to go at least from two to three and four miles to get to this school building.

For the reasons above given, their superintendent is very anxious to have a central community building erected, for the accommodation of the teachers, or at least the superintendent of the schools, and such of the teachers as care to room and board at the central building.

At one time I called the bureau of uniform information and they thought this could be done under the law as it exists at the present time.

We have gone over the matter carefully, section 7625 and related sections of the General Code, and I can find no authority to erect such a building for the accommodation of the teachers, and write to ask you whether, under any law now in the General Code, there is authority for the board of education of Dixon township, Preble county, Ohio, even though the proposition be submitted to the voters of the township and carried, to issue and sell bonds for the purpose of erecting such a building.

We would like to have your opinion in as short a time as possible, so that the matter can be determined one way or another, so far as Dixon townhip is concerned."

Boards of education are permitted by various statutes, hereinafter referred to, to acquire property and build and furnish school houses thereon for the proper accommodation of the schools under their control, but I desire to say at the outset that I doubt if the powers therein granted are broad enough to permit any board of education to build a "central community building" for the accommodation of the teachers and superintendents of such schools.

Section 7620 of the General Code provides that a board of education may build, enlarge, repair and furnish the necessary *school houses*, purchase or lease sites therefor or rights of way thereto, or purchase or lease real estate to be used as play grounds for children, or rent suitable *school rooms*, provide the necessary apparatus and make all other necessary provisions for the schools under its control, and that it also shall provide fuel for the schools, build and keep in good repair fences enclosing such *school houses*, when deemed desirable plant shade and ornamental trees on the school grounds, and make all other necessary provisions for the convenience and prosperity of the schools within the subdistricts.

Section 7666 G. C. provides that a board of education which establishes and maintains a high school or high schools shall build and repair, add to and furnish the necessary *school houses*, purchase or lease sites therefor or rent suitable rooms and make all other necessary provisions relative to such schools as may be deemed proper.

Section 7625 G. C. provides that when a board of education of any school district determines that for the proper accommodation of the schools of such district it is necessary to purchase a site or sites to erect a *school house* or *houses*, to complete a partially built *school house*, to enlarge, repair or furnish a *school house* or to purchase real estate for play grounds for children, or do any or all of such things, then under certain conditions therein mentioned bonds for such purpose or purposes may be sold.

Section 7629 G. C. provides that a board of education of any school district may issue bonds to obtain or improve public school property and that under the conditions therein mentioned bonds may be sold for that purpose.

Section 7630-1 G. C. provides that if a *school house* is wholly or partially destroyed by fire or other casualty, or if the use of any school house for its intended purpose is prohibited by any order of the chief inspector of workshops and factories, under the conditions therein mentioned the board of education may sell bonds to replace same.

Section 7622-1 et seq. of the General Code provides that the board of education may permit the use of *school houses* and school grounds as social centers and places of public meetings.

There is no direct authority for a board of education to build a central community building for the accommodation of the teachers and superintendents. The only language contained in any of said sections which might be considered broad enough in any manner to permit a board of education to do other than build, equip and furnish school houses, would be that part of section 7620, which reads:

> "And make all other necessary provisions for the schools under its control,"

and that part which provides:

> "and make all other provisions necessary for the convenience and prosperity of the schools within the subdistricts,"

and that part of section 7666 which provides:

> "and make all other necessary provisions relative to such schools as may be deemed proper."

The maxim *expressio unius est exclusio alterius*, that is, the expression of one is the exclusion of the other, must be applied to matters of this kind, and applying the same to the first provision mentioned in 7620, that the board of education may make all other necessary provisions for the schools under its control, means the necessary arrangements to carry out the objects of building, enlarging, repairing and furnishing the necessary school houses or purchasing or leasing real estate to be used as play grounds for children, or the renting of suitable school rooms and providing the necessary apparatus therefor, and the doing of all things incident to the carrying out of the above purpose, but not to add new purposes thereto, such as building a central community building. And so the making of all provisions necessary for the convenience and prosperity of the schools within the subdistrict means doing those things which are incident to the providing of fuel for schools, the building and keeping in repair of fences inclosing school houses, the planting of shade and ornamental trees on school grounds, and the doing of the things incident to said purpose, but not to add new purposes such as building central community buildings. And so with the language in section 7666, the making of all other necessary provisions relative to the high schools as the board deems proper means that in the building, repairing, adding to and furnishing the necessary school houses for high schools, or the purchasing or leasing of sites therefor, or renting suitable rooms therefor, the other provisions would be only those incidental to the carrying out of the above purposes and would not authorize the adding to of new purposes such as building central community buildings.

I can come to but one conclusion from a consideration of the above sections and that is, that a board of education is not permitted to erect a central community building for the accommodation of the teachers and superintendents of the schools under its control.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1239.

TOWNSHIP DITCH—PROCEDURE WHEN BENEFITED OWNER FAILS TO CONSTRUCT—ESTIMATES.

Where a land owner whose lands are benefited by the construction of a township ditch fails to construct the portion of the ditch assigned to him to be constructed, and the trustees, under sections 6635 and 6636 proceed to sell the same, they must immediately before the sale make the estimate provided in 6636. If they have made such estimate, and the work has not been sold for such period of time that prices of labor and material have advanced so that it is impossible to sell the work for the estimate, they have power to make another estimate.

COLUMBUS, OHIO, May 25, 1918.

HON. C. F. CRAWFORD, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR:—On April 24, 1918, you addressed the following request to this department:

> "Section 6636 of the General Code provides that township trustees may sell work which is not completed within the time specified by a former order of the board; that such work shall not be sold for a higher sum than that of the original estimate.
>
> A township ditch has been partially constructed. One of the persons to whom a section was apportioned, has refused to construct the same. The estimate made last fall on this section of work was $56.00. Since that time prices of tile—the improvement being a tile improvement—have increased to such an extent as also has the price of labor, that said section of work could not now be constructed for less than $85.00, and in all human probability could not be sold at the original estimate of $56.00, including the costs and expenses of sale, and I am unable to advise the board how to proceed in the matter, and if you can suggest a remedy for the situation, it will be thankfully received."

The subject of drainage comprises title 3 of part 2 of the General Code, and chapter 5 of that title is upon the subject of township ditches, containing detailed provisions for their construction, which is done by apportioning the ditch among the persons benefited, after the location and establishment of the same, and assigning to each of said persons a certain portion of the ditch to construct. An appeal is provided to the probate court with all kinds of provisions necessary for trying and determining the questions involved. Section 6635 then provides as follows:

> "* * * If no appeal is taken, the trustees, upon the expiration of the time specified by them for the opening of the ditch, shall forthwith inspect it, and if a section or part thereof has not been completed, they shall accept a bond with sufficient surety from the person having such unfinished work to perform, conditioned for the faithful completion of such work within the time they specify therein. If such person fails or refuses to give bond for the completion of the work the trustees shall forthwith sell the unfinished work * * *."

Then follows section 6636, referred to by you, which is as follows:

> "Before the work of constructing such ditch is sold by the trustees, they shall make a fair and impartial estimate of the cost thereof, which shall be

entered upon the ditch journal, and it shall not be sold for a sum exceeding such estimate. The fees and allowances in all proceedings, and the apportioning and assessing of costs and expenses shall be as in the original location and establishment of the ditch, and be paid by the person whose section of the ditch is sold, and collected and paid out as provided in section sixty-six hundred and forty-one."

Your statement is that the estimate referred to in this section was made last fall, and the work has not yet been let. No excuse for the delay is given, and in view of the fact that 6635 requires the same to be forthwith, it is necessary to examine the question as to what, if any, steps the trustees may still take toward the completion of the work.

Of course, ordinarily it would be expected that the trustees should make but one estimate. An examination of the sections, however, fails to disclose any express prohibition of a re-consideration of this estimate or the making of another to take the place of it. Neither is there found anything else in the sections to prevent, or, at least, render impossible the making of another estimate.

It might be claimed that the direction to them to do at once, when complied with, rendered them *functus officio* in that respect, and that they have no authority to do it the second time. It appears though from your statement that unless they can re-estimate it, a section of the ditch will not be constructed. This might, and in many cases would, practically destroy the whole value of the improvement, and is a condition that can not arise upon mere construction or conjecture.

The requirement is that they shall do it before constructing the ditch, and then forthwith sell out the work. Reversing this language, the requirement would be that the estimate should be made forthwith before the sale, a construction very necessary in these times when prices are continually changing. They have made this estimate, but it turns out not to have been forthwith before the sale. Therefore, in order for them to comply with this statute, it is necessary just before they sell the work of construction that they make an estimate.

They may, therefore, proceed to make an estimate based upon present prices, and then forthwith sell out the work of construction. The owner of the land who is to make the payment cannot complain at this, much less could he prevent it by injunction. He has had an adequate remedy at all times in his own hands by constructing his portion of the ditch, and his very complaint arises upon his own dereliction.

According to the maxims of equity, he would not be entitled to an injunction either to prevent the sale of the work or the collection of the cost.

If this reasoning be correct, it complies with your request that a remedy for the situation be suggested.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1240.

APPROVAL OF CONTRACT BETWEEN THE WILLIAM H. CONKLIN COMPANY AND THE BOARD OF TRUSTEES OF OHIO STATE UNIVERSITY.

COLUMBUS, OHIO, May 25, 1918.

HON. CARL E. STEEB, *Secretary Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval contract entered into on the 25th day of April, 1918, between The William H. Conklin Company, of Columbus,

Ohio, and the Board of Trustees of Ohio State University, for the construction and completion of the ventilation and heating, plumbing, sewer, marble and tile, for the addition to Lord Hall and Kiln House, as covered by items 14 and 15 of the form of proposal, submitted by said The William H. Conklin Company, for the sum of $3,418.00. At the same time you submitted a bond securing said contract.

I have examined said contract and finding the same to be in compliance with law and having received from the auditor of state a certificate that there is money in the state treasury available for the purpose of said contract, I have this day approved the same and filed the same in the office of the auditor of state.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1241.

APPROVAL OF BOND ISSUE OF ALLEN COUNTY, $3,600.00.

COLUMBUS, OHIO, May 27, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of Allen county, Ohio, in the sum of $3,600.00 in anticipation of the collection of taxes and assessments to provide additional funds to pay the respective shares of said county, of Bath and German townships and of the owners of benefited property assessed for the cost and expense of improving section "H" of inter-county highway No. 129, located in said county and townships.

I have carefully examined the corrected transcript of the proceedings relating to the above issue of bonds and find the same to be in conformity to the provisions of the General Code of Ohio relating to bon issues of this kind. I am, therefore, of the opinion that properly prepared bonds covering the said issue will, when the same are properly executed and delivered, constitute valid and subsisting obligations of Allen county, Ohio, to be paid according to the terms thereof.

No bond form of the bonds to be executed and delivered covering this issue has been submitted. I am therefore holding the transcript of the proceedings relating to said bond issue until a proper bond form covering said issue is submitted and approved.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1242.

FEDERAL FARM LOAN BONDS—TAXATION.

Federal farm loan bonds are not subject to state and local taxation.

COLUMBUS, OHIO, May 27, 1918.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have an inquiry from The Rudolph Kleybolte Company, of Cincinnati, Ohio, relative to the taxability of federal land bank 5 per cent. farm loan bonds.

These bonds are issued under authority of the Act of congress of July 17, 1916 (39 Statutes at Large, 360). The act provides for the establishment at the seat of government in the department of the treasury a bureau to be known as the federal farm loan bureau, under the general supervision of a federal farm loan board, to consist of five members, including the secretary of the treasury. The members of this board are officers of the United States. The board is to divide the continental United States into federal land bank districts, and appoint a farm loan registrar in each district to receive applications for issues of farm loan bonds. Salaries of all the officers so far mentioned are to be paid by the United States, as well as the compensation of persons employed by them. In each federal land bank district the federal farm loan board is to establish a federal land bank, which is to be a corporation owing its existence to the act itself and having a capital stock the shares of which may be subscribed for and held by any individual, firm or corporation, or by the government of any state or of the United States. Stock owned by the government of the United States is to receive no dividends. Corporations to be known as "national farm loan associations" may be organized under the act by persons desiring to borrow money on farm mortgage security. These associations may hold stock in federal land banks, and the shares of such associations are to be held by individuals desiring farm loans. These national farm loan associations may issue certificates against deposits of current funds, convertible into farm loan bonds.

The power to issue and sell farm loan bonds is reposed in the federal land banks, "subject to the approval of the federal farm loan board," and also in corporations to be known as "joint stock land banks," which may be organized for the purpose of carrying on the business of lending on farm mortgage security and issuing farm loan bonds by any number of natural persons not less than ten. Stock in these banks is not to be held by the government of the United States, and they are, generally speaking, to sustain the same relation toward the United States as national banking associations.

The procedure of issuing farm loan bonds is by a written application on the part of the land bank or joint stock land bank to the federal farm loan board, through the farm loan registrar of the district, accompanied by first mortgages on farm lands or United States government bonds, no less in aggregate amount than the sum of the bonds proposed to be issued, as collateral. The federal farm loan board is to appraise the securities and to grant in whole or in part, or reject entirely, the application so made. No farm loan bonds shall be issued unless the federal farm loan board shall approve the issue in writing. Though the bonds are those of the bank, they are to be issued on forms prepared by the secretary of the treasury, the engraved plates, etc., to remain in his custody, and the expense of their preparation to be paid by him, subject to reimbursement by assessment upon the farm land bank in proportion to the work executed.

The foregoing is a partial statement of the relation of the United States to the farm loan bonds. I have made the statement without referring to the sections of the act which contain the appropriate provision upon which it is based. I quote, however, the following from the act itself:

> "Section 21. Every federal land bank issuing farm loan bonds shall be primarily liable therefor, and shall also be liable, * * * for interest payments due upon any farm loan bonds issued by other federal land banks and remaining unpaid in consequence of the default of such other land banks; and every such bank shall likewise be liable for such portion of the principal of farm loan bonds so issued as shall not be paid after the assets of any such other land banks shall have been liquidated and distributed: *Provided*, That such losses, * * * shall be assessed by the federal farm loan board against solvent land banks liable therefor in proportion to the amount of

farm loan bonds which each may have outstanding at the time of such assessment."

This section seems to apply only to federal land banks and not to joint stock land banks:

"Section 26. That every federal land bank and every national farm loan association, including the capital and reserve or surplus therein and the income derived therefrom, shall be exempt from federal, state, municipal, and local taxation, except taxes upon real estate held, purchased, or taken by said bank or association under the provisions of section eleven and section thirteen of this act. First mortgages executed to federal land banks, or to joint stock land banks, *and farm loan bonds issued under the provisions of this act, shall be deemed and held to be instrumentalities of the government of the United States, and as such they and the income derived therefrom shall be exempt from federal, state, municipal, and local taxation.*"

Nothing herein shall prevent the shares in any joint stock land bank from being included in the valuation of the personal property of the owner or holder of such shares, * * * in manner and subject to the conditions and limitations * * * with reference to the shares of national banking associations.

Nothing herein shall be construed to exempt the real property of federal and joint stock land banks and national farm loan associations from either state, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed."

It will be observed that though the government of the United States administers directly many of the features of the scheme of federal farm loans, the bonds themselves are not direct obligations of the United States. They are not, therefore, exempt from state taxation on the same ground that United States bonds themselves are exempt; nor does congress attempt to make them exempt on such ground. They are, rather, declared to be "instrumentalities of the United States" and, though owned by private citizens, are exempted from state taxation on the same ground that stock in a national bank would be exempt from taxation without the permission of congress, as granted in section 5219 of the Revised Statutes of the United States. In fact, the two kinds of banks provided for by the federal farm loan act may be regarded as sustaining precisely the same relation toward the United States as national banking associations; and congress has adopted substantially the same attitude as has long prevailed with respect to the taxation of national banks and interest therein, in regulating state taxation of these banks themselves; but has gone further, and has exempted their obligations known as "Federal farm loan bonds" from taxation in the hands of holders thereof.

I see no reason to dispute the authority of congress to do this. The framework of the whole act shows that the federal farm loan bonds are an integral and necessary part of the scheme of agricultural aid which congress was striving to effectuate. The bonds are, therefore, as much an instrumentality of the United States as the banks themselves. But if I did not feel sure that this was so I would still hesitate to pronounce an act of congress unconstitutional. The federal act makes these bonds exempt and, in my opinion, the taxing authorities of the state should treat them as exempt from state and local taxation.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1243.

ROAD IMPROVEMENT THROUGH VILLAGE—BALANCE OF FUND DEPOSITED BY VILLAGE WITH COUNTY TREASURER TO PAY ITS PROPORTION OF THE COST, SHOULD BE RETURNED TO VILLAGE.

In those cases in which the state highway commissioner extends a road improvement through a village and the village assumes a certain proportion or percentage of the cost and expense of that part of the improvement which lies within the village, and deposits an amount with the county treasurer which is estimated to be sufficient to pay its proportion so assumed, the county should return to the village not only any part of the fund so remaining unused, but also any accumulation of interest thereon, if it should develop, upon the completion of the improvement, that the amount deposited, with accumulations of interest, is more than necessary to pay the obligation of the village under its agreement.

COLUMBUS, OHIO, May 31, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I have your letter of May 17, 1918, in which you enclose a communication addressed to you, and request my opinion on the matter therein contained. The statement of facts and question contained in said enclosure are as follows:

> "The village of Waynesfield in this county, in conjunction with the state highway department, under the Cass road law paved one of their streets. The village sold bonds and placed the proceeds in the county treasury to pay the village's portion of said improvement.
>
> I would like to know whether the village is entitled to its share of the interest on this money under Code section 2737, and I thought perhaps your department had ruled on this proposition. The money was paid into the county treasury under Code sections 6953-6954, found in 105-6 O. L. 610."

I take it that the road improvement under consideration was one in which the contract was let under the Cass highway act and not under the White-Mulcahy law now in force and effect. It is important to keep this in mind, for the reason that said law now in effect contains supplemental sections, viz., sections 1193-1 and 1193-2, which to some extent modify the law as it originally stood, in regard to the state highway commissioner constructing the road improvements into and through villages. So I will consider herein the law as it is found in the Cass act.

The section lying at the foundation of the matter about which you inquire is section 1231-3 G. C., which reads as follows:

> "The state highway commissioner may extend a proposed road improvement into or through a village when the consent of the council of said village has been first obtained, and such consent shall be evidenced by the proper legislation of the council of said village duly entered upon its records, and said council may assume and pay such proportion of the cost and expense of that part of the proposed improvement within said village as may be agreed upon between said state highway commissioner and said council. The state highway commissioner may also enter into an agreement with the council of said village to improve any part of the road within said village to a greater width than is contemplated by the proceedings for said improvement, and the state highway commissioner and the council of said village

shall be governed as to all matters in connection with said improvement within said village by the statutes relating to road improvements through municipalities, by boards of county commissioners."

I call attention to the following language found in said section:

"* * * and said council may assume *and pay such proportion* of the cost and expense of that part of the proposed improvement within said village as may be agreed upon * * *."

and especially to the emphasized part of this last quoted matter. In the latter part of said section it is stated that the authorities shall be governed, as to all matters in connection with said improvement within said village, by the statutes relating to road improvements through municipalities by boards of county commissioners, which makes it necessary for us to note sections 6949 to 6954 inclusive G. C. These are the sections which authorize boards of county commissioners to extend road improvements through or within municipalities.

Section 6949 G. C. read as follows:

"The board of county commissioners may extend a proposed road improvement into or through a municipality when the consent of the council of said municipality has been first obtained, and such consent shall be evidenced by the proper legislation of the council of said municipality entered upon its records, and said council may assume and pay such proportion of the cost and expense of that part of the proposed improvement within said municipality as may be agreed upon between said board of county commissioners and said council."

I will call particular attention to the following language contained in said section:

"* * * and said council may assume *and pay such proportion* of the cost and expense of that part of the proposed improvement within said municipality as may be agreed upon * * *."

and especially to that part which is emphasized.

Section 6953 G. C. provided as follows:

"The municipality shall pay to the county treasurer its estimated proportion of the cost of said improvement as fixed in said agreement between the council and the county commissioners, out of any funds available therefor, and in anticipation of the collection of assessments to be made against abutting property hereinbefore provided, and in anticipation of the collection of taxes levied for the purpose of providing for the payment of the municipality's share of the cost of such improvement, said municipality is authorized to sell its bonds under the same conditions and restrictions imposed by law in the sale of bonds for street improvement under the exclusive jurisdiction and control of the council of a municipality."

Under this section the municipality must pay into the county treasury "its estimated proportion of the cost of said improvement as fixed in said agreement." This may be done from any funds available therefor or out of the proceeds of the bond issue made in anticipation of the collection of taxes to be levied for said purposes.

In section 6954 G. C. we find this provision:

"* * * The total cost and expense of said work shall be paid for on the allowance of the county commissioners, by the warrant of the county auditor, and after the completion of said work and the payment of the cost and expense thereof, any balance of the funds contributed by said municipality shall be refunded to it to be disposed of according to law. * * *."

Under section 2737 G. C. the county treasurer will realize interest on the amount of money deposited with him under the provisions of section 6953 G. C. Your question is as to whether the interest realized on the moneys deposited with the county treasurer by the village would inure to the benefit of the village or the county; that is, whether the accumulated interest upon said fund so deposited with the treasurer should be returned to the village with the excess of the fund deposited so remaining. The language of all the sections seems to indicate that the village in its agreement assumes a certain proportion of the cost and expense of that part of the improvement located within the village; viz., it assumes a half or a third or a fourth of the cost and expense of that part lying within the village. The amount required to enable the village to pay the half, third or fourth of said cost and expense would be merely an estimated amount and could not be definitely known until the improvement was fully comple ed. This clearly was the thought of the legislature when it used the language found in section 6953, as follows:

"The municipality shall pay to the county treasurer its *estimated proportion* of the cost of said improvement * * *."

Inasmuch as the amount deposited with the county treasurer is only an estimated amount, it is my opinion that the village would be entitled to a return not only of any part of the principal sum not used in the payment of that part of the cost and expense to be borne by the village under its agreement, but also of any interest that may have accumulated from the investment of this fund. The very fact that the county must return any part of the principal sum deposited with it by the village, not used in the construction of the improvement, clearly indicates that it was not the intention of the legislature that the money deposited with the county became absolutely the property of the county.

Provision is made fo the depositing of the estimated proportion with the county to enable the county commissioners to pay for the cost and expense of the improvement as it progresses, and with no other object or intent in view. It was not intended that the county should profit by the deposit so made with the county treasurer and hence it is my opinion that the interest realized by the county should be returned to the village with any amount of the principal sum not so used.

However, if the amount so deposited should not be sufficient to take care of the proportion of the cost and expense assumed by the village, it is my opinion that the interest realized upon the fund deposited might be applied to the payment of such proportion of the cost and expense assumed by the village, because it is evident to me that if the amount deposited in the beginning were not sufficient to take care of the cost and expense to be borne by the village, the village would be compelled to make good any deficiency that might exist. For this reason it would not be reasonable to hold that the county should return the interest upon said fund to the village and then in turn the village make up whatever deficiency existed owing to the fact that it had not deposited a sufficient amount in the beginning.

As hereinbefore stated, the provisions in reference to a municipality's making a deposit with the county treasurer seem to clearly indicate that the money deposited does not become county money. In this connection it might be well to quote section 2737 G. C., which reads as follows:

"Section 2737. All money deposited with any depositary shall bear interest at the rate specified in the proposal on which the award thereof was made, computed on daily balances, and on the first day of each calendar month or at any time such account is closed, such interest shall be placed to the credit of the county, and the depositary shall notify the auditor and treasurer, each separately, in writing of the amount thereof before noon of the next business day. All such interest realized on the money belonging to the undivided tax funds shall be apportioned by the county auditor to the state, cities, city school district and county taxing or assessing districts in the proportion that the amounts collected for the respective political divisions or districts bear to the entire amount collected by the county treasurer for such undivided tax funds and deposited as herein provided, due allowance being made for sums transferred in advance of settlements. All interest apportioned as the county's share, together with all interest arising from the deposit of funds belonging specifically to the county shall be credited to the general fund of the county by the county treasurer. The county auditor shall inform the treasurer in writing of the amount apportioned by him to each fund, district or account."

This section refers particularly to "funds belonging specifically to the county"; that is, when funds belong to the county the interest "shall be credited to the general fund of the county by the county treasurer."

The money deposited by the municipality would be of the same nature as that set out in this section, which is called "undivided tax funds." To be sure, it is not called undivided tax funds, but a fund which belongs particularly to the village and is deposited with the county treasurer to enable the county commissioners or state highway commissioner to draw upon in the improvement of the road in question.

Further, upon plain principles of equity, the interest that accrues upon a fund which really belongs to the municipality should follow the fund and should be returned to the municipality with that part of the fund which remains unused in taking care of the cost and expense of the improvement.

In arriving at the above conclusion, I am not unmindful of the holding of our supreme court in State ex rel. v. Pierce, auditor, 96 O. S. 44. In that case the court held that interest arising from a memorial building fund belongs to the county. The fourth branch of the syllabus reads as follows:

"The earnings of all county moneys under the depositary law generally belong to the county unless the statute expressly provides otherwise."

In rendering this decision, the court clearly held that the particular money in question was county money. In the opinion at p. 49 we find the following language:

"This was clearly the county's money and subject to the general depositary law. The statutes clearly provide what shall be done with the county moneys and the earnings upon the same."

As said before, in the case under consideration I do not feel that the moneys deposited with the county treasurer, by the municipality, became county money, and hence the holding in the case above quoted would not control in this matter.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

1244.

APPROVAL OF FINAL RESOLUTION FOR ROAD IMPROVEMENT IN RICHLAND COUNTY.

COLUMBUS, OHIO, May 31, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of May 25, 1918, enclosing for my approval, final resolution for the following named improvement:

"Mt. Vernon-Mansfield road—I. C. H. No. 338, Sec. 'A', Richland county."

I have carefully examined said resolution, find the same correct in form and legal and have endorsed my approval thereon in accordance with section 1218 G. C. and am returning it to you.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

1245.

APPROVAL OF CONTRACT OF R. A. McCUTCHEON FOR THE CONSTRUCTION OF A LEVEE.

COLUMBUS, OHIO, May 31, 1918.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—Under date of May 21st you transmitted to this department for approval the original contract of R. A. McCutcheon for the construction of the levee near the state dam at Middletown, Ohio, together with the bond accompanying the same.

I have carefully examined said contract and finding the same to be in compliance with law and having received from the auditor of state a certificate to the effect that there is money available for the said contract, I have this day approved said contract and filed the same, together with the bond securing said contract, in the office of the auditor of state.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

1246.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN ATHENS, WASHINGTON, RICHLAND, VINTON, SANDUSKY AND WARREN COUNTIES.

COLUMBUS, OHIO, May 31, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your three letters of May 28, 1918, in which you enclose, for my approval, final resolutions for the following named improvements:

Athens-Logan road—I. C. H. No. 155, Sec. (1), Athens county.

Marietta-McConnelville road—I. C. H. No. 393, Sec. "K," Washington county.

Mt. Vernon-Mansfield road—I.C. H. No. 338, Sec. "A," Richland county (Supplemental). In duplicate.

Chillicothe-McArthur road—I. C. H. No. 365, Sec. "J-2," Vinton county.

Fremont-Bellevue road—Sec. "L-2," I. C. H. No. 274, Sandusky county.

Cincinnati-Dayton road—I. C. H. No. 19, Sec. "B," Warren county. Types A and B.

Cincinnati-Dayton road—I. C. H. No. 19, Sec. "A," Warren county. Types A and B. Contract 2.

Hamilton-Middletown road—I. C. H. No. 179, Sec. "A," Warren county. Types A and B. Contract 1.

I have carefully examined said resolution, find the same correct in form and legal and am therefore returning them to you with my approval endorsed thereon in accordance with section 1218 G. C.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

1247.

APPROVAL OF CONTRACT BETWEEN WALTER G. FRANZ AND BOARD OF TRUSTEES OF MIAMI UNIVERSITY.

COLUMBUS, OHIO, May 31, 1918.

HON. W. P. ROUDEBUSH, *Secretary Board of Trustees, Miami University, Oxford, Ohio.*

DEAR SIR:—Under date of May 25th you submitted to this department contract entered into on the first day of May, 1918, between Walter G. Franz and your board of trustees for the employment of said Franz to make all necessary drawings and specifications for an engine and generator to be an addition to the power generating equipment in the central heating and lighting plant of Miami University, agreeing to pay said Franz the sum of 3 per cent of the cost of the work, the same to be due and payable when the plans and specifications are completed and bids are received and contracts let.

Finding said contract to be in compliance with law and the auditor of state having certified that there is money available for the purpose of said contract, I have this day approved the same and filed the same in the office of the auditor of state.

I am returning you herewith duplicate copy of said contr ct.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

1248.

COMMON PLEAS JUDGE—COUNTY OFFICER FOR PURPOSE OF PRIMARY ELECTION LAW—DECLARATION OF CANDIDACY—FILING FEE—PARTY AFFILIATION.

(1) *While the office of common pleas judge is for most purposes a state office, for the purposes of the primary election law, it is to be treated as a county office and the declaration of candidacy and certificate required under the primary act is to be filed with the board of deputy state supervisors of the county in which such office is to be voted for.*

(2) *Section* 4970-1 *provides that the time of filing the declaration of candidacy for the nomination of any office the candidate must pay a fee based upon the annual salary of such office. The fact that part of the salary of a common pleas judge is paid by the state and part by the county is not to be considered. The filing fee is based upon the entire amount of annual salary received by such judge irrespective of what subdivisions contribute to same.*

(3) *The primary election law provides for the regulation of the nomination of party candidates for public office, and for separate tickets for each political party, and that no name of any candidate shall be printed on an official ballot unless he files a declaration of candidacy which contains, among other things, an averment under oath that he is a member of a particular political party entitled to the provisions of the primary act. The provisions of the election law that the candidates for judge shall be voted for upon an independent and separate ballot without a party designation applies only to the regular election and has no application to the primary law; hence, a candidate for common pleas judge seeking nomination under the primary act must file his declaration of candidacy under* 4970 *and declare his party affiliation.*

COLUMBUS, OHIO, June 3, 1918.

HON. WILLIAM D. FULTON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—You have asked for my official opinion on questions arising in the course of filing declarations and certificates of candidates for common pleas judge as raised by letter received by you from Hon. James W. Galbraith, Mansfield, Ohio, and from others.

These questions are:

> Is the office of common pleas judge a state, county, or district office, the county being the unit for his election and his having power, and possibly may be required, to perform services elsewhere in the state?
>
> Where should the declarations of such candidates be filed?
>
> As a part of the salary of this office is paid by the state and a part by the county, the question is raised whether the filing fee should be based upon the part received from the county, or upon the entire salary?
>
> The office of judge being non-partisan, is the candidate for nomination required to declare his party affiliation as in other cases, or should a different blank be used?

I will answer these questions in the inverse order, and first consider whether or not, owing to the fact that the office is now non-partisan, the candidate is required to declare his party affiliation.

It will be recalled that a prior primary election act known as the Bronson act, 2916 et seq. R. S., was attacked on the ground that it was unconstitutional

as affecting the right of the elector to choose his political faith and at any time change same; that it was in direct violation of the constitutional provision for procuring signatures to the ballot, as well as for other reasons.

The supreme court in State ex rel. Webber v. Felton, 77 O. S. 554, held that the nomination of party candidates for public offices concerning the public welfare and the legislature in the exercise of police power, may make reasonable regulations therefor.

In the primary act as found in section 4948 et seq. General Code, the legislature has provided the manner of nomination of the candidates for all offices, including members of the committees of all voluntary political parties or associations in this state which at the next preceding general election polled for its candidate for governor in the state, or any district, county or subdivision thereof, or municipality, at least ten per cent of the entire vote cast therein for governor. The primary act is expressly a partisan law. It affects political parties having cast the required vote for governor. It only applies to such political parties, and persons desiring to be candidates other than candidates of such political parties are relegated to the provisions for nomination of candidates for office by petition.

Section 4970 absolutely prohibits the printing of the name of any candidate for office upon the official ballot, unless a declaration of candidacy and certificate shall have been filed with the proper board of supervisors. The declaration contains an avowal under oath of the candidate's party affiliation as well as an expression of the candidate's intention to vote for a majority of the candidates of the party of his affiliation at the next ensuing election. The certificate likewise contains a sworn statement by certain qualified electors that the candidate is a member of the political party as stated in his declaration of candidacy.

Section 4974 makes provision for protests being filed against the candidacy by any person and for the hearing of same. Such protests can only be filed by a recognized member, or its controlling committee, of the political party of which the candidate is a member.

Section 4976 provides for separate party tickets and the contents conform to the ballot.

Section 13335 provides a penalty for voting or attempting to vote at a primary election of a political party other than the political party with which the person has affiliated, as defined by law.

So it is plainly evident that the primary election law of Ohio is very much partisan, and that the candidates seeking nomination under its provisions, must take a decided stand as far as their political affiliations are concerned. Unless a candidate complies with the various provisions of the act he cannot have his name printed upon a separate official ballot of any party, and in consequence, could not be voted for at such primary.

So if one seeks his nomination under the primary law, and to obtain its advantages, he must comply with all of the provisions of the act, including a sworn statement as to his party affiliation.

It is suggested that the office of common pleas judge is non-partisan as far as the election of such judges is concerned, since the enactment of the act to provide for the election of judicial officers by separate ballot, 102 Ohio Laws, 5. Such judges are voted for upon a separate and independent ballot without any party designation, and in consequence, so far as their election is concerned, they have been deemed and spoken of, as non-partisan offices. But this does not affect the question of their nomination. If they desire to be nominated in a non-partisan manner, they cannot get into the primary but must be nominated as other independent candidates are; that is, by petition.

It has been further suggested that a different blank than the one used in the

primary for other offices might be used. Inasmuch as there is no provision for the use of any other official ballots in the primary act than the separate party tickets as therein provided for, this suggestion has no weight.

So answering your question specifically, it is my opinion that if a party desires to seek nomination at the primary election, he is required to file his declaration of candidacy, which includes a statement of his party affiliation.

The third question refers to the fact that part of the salary of the office of common pleas judge is paid by the state, and part by the county, and asks what salary is the basis for computing the filing fee which is to be paid at the time of filing the declaration of candidacy.

Section 4970-1 General Code reads:

> "At the time of filing the declaration of candidacy for nomination for any office, each candidate shall pay a fee of one-half of one per cent, of the annual salary for such office, but in no case shall such fee be more than twenty-five dollars. All fees so paid in the case of candidates for state offices, office of United States senator and congressman-at-large, shall forthwith be paid by the officer receiving the same into the treasury of state. All other fees shall be paid by the officer receiving the same into the treasury of his county to the credit of the county fund. No fee shall be required in the case of candidates for committeeman or delegate or alternate to a convention or for president or vice-president of the United States, nor for offices for which no salary is paid."

It is readily seen that the filing fee is one-half of one per cent of "the annual salary." I think this language is too plain to need interpretation and construction. It makes no difference who pays the salary or how many subdivisions may contribute to the fund which constitutes "the annual salary," the fee is based upon the entire amount.

Hence, in the determination of the amount of the fee to be paid at the time of filing the nomination for common pleas judge, all that is necessary to be determined is what is the entire annual salary and the fee is figured on said salary. But in no case shall such fee be more than $25.00.

The second and first inquiries may be answered together, for the place where the declaration of candidacy shall be filed is to be determined by the conclusion reached as to whether the office of common pleas judge is a state, district or county office *under the primary act.*

Section 4949 provides for the nomination of

> "* * * all elective state, district, county * * * offices, * * * all voluntary political parties * * * and the persons not so nominated shall not be considered candidates and their names shall not be printed on the official ballots."

Section 4952 provides:

> "Candidates for *state offices, United States senator and congressman-at-large* shall be nominated by direct vote of the people in the manner following: Each person so desiring to become a candidate for an office above enumerated shall not less than sixty days before the date of the primary election at which such nominations are to be made, file with the state supervisor

of elections a declaration of candidacy signed and acknowledged and certified to by a certificate of *five electors of the state* who are members of the political party to which such candidate belongs, and shall pay to such state supervisor the proper fee."

Section 4952 provides that

"Candidates for district offices where such district includes more than one county, which shall include all candidates for member of the house of representatives in the congress of the United States, *other than* congressman-at-large, shall be nominated * * *. Each person * * * shall file * * * a declaration of candidacy * * * by a certificate of *five electors of the district* * * *."

Section 4969 provides:

"All nominations for offices or places on the primary ballot other than those heretofore provided for shall be made by the payment of the proper fees and by the filing of declarations of candidacy and certificates, which shall be filed with the board of deputy state supervisors at least sixty days before the day for holding the primary election. Such declarations of candidacy shall be signed and acknowledged by the person desiring to become a candidate and shall be accompanied by the certificate of *five electors of the county,* municipality, precinct, ward or other political subdivision for which such nomination is to be made and shall be in the form hereinafter provided. Where the term 'nomination paper' or 'nominating petition' is used in this chapter it shall be held to include 'declaration of candidacy' and any other paper required by law to be filed by a person seeking to become a candidate at a primary election."

It will be noted that section 4952 provides for the nomination of candidates for state offices, United States senator and congressman-at-large, and that the certificate necessary under the primary act shall be signed by five electors of the *state,* while 4952-1 providing for nomination of candidates for district offices, where the district includes more than one county, including candidates for congress *other than congressman-at-large,* shall have the certificate certified to by five electors of the *district.*

As far as the office is concerned, congressman-at-large differs from the congressman of the district only in so far as he is elected by the electors of the entire state, while the electors of the particular districts elect the other congressman. But there is an evident intention to have the declaration signed by the electors of the territory wherein the particular office was voted for. So in the provision of section 4969, which includes all the offices not taken care of in 4952 and 4952-1, provision is made for the signing of the required certificate by five electors of the *county,* or other political subdivisions for which the nomination is made.

I think it is plainly evident that so far as the primary act is concerned, the legislature intended to treat the officers to be voted for as classified by the territory in which the particular electors voting for the particular candidate were qualified to vote.

While for many purposes the common pleas judge is a state officer, and under certain circumstances may be called upon to perform the functions of his office in various parts of the state, yet he is elected by the electors of the county. While he is not a county officer under the common acceptation of the term, as far as his

nomination and election is concerned, he is to be treated as a county rather than as a state officer.

You will recall the provision of 5004 prior to the amendment in 103 O. L. 843, provided that the certificate of nomination and nomination papers for state offices should be filed with the secretary of state, and for offices to be filled by the electors of a district, or subdivision of a district, composed of two or more counties, with the chief deputy state supervisor of the county in the district, or subdivision, containing the greatest number of inhabitants. That section was construed so as to provide for the filing of certificate of nomination and nomination papers of candidates for circuit judge in the most populous county of the circuit, and a common pleas judge in the most populous county of the subdivision, and for the filing of such papers. It was not, so far as I know, contended that there should be a filing with the secretary of state on account of the office of judge being a state office.

It is my conclusion, therefore, that for the purposes of the primary act, the office of common pleas judge is to be treated as a county office, and not as a state office, and that the declaration of candidacy and certificate required by the primary act must be filed under the provisions of section 4969, and with the board of deputy state supervisors of the county in which such office of judge is to be voted for.

You understand, of course, that the questions referring to matters coming under the primary election act, the answer is confined to the declaration of candidacy and certificate provided for under the act. In the event that a person does not desire to subject himself to the primary act, he may seek nomination under the provisions of section 4992 General Code, et seq., and the number of petitioners would be determined by the provisions of 4999.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

1249.

CONSTITUTION—PROPOSAL TO AMEND MAY BE PROPOSED BY JOINT RESOLUTION—HOW CONSTITUTIONAL AMENDMENT SUBMITTED—EFFECT OF JOINT RESOLUTION No. 34 (107 O. L. 774).

1. *A proposal to amend the constitution under authority of article XVI, section* 1, *may be proposed by joint resolution.*

2. *A statute law of the state can neither be repealed nor amended by a joint resolution of the general assembly.*

3. *Section* 5019 *G. C.* (103 *O. L.* 554) *prescribes the manner and form of the submission of the constitutional amendments to the electors. This section imposes a duty upon the secretary of state as state supervisor of elections of seeing to it that each amendment to be submitted shall be stated on the ballot in language sufficient to clearly designate it, and that part of joint resolution No.* 34 *adopted by the* 82*d general assembly of Ohio on March* 27, 1917 (107 *O. L.* 774), *attempting to provide the manner and form of the statement of the proposed taxation amendment on the official ballot, cannot prevail over the statutory provisions found in section* 5019 *G. C., and that part of said joint resolution which attempts to do so is to be treated as mere surplusage and void.*

COLUMBUS, OHIO, June 3, 1918.

HON. W. D. FULTON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—You have referred to me a notice and protest signed by a taxpayer, objecting to the submission to the electors of the state of an amendment to

the constitution, as proposed by joint resolution No. 34 and adopted by the eighty-second general assembly on March 21, 1917, and found in 107 O. L. 774.

As stated by Mr. James A. Conroy, the taxpayer objecting, the protest against the proposal being designated on the official ballot in the manner provided in the joint resolution, is based on the following grounds:

"1. The legislature cannot provide by joint resolution for the designation of a proposed constitutional amendment on the official ballot. This can only be done by law and a joint resolution is not a law and cannot have the effect of law and therefore, to print upon the official ballot the designation set forth in said joint resolution, would be an expenditure of public funds of the state, without authority of law.

2. The manner in which proposed amendments to the constitution shall be submitted, and the ballots prepared, is provided for by law. Article 16, section 1, constitution; article 2, section 1-g, constitution; section 5019, General Code.

3. The designation sought to be made by this joint resolution is misleading and if said amendment were submitted under said designation, it would amount to a fraud upon the electors of this state, for the reason that said designation does not indicate the effect of such amendment. It assumes that there now exists double taxation of real estate in this state, which is not true. Further, it states that this amendment provides against double taxation of real estate; the amendment, if adopted, has no direct effect whatever, upon any taxation, but removes a constitutional limitation upon the legislature; so that the legislature and not the people, might classify property for taxation without any restraint and provide for a single tax on land.

4. Said designation, if placed upon the official ballot, in the form in which it appears in said joint resolution, would be contrary to the provisions of laws to the form of such ballots."

The joint resolution referred to reads as follows:

"*Be it resolved by the general assembly of the state of Ohio,* three-fifths of the members elected to both houses concurring therein:

That there shall be submitted to the electors of the state, in the manner provided by law, on the first Tuesday after the first Monday in November, 1918, a proposal to amend section 2 of article XII of the constitution of the state of Ohio, to read as follows:

Article XII.

Section 2. Laws shall be passed, taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, and also all real and personal property according to its true value in money, excepting all bonds outstanding on the first day of January, 1913, of the state of Ohio or of any city, village, hamlet, county, or township in this state or which have been issued in behalf of the public schools in Ohio and by the means of instruction in connection therewith, which bonds outstanding on the first day of January, 1913, shall be exempt from taxation but burying grounds, public school houses, houses used exclusively for public worship; institutions used exclusively for charitable purposes, public property used exclusively for any public purpose, and personal property, to

an amount not exceeding in value five hundred dollars, for each individual, may, by general laws, be exempted from taxation; and laws may be passed to provide against the double taxation that results from the taxation of both the real estate and the mortgage or the debt secured thereby, or other lien upon it, but all such laws shall be subject to alteration or repeal; and the value of all property, so exempted, shall, from time to time, be ascertained and published as may be directed by law.

Be it further resolved, That at such election herein provided for the submission of this amendment to the electors of the state, this proposition shall be placed on the official ballot in the manner prescribed by law and shall be designated as follows:

'TO PROVIDE AGAINST DOUBLE TAXATION OF REAL ESTATE—YES.

TO PROVIDE AGAINST DOUBLE TAXATION OF REAL ESTATE—NO.'

If the votes for the proposal shall exceed those against it, this amendment shall take effect on the first day of January, 1919, and said original section 2 of article XII of the constitution of the state of Ohio shall be repealed and annulled."

The state constitution provides that it may be amended as follows:

(1) Article II provides for amendments by means of the initiative and referendum, but inasmuch as the proposed amendment under discussion was not initiated under the provisions of the sections of this article, it is needless to consider the same.

(2) Article XVI provides, under section 1, that the general assembly may propose amendments to the constitution. Under section 2 of said article it is provided that whenever two-thirds of the members elected to each branch of the general assembly shall think it necessary to call a convention to revise, amend or change the constitution, they shall recommend to the electors to vote for or against such convention. While section 3 of the same article provides that at the general election in 1932, and in each twentieth year thereafter, the question: "Shall there be a convention to revise, alter or amend the constitution," shall be submitted.

The proposal under discussion was enacted under the authoritiy of article XVI, section 1. This section reads:

"Either branch of the general assembly may propose amendments to this constitution; and, if the same shall be agreed to by three-fifths of the members elected to each house, such proposed amendments shall be entered on the journals, with the yeas and nays, and shall be submitted to the electors, for their approval or rejection, on a separate ballot without party designation of any kind, at either a special or a general election as the general assembly may prescribe. Such proposed amendment shall be published once a week for five consecutive weeks preceding such election, in at least one newspaper in each county of the state, where a newspaper is published. If the majority of the electors voting on the same shall adopt such amendments the same shall become a part of the constitution. When more than one amendment shall be submitted at the same time, they shall be so submitted as to enable the electors to vote on each amendment, separately."

It is conceded that the proposal under section 1 of article XVI, supra, may be done by joint resolution of the general assembly, and this has been the usual

method of providing for such proposal, as an examination of the year books will show. However, objection is made that the legislature cannot provide by joint resolution for the *designation* of the proposed constitutional amendment on the official ballot, and that this can only be done by law.

Attention is called to the fact that section 5019 G. C. (103 O. L. 554) provides how constitutional amendments shall be submitted. This section reads:

> "Sec. 5019. When an amendment to the constitution is to be submitted to the electors for their approval or rejection, such amendment shall be so submitted on a separate ballot at the top of which shall be printed the words 'Proposed amendment to the constitution,' or, if more than one such amendment is submitted at the same election, such heading shall be 'Proposed amendments to the constitution.' Each amendment shall be stated thereon in language sufficient to clearly designate it, which statement shall be printed in a space defined by ruled lines with two squares to the left thereof, the upper of which shall contain the word 'Yes,' and the lower the word 'No.' There shall be two similar blank squares, one to the left of that containing the word 'Yes,' and one to the left of that containing the word 'No.' Persons desiring to vote in favor of any such amendment shall do so by making a cross mark in the blank square to the left of the word 'Yes,' and those desiring to vote against the same shall do so by making a cross mark in the blank square to the left of the word 'No.' More than one such amendment may be submitted on the same ballot. The provisions of this title, so far as practicable, shall apply to the marking of ballots and the counting of votes upon any constitutional amendments so submitted. All such ballots shall be deposited in a separate ballot box."

This section manifestly shows that the legislature by statute has provided that each amendment shall be stated thereon in language sufficient to clearly designate it and also has provided the form of placing the amendment upon the official ballot and the manner in which the elector marks his choice.

It might be well to consider that part of the joint resolution which seeks to prescribe the manner and form of placing the proposed constitutional amendment upon the official ballot. It will be noted that the joint resolution starts out with the formal wording: "Be it resolved by the general assembly of the state of Ohio," and then proceeds to provide that there shall be submitted to the electors a proposed amendment "to read as follows." Then follows article XII, section 2, as proposed to be amended. The resolution then continues: "Be it further resolved" etc. Here follows the manner and form in which the proposed amendment is to be placed upon the official ballot.

The language of section 5019 G. C., as to the manner in which the amendment shall be placed on the ballot is:

> "* * * Each amendment shall be stated thereon in language sufficient to clearly designate it, which statement shall be printed in a space defined by ruled lines with two squares to the left thereof, the upper of which shall contain the word 'Yes,' and the lower the word 'No.' There shall be two similar blank squares, one on the left of that containing the word 'Yes,' and one to the left of that containing the word 'No.' * * *."

There is no specific provision as to the person who shall frame the wording, in order that the language used will be sufficient to clearly designate the amendment. But as in many cases the proposers of the amendment might not seek to formulate

this statement, and as there would have to be some authority to determine whether or not a submitted statement, if authorized, complied with the statutory requirement, it would seem reasonable that the secretary of state, who is by law made the supervisor of elections and has general jurisdiction thereof, would have something to say as to whether the statute was complied with or not.

Article II, section 1g of the constitution among other things provides:

> "* * * Unless otherwise provided by law, the secretary of state shall cause to be placed upon the ballots, the title of any such law or proposed law or proposed amendment to the constitution, to be submitted. * * *."

The section from which the above quotation is taken is of course a part of the initiative and referendum provisions of the constitution and especially applies to an initiated amendment to the constitution. It probably has no direct reference to a proposed amendment by the general assembly, but it is seen that the people of the state have imposed a specific duty upon the secretary of state in the matter of an initiated amendment.

The election laws of the state make the secretary of state, by virtue of his office, state supervisor and inspector of elections and the state supervisor of elections. It is made his duty (section 5015 G. C.) to certify all nominations that are filed with him, together with a form of official ballot. In the past, various secretaries of state, as such supervisor of elections, have felt it their duty to send out forms of ballots to be used in the various counties where offices or questions are voted on throughout the state, that it might appear on all the ballots uniformly. While section 5019, supra, does not specifically name the secretary of state as state supervisor, nor specifically impose the duty of framing the designation to go on the ballot, still this section is a part of the election laws, the enforcement and carrying out of which is made the duty of said officer.

It is my opinion that the clear inference is that this duty is imposed upon the secretary of state as state supervisor, and that section 5019 is to be construed as if it read that the state supervisor of elections shall place a statement on the official ballot in language sufficient to clearly designate the proposed amendment.

It will be noted that the joint resolution provides:

> "* * * this proposition shall be placed on the official ballot *in the manner prescribed by law* and shall be designated as follows" (here follows the statement suggested to be placed on the ballot).

Inasmuch as the joint resolution provides that the proposition shall be placed on the official ballot in the manner prescribed by law, and as the statute providing for the voting on constitutional amendments does not contemplate the placing of the entire amendment upon the official ballot, but merely sufficient language to clearly designate it, this language is merely declaratory of what the statute is, and unnecessary because the matter having been provided for by statute, the legislature could not affect the law already passed, by joint resolution.

The supreme court in State ex rel. v. Kinney, Sec'y of State, 56 O. S. 721, held:

> "The statute law of the state can neither be repealed nor amended by joint resolution of the general assembly."

It is my opinion that that part of the joint resolution providing for the manner in which the amendment should be placed upon the ballot and designating the form,

must under the authority of State ex rel. v. Kinney, supra, be treated as mere surplusage, and that the secretary of state need not pay any attention thereto.

It is my conclusion, therefore, that the secretary of state, as state supervisor of elections, need not pay any attention whatever to the designation of the form of the amendment to be placed upon the official ballot; that a duty is imposed upon him by statute to place such proposed amendment on the official ballot in language sufficient to clearly designate it, and that this duty imposed upon him by law cannot and has not been in any way changed by the joint resolution.

As this answers the objections of the protestor, numbered 1, 2 and 4, it becomes unnecessary to pass upon the question raised in objection numbered 3.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1250.

APPROVAL OF BOND ISSUE OF ALLEN COUNTY—$7,900.00.

COLUMBUS, OHIO, June 3, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

> "In re bonds of Allen county, Ohio, in the sum of $7,900.00 in anticipation of the collection of taxes and assessments to provide additional funds to pay the respective shares of said county, of Bath and Perry townships and of the owners of benefited property assessed for the cost and expense of improving section 'A' of Intercounty Highway No. 128, located in said county and townships."

GENTLEMEN:—I have carefully examined the corrected transcript of the proceedings relating to the above issue of bonds and find the same to be in conformity to the provisions of the General Code of Ohio relating to bond issues of this kind. I am, therefore, of the opinion that properly prepared bonds covering the said issue will, when the same are properly executed and delivered, constitute valid and subsisting obligations of Allen county, Ohio, to be paid according to the terms thereof.

No bond form of the bonds to be executed and delivered covering this issue has been submitted. I am therefore holding the transcript of the proceedings relating to said bond issue until a proper bond form covering said issue is submitted and approved.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1251.

ROADS AND HIGHWAYS—HOW PROCEEDS OF BOND ISSUE UNDER SECTION 1223 MUST BE USED.

The proceeds realized from the sale of bonds under section 1223 *G. C.* (107 *O. L.* 133) *for a road improvement under the jurisdiction of the state highway commissioner could not be used to pay the cost and expense of the improvement*

of the same road in a proceeding under section 6906 et seq. G. C. (107 O. L. 95). The proceeds of said bond issue would pass to the sinking fund of the county and be subject to the uses of such sinking fund.

COLUMBUS, OHIO, June 3, 1918.

HON. G. O. MCGONAGLE, *Prosecuting Attorney, McConnelsville, Ohio.*

DEAR SIR:—I have your communication of May 1, 1918, which reads as follows:

> "Our county commissioners, prior to June, 1917, issued bonds for the county's proportionate share in building a 2.15 mile section of a certain intercounty highway, two other sections of the same being then under construction. This section has been advertised five times, estimates being raised, and no bids have been received. The county's proportionate share of this money has long since been drawing two per cent interest in the depositary, the bonds drawing five.
>
> May the commissioners proceed to use this fund to construct this section of road by force account? I call attention to sections 1203 and 6948-1 (107 O. L. 125 and 107 respectively)."

The road in question is one over which the state highway commissioner has assumed jurisdiction under the provisions of sections 1178 to 1231-3 G. C. For this improvement the county commissioners issued bonds under section 1223 G. C., to take care of the cost and expense of the improvement to be borne by the county, township and abutting property owners.

You inquire whether the county commissioners might now assume jurisdiction over the particular highway in question, construct the same under force account and pay for it, at least in part, from the proceeds realized from the sale of said bonds.

Section 1223 G. C. (107 O. L. 133) provides that the bonds issued thereunder "shall state for what purpose issued" and that

> "the proceeds of such bonds shall be used exclusively for the payment of the cost and expense of the construction, improvement and repair of the highway for which the bonds are issued."

If the state highway commissioner should relinquish his jurisdiction over the construction of this road under the provisions of section 1178 et seq. G. C., and the county commissioners assume such jurisdiction, they would proceed under sections 6906 et seq. (107 O. L. 95); that is, it would virtually be an entirely new proceeding just the same as if the state highway commissioner had never taken jurisdiction of the matter. While the county commissioners would construct exactly the same piece of road which the state highway commissioner had intended to construct, yet it is my opinion that the improvement made by said commissioners would be a different one from that which would have been made by the state highway commissioner, and hence the proceeds of the bond issue would not be used in the manner set out in section 1223, supra, if the commissioners should apply them to a part of the cost and expense of the improvement.

Section 5654 G. C. provides as follows:

> "The proceeds of a special tax, loan or bond issue shall not be used for any other purpose than that for which the same was levied, issued or made, except as herein provided. When there is in the treasury of any

city, village, county, township or school district a surplus of the proceeds of a special tax or of the proceeds of a loan or bond issue which cannot be used, or which is not needed for the purpose for which the tax was levied, or the loan made, or the bonds issued, all of such surplus shall be transferred immediately by the officer, board or council having charge of such surplus, to the sinking fund of such city, village, county, township or school district, and thereafter shall be subject to the uses of such sinking fund."

In this section it is provided that if the proceeds of a bond issue cannot be used for the purpose for which the bonds were issued, they shall be transferred immediately to the sinking fund of the county. So under this section the county commissioners would not have authority in law to use the proceeds of said bond sale for a different purpose from that for which they were issued; but if the state highway commissioner would not proceed further with the improvement of said road and the purpose of the bond issue in that event fails, the proceeds would immediately be transferred to the sinking fund of the county, to redeem the bonds issued by the county as they fall due from time to time.

The question might also be raised as to whether the state highway commissioner, having once assumed jurisdiction over the construction of this highway, could surrender his jurisdiction and give the county commissioners jurisdiction to proceed with the construction. However, in view of the above conclusion, it will not be necessary for me to pass upon this particular question.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1252.

COUNTY BOARD OF EDUCATION—WHEN THEY MAY REDISTRICT—EFFECT OF REDISTRICTING UPON CONTRACT OF SUPERINTENDENT WHOSE CONTRACT EXTENDED BEYOND THE YEAR IN WHICH REDISTRICTING TOOK PLACE—TERM OF NEW SUPERINTENDENT.

The county board of education of a county school district may redistrict such county school district into supervision districts any year.

When the county board of education redistricts the county school district and changes the district lines of a supervision district which supervision district had employed a district superintendent for more than one year, such change in the supervision district will cause a termination of the contract of the district superintendent, which contract extended beyond the school year in which the redistricting was made.

Where the county board of education has redistricted the county school district, and has changed the lines of any supervision district therein, the district superintendent of such newly created supervision district can be employed for but one year at the first election held in such newly created supervision district.

COLUMBUS, OHIO, June 3, 1918.

HON. GEORGE F. CRAWFORD, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR:—In your request for my opinion you say:

"During the past year one of our district superintendents was employed for a period of three years. The county board of education, on

April 1, 1918, redistricted the county, with the result that an additional township was added to the supervision district over which said superintendent had supervision.

It was conceded that by such redistricting, the contract between the superintendent and the former district was rendered void, and a re-employment became necessary. There has been a re-employment of the same superintendent by the district as changed by the county board, for a term of three years, and the question has arisen as to whether or not * * * such employment could be made for a period of three years, or whether or not such employment could be for one year only, being the first employment.

My opinion on the proposition is that if the redistricting rendered the contract void between the superintendent and the district as then established, it would make the present employment a *first* employment and would be limited to one year. I would like to know first as to whether the addition of a rural district to the original district would work a discontinuance of the contract between the superintendent and the original district, and if so, whether or not the district as now constituted could employ the superintendent for a period of more than the one year."

The section which provides for the redistricting of a county school district into supervision districts is section 4738, and as last amended (106 O. L., 396) reads in part as follows:

"The board of education shall divide the county school district, *any year,* to take effect the first day of the following September, into supervision districts, each to contain one or more village or rural school districts. The territory of such supervision districts shall be contiguous and compact. In the formation of the supervision districts consideration shall be given to the number of teachers employed, the amount of consolidation and centralization, the condition of the roads and general topography. The territory in the different districts shall be as nearly equal as practicable and the number of teachers employed in any one supervision district shall not be less than thirty. The county board of education shall, *upon application of three-fourths of the presidents of the village and rural district boards of the county, redistrict the county into supervision districts.* * * *"

Under the provisions of the above quoted section you say that during the last year, that is on April 1, 1918, the county board of education of your county redistricted the county school district and that as a result of such redistricting an additional township (rural district) was added to the supervision district, which supervision district had employed its superintendent for a period of three years.

That the county board of education has a right to so redistrict the county in any year has been determined by this department several times, and when three-fourths of the presidents of the village and rural district boards of the county petition or make application to the county board of education for such redistricting, then it is mandatory upon the county board to so redistrict the county school district, and it has also been determined by this department in several opinions, hereinafter referred to, that when the county school district is so redistricted in any year by the county board of education, and a supervision district has employed a superintendent, whose term extends beyond the period of the school year, in which such redistricting is had, and by such redistricting the district line of such super-

vision district is changed, either by adding to or taking from such supervision district, territory of the county school district, then and in that event the contract of such supervision district with the district superintendent is hereby rendered void or terminated and the new supervision district, as formed by the county board of education, must employ a district superintendent for such new supervision district.

In opinion No. 94, rendered by this department March 9, 1917, and found in Opinions of the Attorney-General for 1917, Vol. 1, page 211, it was held:

> "The county board of education has the authority to divide the county school district into supervision districts during any year, the same to take effect on the first day of the following September, *and the district superintendent has no such vested right in a contract for more than one year which will prevent such redistricting or which will compel a continuation of such contract.*"

In opinion No. 186, rendered by this department under date of April 14, 1917, found in Opinions of the Attorney-General for 1917, Vol. 1, page 482, it was held:

> "Redistricting of the county school district into supervision districts *upon the application of three-fourths of the presidents of the village and rural district boards has the effect of terminating contracts of district superintendents which extend beyond the school year.* Such district superintendents have no vested rights in such contracts which will defeat redistricting legislation."

So that, it may be considered that the county board of education had a right to redistrict your county school district on April 1, 1918, and that when it changed the supervision district which had employed a superintendent for more than one year, the contract of such superintendent for such supervision district was thereby terminated, and the next question to be determined is, whether or not such new supervision district may hire a superintendent for more than one year.

Section 4741 G. C. provides in part:

> "The *first* election of a district superintendent shall be for a term not longer than one year. Thereafter he may be re-elected in the same district for a period not to exceed three years * * *."

The language of said section is so clear that a construction of the same seems almost unnecessary in order to determine its meaning, for it says the *first* election of *any* district superintendent shall be for a term *not longer than one year,* and that thereafter he may be elected for a term of not to exceed three years. Whenever a supervision district is changed, either by adding to such district or by taking from such district any territory of the county school district, then the supervision district is a new district, that is, it is a different district from what it was before such redistricting was had. It is noted from section 4738, above quoted, that supervision districts may be formed from one or from more than one village or rural school districts of the county school district and each supervision district, when so formed, shall elect a district superintendent, either by the boards of education of such districts which compose such supervision district. if there are three or less districts in such supervision district, or by the presidents of such boards of education of the

districts which compose such supervision district, if there are more than three in such supervision district. When, then, a new supervision district is formed by adding to an old supervision district another district, the electing body is a new electing body and it will be the first election for such new electing body. That some of the electing body had participated in a previous election of a district superintendent cannot, in any manner, effect the status of the body as a whole.

Therefore but one conclusion can be reached and that is that where the county board of education has redistricted the county school district and has changed the district lines of any supervision district therein, the district superintendent of such newly created supervision district can be employed for but one year at the first election held in such newly created supervision district.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

1253.

MINING MACHINES—WHEN SAME MAY NOT BE MOVED.

The provisions of section 957 G. C., prohibiting the moving of mining machines while the cutter chain is in motion, makes it unlawful to use the "breast" mining machine for cutting coal, which machine is moved with power, because this cutter chain necessarily must be in motion in order to move such machine with the power.

COLUMBUS, OHIO, June 3, 1918.

The Industrial Commission of Ohio, attention of L. D. DEVORE, *Chief Deputy and Safety Commissioner of Mines, Columbus, Ohio.*

GENTLEMEN:—I have your inquiry asking opinion upon the following:

> "Owing to a controversy arising over the situation of handling the 'breast' mining machines when cutting coal at the Buffalo mine, operated by the Cambridge Collieries Company, Guernsey county, Ohio, a joint report of Inspectors Smith, Jenkins and Thos. P. Williams shows that the mining machines are moved with the power, the new device being a chain that reaches across the room and is made secure to the right hand rib.
>
> The chain is equipped with single pulley block attached. One end of the chain is hooked over a machine bit which is put in the reverse way, and the power turned on to move the machine the desired distance. When the room is cut, the chain is rearranged and the machine moved back to the track with the power.
>
> We should be pleased to have you give us an opinion at your earliest convenience, whether this system of moving mining machines as above pointed out is contrary to section 957 of the General Code of Ohio."

Accompanying your request is a report of the use of mining machines in the manner described, in which it is stated that claim is made that the use of the device described was a great saving of labor and that the use has come in to mining work since section 957 was passed, and was not contemplated by said section.

Section 957 General Code, to which reference is made, provides:

> "Machine runners and helpers shall use care while operating mining machines. They shall not operate a machine unless the shields are in

place, and shall warn persons not engaged in the operating of a machine of the danger in going near the machine while it is in operation, and shall not permit such persons to remain near the machine while it is in operation. * * * They shall not move the machine while the cutter chain is in motion. * * *"

The inhibition contained in the part of 957 above quoted, is against operating the machine unless the shields are in place, permitting certain persons remaining near the machine while it is in operation, and *moving the machine while the cutter chain is in motion.* The statute in express terms provides that the machine runners and helpers "shall not move the machine while the cutter chain is in motion."

Now, as I understand your statement of facts, and as I gather from the report of the inspectors, the mining machines are moved with the power by means of a chain with pulley blocks attached, the power being turned on to move the machine to the required place, and when the room is cut the machine is moved back to the track with the power. The fact that this device was not in use, and that the question of using it has grown up since the passing of section 957, does not take it without the prohibition. The custom under this section was illegal in its inception, and the statute expressly, and in terms prohibiting the moving of the machine while the cutter chain was in motion, would preclude the use of this device in the manner in which you have described.

It is unfortunate that the benefit of the saving that this device accomplishes must be lost, but whatever good or benefit might accrue in using the machine in the manner described, while it might be an argument to the legislature to amend the statute so as to permit such use, can have no bearing upon construing the language of the law as it now exists.

An examination of the mining laws of the state shows a manifest intention on the part of the legislature to safeguard the miner. Duties are imposed upon those who operate mines, upon the superintendent of the mine's foreman and overseer, as also upon the miner. It can well be seen from these statutes that every endeavor is made to protect the workman in the mines as against the acts of his fellow miners and also himself.

Under section 976, the penalty section, penalties are to be visited upon the refusal or neglect of the owner, lessee or agent, the superintendent's foreman or overseer as well as the general violations of the law by individuals, and this section expressly provides a penalty for any person or persons who violate the provisions of section 957.

Specifically answering your question, it is my view that the provisions of section 957 prohibiting the moving of mining machines while the cutter chain is in motion, prohibits the use of the device for moving the machine with power, as stated in your inquiry, because the cutter chain, as stated, necessarily must be in motion in order to move the machine in the manner described.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

1254.

FIRE INSURANCE—UNIFORM FEE CHARGED BY AGENT FOR WRITING POLICIES IS NOT DISCRIMINATION IN RATES.

A charge by a fire insurance agent of a uniform fee for writing policies in the

company or companies represented by him is not a discrimination in rates within the meaning of the act creating rating bureaus, 107 *O. L.* 743.

COLUMBUS, OHIO, June 3, 1918.

HON. G. B. FINDLEY, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of May 14, 1918, requesting my opinion as follows:

> "You are familiar with the practice of mutual fire insurance companies to allow their agents a policy or survey fee of $2.00 or more upon each policy written. I understand that the fee so charged is an agency profit and a uniform charge for a legitimate service rendered.
>
> Is it your opinion that the anti-discrimination law recently passed limits in any way the collection of the policy or survey fee? Is it not true that a proper policy survey charge is a claim of the agent for personal services and not included among so-called 'premium' charges?"

The law to which you refer is the act of March 20, 1917, found in 107 Ohio Laws, 743. The first section of this act requires every fire insurance company to belong to a rating bureau, which bureau is described and regulated in the succeeding sections. Section 8 of the act, section 9592-8 G. C. provides:

> "No fire insurance company * * * shall fix or charge any rate for fire insurance upon property in this state which discriminates unfairly between risks in the application of like charges and credits, or which discriminates unfairly between risks of essentially the same hazards and having substantially the same degree of protection against fire."

Section 9 (section 9592-9 G. C.) provides:

> "Any deviation of any company or insurer from the schedule of rates established and maintained by the bureau which it maintains, or of which it is a member, shall be uniform in its application to all of the risks in the class for which the variation is made, and no such uniform deviation shall be made unless notice thereof shall be filed with the bureau of which the insurer is a member, and the superintendent of insurance of his state, at least fifteen days before such uniform variation is in effect, and schedules providing for such variation shall be filed with the rating bureau and the superintendent of insurance showing the amended basis rate and amended charges and credits and application of the amended schedules to individual risks in the class affected."

The above excerpts from the law constitute the portion thereof bearing upon the question you ask. It is to be noted that the prohibition is directed to the company. This, of course, is broad enough to include any agent of the company acting in his representative capacity on behalf of the company.

The company, however, does not receive these policy fees, as stated in your request. They are retained by the agent as compensation for writing the policy; they do not seem, therefore, to come within the purview of this statute, or to have been in contemplation of the legislature in enacting the same. They speak continually of rates; no other charge of any kind is mentioned but rates, and it is well understood that the word "rates" as applied to the charge by an insurance

company for a policy means rates based upon a percentage of the face of the policy. The rate, as it is commonly spoken of, is a certain percentage of the amount for which insurance is taken out, and is the basis for the calculation of the amount of what is known as the premium, which is the price paid for the insurance to the company.

You are therefore advised that the matter in question does not interfere with the common practice of charging a policy fee.

However, it does not follow that this practice might not become a proper subject of regulation by the insurance department. If a company made use of it as a subterfuge to accomplish an actual discrimination, it would no doubt be a violation of the act, as if, for instance, they reduced the compensation allowed by them out of the premiums on policies which the agent is permitted to retain, and in certain cases or classes of risks, require him to secure his compensation by the charge of a policy fee, or a greater policy fee than he ordinarily would charge. This would effect a discrimination, which would be a violation of the act, which violation does not arise by the mere charge by an agent of uniform fees for writing policies, regardless of the company in which they are written.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

1255.

BANKS—NOT AUTHORIZED TO INVEST IN UNDIVIDED PORTIONS OF REAL ESTATE.

The statutes authorizing banks to invest in real estate whereon is, or may be erected, buildings suitable for the transaction of the business of such banks, means they may invest in real estate in its entirety and not in undivided portions thereof.

COLUMBUS, OHIO, June 3, 1918.

HON. PHILIP C. BERG, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your communication of May 20, 1918, in which you request my opinion, as follows:

> "Please advise whether a commercial bank, a savings bank, a safe deposit company, a trust company, or a combination of any or all of them, may hold an undivided half or other fractional interest in its banking house and the real estate upon which it is located."

Commercial banks are governed in this matter by section 9753, which is as follows:

> "A commercial bank may purchase, lease, hold and convey real estate only as follows:
>
> (a) Real estate whereon is erected or may be erected a building or buildings useful for the convenient transaction of its business, and from portions of which, not required for its use, a revenue may be derived; but the cost of such building or buildings and the real estate whereon they are erected, in no case shall exceed sixty per cent of its paid-in capital and surplus.
>
> * * * * * * * * *

(d) Such corporation also shall have power by lease to acquire a suitable building for the convenient transaction of its business, and from portions of which, not needed for its own use, a revenue may be derived."

By section 9762 the same provision is made applicable to savings banks; and by section 9774 the same provision is made applicable to trust companies. Safe deposit companies are governed by section 9772, which is as follows:

"A safe deposit company may purchase, lease, hold and convey real estate whereon is erected or may be erected a building or buildings useful for the convenient transaction of its business, including fire and burglar proof vaults or safes, and from portions of which, not required for its own use, a revenue may be derived. The cost of such buildings and the real estate whereon they are erected in no case shall exceed fifty per cent of the paid-up capital and surplus of the corporation."

Technically considered, the term "real estate" includes undivided interests in land held in common. It is necessary to examine the above provisions to see whether this meaning is intended by the legislature in them. The undivided interest you mention is real estate; but is it real estate whereon buildings may be erected? Owners in common have what is called unity of possession, from which it follows that each owns every particular part and location of the real estate so held in common. Each one owns it all, but, of course, necessarily subject to the condition that the other or others also have the same ownership.

It would therefore also answer the description of real estate whereon may be erected buildings useful for the convenient transaction of the business of a bank, etc., and yet it is apparent that this meaning is not that intended by the legislature. This technical meaning of real estate cannot follow the latter part of the clause permitting ownership in which the amount of the investment is limited. It is the cost of such building or buildings and the real estate whereon they are erected that shall not exceed sixty per cent of the capital and surplus.

The cost of the building here referred to is undoubtedly the whole cost. The words are used in their ordinary sense, and this reflects back upon the land itself, for it is the cost of the buildings and the real estate whereon they are erected, which, of course, means the ground whereon they stand, with its necessary appurtenances.

If this were in doubt and it was necessary to proceed further and consider the consequence of the interpretation of the statute, it occurs that a contrary interpretation might permit the investment of sixty per cent of the capital and surplus of a commercial bank in an infinitesimally small undivided interest in real estate, as the owner of an undivided interest potentially may become the owner in whole by proceedings in partition, and as such proceedings must always be in contemplation of tenants in common, and as the bank, to carry out the purposes intended by the act, might find it necessary to become the owner of the whole property, it would follow in such case that it might have much more than its capital and surplus invested therein.

The evident reason for permitting the bank to hold this real estate, or rather the expressed reason is, that the bank may have a proper location and building for the transaction of its business, and this would not be accomplished by the precarious possession given by a tenancy in common with other co-tenants, who in law would have an equal, or the same right, at all times to possession of the premises, and who might at any time assert such right, and instead of permanence and security to the bank, it would thereby have confusion and continual uncertainty.

This meaning is also made more probable by comparison with paragraph (d) of section 9753. The power to lease a suitable building there could not mean an undivided interest in such building.

In view of the evident purpose of this legislative authority and the connection and context of the legislation, as well as what appears to be the meaning of the language itself, you are advised that such banks are only authorized to hold the entire estate and not an undivided interest in real estate.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

1256.

CLERK OF COUNCIL—MAY SERVE NOTICES OF SPECIAL MEETINGS AND RESOLUTIONS—COMPENSATION—WHAT NOTICE UNDER SECTION 3818 SHALL CONTAIN.

1. *Council may provide that the clerk shall serve notice on members of special meetings of council and also serve copies of all notices and notices of all resolutions that may be ordered by council, and shall receive as compensation therefor the sum of twenty-five cents for each service, and said clerk is entitled to such compensation in addition to his regular compensation as clerk of council.*

2. *The notice provided for in section* 3818 *G. C. is the resolution of necessity provided for in section* 3814 *G. C., and shall contain the matters and things set up in section* 3815 *G. C. It does not contemplate reference to any particular lot or parcel of land, but refers to the entire improvement. Ordinarily, a clerk of council or an assistant when called upon to serve such notice upon the owner of each piece of property to be assessed is only required to serve a single notice, no matter how many lots or parcels of land on the improvement belong to the same owner.*

COLUMBUS, OHIO, June 3, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Under date of April 25 you wrote me, enclosing a copy of ordinance No. 39 of the city of Mansfield, a part of which reads as follows:

> "The clerk of council or an assistant shall serve notice on members of special meetings of council and also serve copies of all notices and notices of all resolutions that may be ordered by council and shall receive as compensation therefor the sum of twenty-five cents for each service."

You request my opinion upon the following questions:

> "1. Is such ordinance legal and may the clerk of council legally receive the sum of 25 cents for each service of notice of special meetings of council and special assessment notices and such other notices as may be ordered by council in addition to his regular compensation as clerk of council?
>
> 2. If such compensation be legal and the clerk of council at one delivery serves ten notices to the owner of ten lots which may be side by side, can such clerk of council legally be paid for each of the ten notices?"

I assume that the ordinance was legally passed and that your question as to its legality is not as to the manner of its passage, but whether or not the subject-matter is proper and whether council is authorized to impose such duties upon the clerk of council or an assistant and provide the compensation as in the ordinance set out.

Section 4210 G. C. provides:

> "Within ten days from the commencement of their term, the members of council shall elect a president pro tem., a clerk, and such other employes of council as may be necessary, and fix their duties, bonds and compensation. The officers and employes of council shall serve for two years, but may be removed at any time for cause, at a regular meeting by a vote of two-thirds of the members elected to council."

This section authorizes the election of the clerk and such other employes of council as may be necessary, by the members of council, and the fixing of the duties and compensation of such clerk and other employes.

As far as the duties of such clerk are concerned, under this section they are to be determined by council, and council alone is the sole judge. In addition to the duties determined and imposed by council, there are certain other duties imposed by law upon the clerk. For instance, in the matter of public improvements, payable in whole or in part by special assessments, it is provided by section 3818 G. C. that:

> "A notice of the passage of such resolution shall be served by the clerk of council, or an assistant, upon the owner of each piece of property to be assessed, in the manner provided by law for the service of summons in civil actions. If any such owners or persons are not residents of the county, or if it appears by the return in any case of the notice, that such owner cannot be found, the notice shall be published * * *."

So the service of the notice of special assessment is a statutory duty imposed upon the clerk.

Sections 3679, 3848, 3892, 3893, 4227, 4228, 4231 and 4232, and possibly some other sections of the General Code, impose specific duties upon the clerk. Such duties would be in addition to the other or similar duties determined and imposed upon him by council. No matter what his duties are or whether they are imposed by law or by council, his compensation is to be fixed by council. The statute does not provide that council shall fix a salary for the clerk. It is authorized to fix his compensation, which may include both salary and compensation.

As said by Spear, J., in Gobrecht v. Cin'ti., 51 O. S. 68, at p. 72, a general definition of "salary" includes "compensation," and while salary is compensation, compensation is not in every instance salary.

It is my opinion, then, that, assuming that the ordinance was properly passed, it is legal and under it the clerk of council may legally receive the fee fixed for each service of notice for special meetings of council and for the service of copies of all notices and notices of all resolutions that may be ordered by council, and that he is entitled to such specific fees, even if council has provided a regular compensation or salary for his other duties.

In your second question you inquire whether the clerk of council, who at one delivery serves ten notices to a person who is the owner of ten lots on the improvement, which possibly may be side by side, could legally be paid twenty-five cents for each of the ten notices.

That part of the ordinance in question which provides compensation for certain services therein named reads as above quoted on page one. The fee of twenty-five cents for each service is for each service of "notice on members of special meetings of council," "copies of all notices" and "notices of all resolutions that may be ordered by council."

The inquiry assumes, and I think correctly, that the ordinance provides for a fee for service of a notice of a special assessment upon the owner of lots affected by such assessment.

Section 3818 G. C. provides that a notice of passage of the resolution of necessity shall be served by the clerk of council, or an assistant, "upon the owner of each piece of property to be assessed, in the manner provided by law for the service of summons in civil actions." It further provides that if any such owners or persons are not residents of the county, the notice shall be published at least twice in a newspaper of general circulation within the corporation.

You will recall that your bureau made inquiry of my predecessor, Hon. E. C. Turner, as to whether several lots or parcels of land owned by non-residents in a special assessment improvement could be included in one notice, and whether a newspaper is entitled to legal compensation for such publication when the newspaper publishes notice as per a form submitted by the city officials, said form providing a separate notice as to each lot or tract of land owned by non-residents. Mr. Turner held (Vol. II, Opinions of the Attorney-General for 1916, p. 1222, as will be found at p. 1223) as follows:

> "The statutes are silent as to whether or not a separate notice shall be published as to each non-resident owner, or whether or not the same may be included in the one publication. Being silent as to this matter, I am of the opinion, in answer to your first question, that several lots or parcels of land owned by non-residents in a special assessment improvement may be included in one notice, and for the sake of economy should be so included.
>
> However, in answer to your second question, if the city officials submit forms of separate notice to each lot owner to a newspaper for publication, said newspaper would be entitled to legal compensation for each publication."

This does not assist us in solving the question submitted, but attention is called to the conclusion reached by Mr. Turner, with which I concur.

The resolution spoken of in section 3818 G. C. is the resolution provided for in section 3815 G. C. This section, as amended in 107 O. L. 151, provides:

> "Sec. 3815. Such resolution shall determine the general nature of the improvement, what shall be the grade of the street, alley, or other public place to be improved, the grade or elevation of the curbs, and shall approve the plans, specifications, estimates and profiles for the proposed improvement. In such resolution council shall also determine the method of the assessment, the mode of payment, and whether or not bonds shall be issued in anticipation of the collection thereof. Assessments for any improvement may be payable in one to twenty installments at such time as council prescribes."

It will be noted that the notice provided for in this section is a general notice, affecting all the property along the improvement, and such resolution would not refer in any way to any particular lot or parcel of land. So I cannot see the necessity of having a separate notice for each lot and parcel of land and of having

the clerk or his assistant serve more than one notice upon a lot owner affected by the proposed improvement, and it is my opinion that one such notice being sufficient for each owner, more than one, even if such owner held title to more than one lot or parcel, would be superfluous and unnecessary.

Section 3818, supra, does provide that the notice shall be served "upon the owner of *each piece* of property to be assessed," and if council, for some reason sufficient to itself, should order a notice to be given to each owner as to each piece of property that was assessable, then under this ordinance, which gives a fee for service of each notice of all resolutions that may be ordered by council, the clerk or his assistant would probably be entitled to the fee for each service.

I do not know what the rule has been in municipalities of the state, but it is my opinion that the statute only contemplates a single notice to each owner of property on the improvement, no matter how many pieces or parcels of land he may own thereon.

I would suggest that if there has been any custom of duplicate notices to such owners, it should be ordered discontinued, but that no findings be made against officials following such custom. Of course if the notice is served by direct order of council and there is in the municipality an ordinance providing for a fee for service of notices ordered by council, as in the instant case, then the ordinance would specifically provide for a fee for each separate notice and in this particular case the fee would be legally chargeable.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1257.

CIVIL SERVICE—LEAVE OF ABSENCE—EFFECT—EXTENT—RULES BY COMMISSION RELATIVE TO—ABANDONMENT.

A leave of absence from duty by an employe in the state civil service, either with or without pay, is not a separation from the service within the meaning of section 486-16 *G. C.*

The state civil service commission has authority to provide by rule that leave of absence be reported to them when such leave of absence is under such circumstances or for such length of time that they may be required to supply an employe temporarily to perform the duties of the position.

No leave of absence could be granted which by its terms is to extend for a period beyond a year.

Whenever an employe is properly absent upon leave of absence, he has the right to return at the end of the period of such leave and resume his position.

COLUMBUS, OHIO, June 3, 1918.

The State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—Under date of March 21, 1918, you address the following communication to this department:

"Section 486-16 of the civil service law provides in part as follows:

'Any person holding an office or position under the classified service who has been separated from the service without delinquency or miscon-

duct on his part may, with the consent of the commission, be reinstated within one year from the date of such separation to a vacancy in the same or similar office or position in the same department, etc.'

Employes in the classified service frequently request and are granted leave of absence by appointing officers, for periods ranging from a few days to one year. There seems to be no provision of the law, other than the one quoted, under which leave of absence might be granted. Former Civil Service Commissions have established a rule that a leave of absence may not be granted for a period of longer than one year, it being held that a leave without pay is a temporary separation from the service, under the provisions of section 486-16, and that inasmuch as the commission must fill, in accordance with the civil service law, vacancies caused by leave of absence for periods exceeding thirty days, except in cases where leave is granted on account of sickness and filled in accordance with the provisions of section 486-14, every leave of absence must be reported to it for approval. Certifications for temporary employment are made in accordance with the law, whenever possible, to fill positions thus temporarily vacated by the granting of leave.

Your advice and opinion is respectfully requested as follows:

Is there any provision of law under which classified employes may be granted leave of absence, except on account of sickness, as provided in section 486-14? If so,

1. Is a leave of absence, without pay, a separation from the service within the meaning of section 486-16, above quoted?

2. Can the civil service commission require by rule, that leave of absence be reported, with the reasons therefor, for its approval?

3. Can such leave, under the civil service law, be granted for a period exceeding one year?

4. When leave of absence has been granted a classified employe for a specified period, and the position in the meantime has been filled by certification, does the employe granted leave have undisputed claim to his position upon expiration of his leave?

5. If an employe granted leave of absence fails to return to duty promptly upon expiration of such leave, does this action on his part sever all claim he may have to the position?"

There is no express provision of statute in reference to leave of absence of employes in the state service, except as the same is alluded to in section 486-14, which reads as though it might be intended to assume that there could be no leave of absence except for sickness or disability. It is not necessary, however, to draw this implication from this language. The civil service law, like all other laws, is drawn to have a practical application and is intended to be applied to people and affairs in a practical manner. The law takes the world as it exists and is intended at all times to be applied in accordance with existing conditions. A man is not a machine, and if he were he wouldn't run all the time. When a man enters the service of the state, he does so in much the same way as if it were private service. While theoretically he gives all his time, yet applying the terminology of logic, this is a general and not a universal practice. It is certain that any man who enters any service, public or private, will be off duty at some time, and this occasional and incidental absence from duty is contemplated in the civil service of the state, as in every other connection in which men are employed. No express provision of the law is necessary to warrant it.

Answering, then, your five questions founded upon this situation, you ask, first,

> "Is a leave of absence, without pay, a separation from the service within the meaning of section 486-16, above quoted?"

This should be answered in the negative. The term "separated from the service" is used in the civil service law and plainly contemplates a discharge or entire separation. The statute is:

> "Any person * * * who has been separated from the service * * * may, with the consent of the commission, be reinstated within one year from the date of such separation to a vacancy in the same or similar office or position in the same department."

This clearly, therefore, does not mean such temporary separation as would arise from an absence of a few days upon leave. A person so absent is not out of the service, not separated from it, but is, in legal effect, in it all the time. It would make no difference as to the leave of absence being without pay, although loss of pay is not usually an accompaniment of such short absence. However, in the very nature of the case there ought to be no construction of law adopted which would prevent the head of a department doing that for the state which it is proper for a private employer to do for himself. There are many cases, where it is necessary for an employe to be absent for a short time when it is strictly just, that he should not receive pay. Suppose, for instance, an employe was the owner of real estate in California or had any occasion to go there on private business of profit to himself, there is no reason why he should be deprived of the opportunity to make a brief visit to look after his business and no reason that he should be paid for his time while doing so, and no reason for his forfeiting or losing the position by doing so, as the average man who would be chosen to fill the vacancy would be liable to the same temporary absence.

Your second question is:

> "Can the civil service commission require by rule, that leave of absence be reported, with the reasons therefor, for its approval?"

The power of the civil service commission to make rules is found in section 486-7 of the act. This sections begins:

> "POWERS AND DUTIES. The commission shall,
> First: (Rules and Regulations.) Prescribe, amend and enforce administrative rules for the purpose of carrying out and making effectual the provisions of this act."

The words "powers and duties" in the heading refer to a series of provisions, each of which is both a power and a duty; that is, in the one above quoted there is power to make rules and, the language being in form mandatory, it is also a duty that is imposed upon them. The second of these duties, as enumerated, is to keep the minutes of its proceedings and official actions; the third is to keep a roster of all persons in the classified service; the fourth is to make investigations concerning all matters touching the enforcement and effect of the law and the rules; the fifth is the subpoenaing of witnesses, and, in short, obtaining testimony in such

manner as to make its investigations effective; the sixth is to hear appeals of persons who have been discharged, etc., and the seventh to make an annual report. This section contains an express categorical list of the powers and duties of the state civil service commission. Now it will be observed that the rules which it is authorized and required to make are for the purpose of carrying out and making effectual the provisions of the act. In determining, therefore, whether a certain proposed rule would be within the power of the commission to make, it is necessary to apply the test of whether the rule could have proper application to the purpose of carrying out and giving effect to the provisions of the act.

Referring to the law, then, for the control of the commission over leave of absence, in order to consider the rule proposed in your question, we find in section 14 the following:

> "In case of an emergency an appointment may be made without regard to the rules of this act, but in no case to continue longer than thirty days, and in no case shall successive appointments be made; provided, however, that interim or temporary appointments, made necessary by reason of sickness or disability of regular officers, employes or subordinates shall continue only during such period of sickness or disability, subject to rules to be provided for by the commission."

It would not be practicable and not desirable, either to any of the departments or to the civil service commission, that if an employe desired to leave his duties for an hour or two the same should be reported to the commission, and yet, in a sense, such brief absence, with permission of a superior, is leave of absence. The same statement might be vouchsafed as to an absence of a day, or a few days. Inasmuch, however, as temporary appointments may be made at times to fill these short vacancies and such temporary appointments can be made for no longer than thirty days, the rule requiring departments to report leave of absence for as long as thirty days would be entirely reasonable, and within the authority of the commission to make.

While such absence might necessarily be required to be reported it would probably not extend to the requirement of approval by the civil service commission, as the granting of such leave of absence is an administrative matter in each case for the department in question and the head of such department would be presumed the best qualified to decide whether such leave would be an impairment to the service and whether in short it should be granted.

The third question reads:

> "Can such leave, under the civil service law, be granted for a period exceeding one year?"

This question should certainly be answered in the negative; not that there is any express provision in the law, but a year is such a period that cannot be looked upon as a mere temporary absence from service. A year is a substantial percentage of the average working life of a man. It is such period of time as one who fills his place would be in a sense permanently installed in the work and, ordinarily, better qualified to continue it than one who had left it a year before. It is, in short, too long a time for anyone to hold office or employment and not be connected with the performance of its duties.

Your fourth question is:

> "When leave of absence has been granted a classified employe for a specified period, and the position in the meantime has been filled by cer-

tification, does the employe granted leave have undisputted claim to his position upon expiration of his leave?"

Whenever leave of absence is properly granted to an employe, the employe has a right to come back. This is involved in the very term itself. It is not understood when an employe has a leave of absence, for thirty days for instance, that he means to stay forever. The leave of absence is leave from the duty that he is specifically employed about and if he could not return and drop into the exact place he left, in place of being a leave of absence it would amount to a resignation or a discharge. This would be equally true however his position has been filled or by whomsoever his duties have been performed during his absence, and in that case if the position during his absence were filled by some one certified from the commission, this latter would be, nevertheless, a temporary appointment, although it is styled a regular appointment in the act.

Your fifth question is:

"If an employe granted leave of absence fails to return to duty promptly upon expiration of such leave, does this action on his part sever all claim he may have to the position?"

The answer to this question would neither be entirely in the affirmative or the negative, but each case will depend upon its own circumstances. If the employe absent on leave were returning to his employment by the ordinary means of travel and in plenty of time to arrive under ordinary circumstances, and by reason of deep snows or storms, or other causes, railroad traffic were suspended, he would have a sufficient excuse. On the other hand, if without such excuse or any excuse he remained away much longer than the leave granted him, such action might be considered as a voluntary relinquishment of his position and possibly, in that view, a successor might be appointed, and the original appointee dropped without even preferring charges, upon the theory that he had abandoned the office. Ordinarily, however, such staying away overtime would be simply ground for removal upon charges for which a reason should be given and of which an explanation might be made and from which an appeal could be taken.

One other subject should not be passed by without notice. A great many leaves of absence have been granted in order that employees of the civil service might temporarily enter the military service. The war is, of course, temporary; the period of its continuance is a matter of conjecture only.

While engagement in the military service of the country in a time of war is not disability in the ordinary sense of the term, yet it may readily be construed as such under the terms of the civil service law. It renders the employe unable for the time being to perform the duties of his employment in the civil service; its demands are as exacting as would be his own illness or sickness or misfortune in his family, or any of the things which ordinarily are held to excuse his absence from employment. As the safety and protection of the country is necessary to all interests public and private in the whole country, he who is necessarily engaged in the war is necessarily absent from an office which he holds, and disabled for the time being from fulfilling it in the sense that from strict necessity he is unable to do so.

Yours very truly,

JOSEPH MCGHEE,

Attorney-General.

1258.

APPROVAL OF CONTRACT BETWEEN THE BOARD OF TRUSTEES OF BOWLING GREEN STATE NORMAL COLLEGE AND LOUIS BRANDT.

COLUMBUS, OHIO, June 6, 1918.

DR. H. B. WILLIAMS, *President, Bowling Green State Normal College, Bowling Green, Ohio.*

DEAR SIR:—You have submitted to this department the contract entered into the first of September, 1917, between the board of trustees of the Bowling Green state normal college and Louis Brandt, landscape architect. In such contract said Brandt agrees to superintend the landscape improvement work now being constructed by The Finch Engineering Co. for the sum of five (5) per cent commission on the sum actually paid out for said improvement, and in such contract said board of trustees also employs an engineer to be furnished by said Louis Brandt at one hundred and fifty dollars ($150) per month, amounting to approximately four hundred and fifty dollars ($450.)

I have carefully examined in regard to the commission paid to said Brandt and from a personal interview with him and with yourself have determined that in the instant case the said five per cent commission is not excessive.

Having received from the auditor of state a certificate that there is money available for the purposes of said contract, I have this day approved the same and filed the same in the office of the auditor of state.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1259.

COUNTY BOARD OF EDUCATION—WHEN PRESIDENTS OF VILLAGE AND RURAL BOARDS OF EDUCATION MAY ELECT MEMBER THERETO.

If the presidents of the various village and rural boards of education of the districts which compose the county school district fail to elect a member of the county board of education on or before the third Saturday in January in each year, they have the right to elect such member at any time during the year and the term will begin as of the third Saturday of January and extend for five years therefrom.

COLUMBUS, OHIO, June 6, 1918.

HON. SUMNER E. WALTERS, *Prosecuting Attorney, Van Wert, Ohio.*

DEAR SIR:—In your request for my opinion you say:

> "In December, 1917, the school board presidents elected a member of the county board of education for the term commencing on the third Saturday of January, 1918, which election according to your opinion No. 877, rendered December 19, 1917, is illegal. Said election resulted in the re-election of the member whose term expired the day preceding the third

Saturday of January, 1918. I desire your answer to the following question:

Can the presidents of the boards of education as constituted on and after the first Monday of January, 1918, *at this time,* have a meeting called and elect a member of the county board for the term commencing the third Saturday of January, 1918; or does their failure to elect between the first Monday of January, 1918, and the third Saturday of January, 1918, result in the old member holding over for another term of five years?"

Section 4729 G. C. provides:

"On the second Saturday in June, 1914, the presidents of the boards of education of the various village and rural school districts in each county school district shall meet and elect the five members of the county board of education, one for one year, one for two years, one for three years, one for four years and one for five years, and until their successors are elected and qualified. The terms of office of such members shall begin on the fifteenth of July, 1914, and each year thereafter on the third Saturday of January. Each year thereafter one member of the county board of education shall be elected in the same manner for a term of five years. * * * *"

Section 4730 G. C. provides that such first election for members of the county board of education shall be called by the county auditor, giving at least ten days' notice of the place where such meeting is to be held, and,

"The call for all future meetings shall be issued by the county superintendent. The meeting shall organize by electing a chairman and a clerk. The vote of a majority of the members present shall be necessary to elect each member of the county board. * * * The result of the election of members of the county board of education shall be certified to the county auditor by the chairman and clerk of the meeting."

So that, from the above sections it will be seen that no definite time is mentioned for the calling together of the presidents of the rural and village boards of education in any year after the year 1914, when the members of the county board of education are elected.

In my Opinion No. 877, rendered December 19, 1917, I held that members of the county board must be elected by the presidents of the rural and village boards who are in office at the time the vacancy occurs in the membership of the county board, or, in other words, when the county board members' terms close. That is, the statute provides that the term of the members of the board shall begin on the third Saturday in January and extend for five years. The statute also provides that the presidents of the various village and rural boards of education shall be elected on the first Monday in January of each year, so that it would be for such new presidents to elect the successor to the member whose term expires the day preceding the third Saturday in January of each year. On May 27, 1918, the court of appeals of Hocking county in the case of State of Ohio ex rel. John F. Harsh vs. Charles White, reach the same conclusion. In such case the presidents of the village and rural district boards of Hocking county met on August 23, 1917, and attempted to elect a member of the county board. The new presidents met January 18, 1918, and elected a different person

from the one who was elected by the old presidents. In an action in *quo warranto* the court held that the election in August was void and that the election of the new presidents was the valid election and followed State ex rel. Morris v. Sullivan, 81 O. S. 79, in which latter case it was held that an appointing power could not forestall the rights and prerogative of his successor by appointing a person to office, the term of which did not expire until after the term of the appointing power. Your case, however, is different from the Hocking case in that your new presidents have never acted and you inquire if they can now act.

In relation thereto I desire to call your attention to the case of State ex rel. Scott v. Ryan, 95 O. S. 405, in which case Scott was on the third day of April, 1916, duly elected a member of the county board of education of Adams county to serve until the third Saturday in January, 1921. He took the oath of office required by law and duly qualified to fill said office and perform the duties thereof. Ryan was in possession of the office and claimed that he could not be ousted therefrom on the facts stated by Scott. The court held that Scott was rightfully entitled to the office and by its order inducted him into the same. If, as in that case, the election could be held on April 3d, I can see no reason why it could not be held at this time in your case, and I therefore advise you that the presidents of the various village and rural district boards of education, never having been called together to act upon the election of a member of the county board, in the place of the one whose term expired the day preceding the third Saturday in January, 1918, may be called together at this time to elect such member whose term will end on the day preceding the third Saturday in January, 1923.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1260.

APPROVAL OF LEASE BY STATE TO COMMISSIONERS OF MUSKINGUM COUNTY.

COLUMBUS, OHIO, June 10, 1918.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of June 5, 1918, in which you enclose a form of lease made by the state of Ohio to the county commissioners of Muskingum county under and by virtue of an act passed March 21, 1917, found in 107 Ohio Laws 702.

While said act does not require the approval of the attorney-general, yet I have examined the same carefully, and find it to be correct in form, and in accordance with the provisions of said act.

I might say, however, that it embraces one condition not found in the provisions of the act, in that the county of Muskingum is given five years in which to use the land leased for the purposes for which it is leased, and if the lands are not used within said period of five years for the purposes for which they were leased, then the same shall revert to the state.

If the county commissioners are willing to accept the lease with the said conditions contained therein, it will not in any way affect the rights of the state of Ohio; but it is my opinion that the county of Muskingum would have the right under the provisions of the act to request that said time limitation be stricken from the lease. Otherwise, it is my opinion that this lease is in harmony with the provisions of said act, and I am therefore returning same to you with my approval.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

1261.

TRAFFIC REGULATIONS—COMMISSIONERS MAY NOT PURCHASE SCALES TO SECURE EVIDENCE OF VIOLATIONS.

County commissioners have no authority in law to purchase "scales" to be used in the matter of securing evidence to convict those persons who violate the traffic regulations of the state.

COLUMBUS, OHIO, June 10, 1918.

HON. SAMUEL DOERFLER, *Prosecuting Attorney, Cleveland, Ohio.*

DEAR SIR:—I have your communication of May 29, 1918, which reads as follows:

> "A serious condition exists in this county by reason of the fact that commercial concerns use large trucks to carry their freight. Sometimes the weight is as high as twenty tons and by reason of that fact, these trucks are destroying the brick roads in the county.
>
> The county has in its employ a man for the purpose of arresting anybody overloading, but he complains that there are no scales in the county which are large enough for him to weigh the loads, so that he might get evidence to prosecute the violators.
>
> The county commissioners are desirous of purchasing three twenty-five ton scales and the question has arisen as to whether or not they have the authority to do so. As you know, the law provides that they can buy machinery, tools and equipment for the purpose of improving roads. Is this provision, in your opinion, broad enough to include scales, or is there any other provision in the law which will permit the county commissioners to purchase scales for this purpose?"

The particular provisions of the General Code which your county commissioners are desirous of having enforced are found in sections 7246 to 7251 General Code inclusive.

In connection with your question I desire to quote the following from section 7246 General Code:

> "No traction engine, trailer, wagon, truck, steam roller, automobile truck or other power vehicle, whether propelled by muscular or motor power, weighing in excess of twelve tons, including weight of vehicle, object or contrivance and load, shall be operated over and upon the improved public streets, highways, bridges or culverts within the state, except as hereinafter provided."

The particular part of this quoted matter to which I desire to call attention is that it deals with "improved public streets, highways, bridges or culverts within the state;" that is, all state roads, county roads, township roads and streets of a municipality, providing the same are improved.

With this particular provision in mind, let us turn to the provisions of section 7200 General Code, to which you no doubt refer in your communication. This section reads in part as follows:

> "The county commissioners may purchase such machinery, tools or other equipment for the construction, improvement, maintenance or repair

of the highway, bridges and culverts under their jurisdiction as they may deem necessary, which shall be paid for out of the road funds of the county."

The particular part of this quoted matter to which I desire to call attention is that its provisions are limited to highways, bridges and culverts under the jurisdiction of the county commissioners.

The only theory upon which it might be inferred that scales could be included in the general terms "machinery, tools or other equipment" is that they would be used in the matter of prosecuting those persons who violate traffic regulations of the state, and thus they would indirectly be used to prevent the wearing out of highways and thus decrease the amount of work necessary to maintain and repair the same.

But when we consider the matter of maintenance and repair of roads we find under the provisions of 7464 to 7467 General Code that the jurisdiction of county commissioners in reference to this matter is limited to county roads, as defined in section 7464 General Code. And section 7200 limits the power of the county commissioners to purchase "machinery, tools or other equipment," in so far as it may be necessary, in reference to roads coming under their jurisdiction, which would be in the matter of the maintenance and repair of county roads.

With this in mind, let us compare the provisions of section 7246 with the provisions of 7200 in reference to the scope of the same. The provisions of section 7200 in reference to the maintenance and repair of roads for which "machinery, tools and other equipment" may be purchased, are confined to county roads, while the provisions of section 7246 General Code include not only county roads but state roads, township roads and municipal streets, provided they are improved thoroughfares.

From this it seems to be fairly evident that the county commissioners, under the provisions of section 7200 which gives them authority to purchase "machinery, tools or other equipment" in reference to the matter of the repair and maintenance of county roads, would not be authorized to purchase "scales," which would have reference not only to county roads, but also to state roads, township roads and streets of a municipality.

Secondly, it could hardly be said either that the power to purchase "scales" might be implied from the express power granted to the county commissioners to purchase "machinery, tools or other equipment" for the maintenance and repair of roads. An implied power is to be inferred only when it is essential to enable a body or official to carry out an express power granted. The only object which scales could serve would be to enable the proper officials to secure the necessary evidence to prosecute those persons who are violating the traffic regulations of the state, but the matter of prosecution of law violators and the matter of getting evidence with which law violators may be convicted is not a duty which rests primarily with the county commissioners, but is one which rests with the prosecuting attorney of the county; hence, there having been no express power granted to the county commissioners to secure such evidence, the implied power to purchase "scales" could not be inferred.

Further, I do not feel that the legislature intended in the use of the language found in section 7200 General Code to make it include "scales." The legislature evidently had in mind only the machinery and tools that are necessary to do something in the matter of bringing the roads up to the condition in which they were at the time they were improved, or in keeping them in such a condition, and therefore did not have in mind such a thing as "scales."

It could further be said that the term "scales" does not seem to fit into the

terms "machinery and tools," and under the familiar rule of *ejusdem generis* it could not be brought within the term "other equipment."

From all the above, I do not believe that the provisions of section 7200 General Code are broad enough to give the county commissioners authority to purchase "scales" for the purposes set out in your communication.

Neither do I know of any other provision of law which would authorize the county commissioners to make such a purchase.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

1262.

COUNTY COMMISSIONERS MAY NOT INVEST PROCEEDS OF SINKING FUND LEVIES IN INTEREST BEARING SECURITIES FOR PURPOSE OF ACCUMULATING SINKING FUND—HOW SUCH PROCEEDS MAY BE USED—HOW EARNINGS FROM SUCH ILLEGAL INVESTMENT DISTRIBUTED.

County commissioners have no power to invest the proceeds of sinking fund levies in interest-bearing securities for the purpose of accumulating a sinking fund. It is the duty of the county auditor and county treasurer to pay the county's funded debt and interest as it falls due; and for this purpose they may use only the proceeds of the levy, even the depositary interest on same being subject to the general county fund.

Where the county officials have made an illegal investment of the proceeds of sinking fund levies in interest-bearing securities, the earnings resulting therefrom should be credited to the general county fund to the extent of the rate which could have been secured on inactive deposits in the county depositary; the surplus, if any, should be credited to the sinking fund. If the securities are sold for an amount insufficient to replace the principal, with interest at the depositary rate, the auditor and treasurer are liable for the difference.

COLUMBUS, OHIO, June 10, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your letter of recent date enclosing copy of a letter received by you from the auditor of Adams county, requesting the advice of your bureau as follows:

> "Since the Smith one per cent law came into effect, the board of county commissioners, owing to the limits of taxation, have issued bonds yearly, to meet the annual county expenditures.
>
> The money received from the levies for the payment of the principal of said bonds have been invested in bonds which mature prior to the maturity of the bonds which were issued to take up the original indebtedness.
>
> Sections 2294, 2295, 1465-58, 5649-1 and 5649-1a G. C., and article XII, section 11 of the constitution of Ohio have a bearing directly and indirectly upon the levies for and use of sinking funds in counties and their political subdivisions.

1. In view of the above where a county issues long time bonds, have county commissioners authority to invest sinking funds as is done in municipalities?

2. Having already invested said moneys in this manner, shall the earnings resulting therefrom be devoted to the accretion of the sinking funds or do such earnings go to the general county fund under section 2737?

We would refer you to opinion of attorney-general in 1914 reports, pages 1224-1226; on page 1226 of which is given a definition of 'Sinking fund.'"

You request my opinion upon the questions as submitted.

Article XII, section 11 of the constitution as amended in 1912 provides as follows:

"No bonded indebtedness of the state, or any political subdivisions thereof, shall be incurred or renewed, unless, in the legislation under which such indebtedness is incurred or renewed, provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds, and to provide a sinking fund for their final redemption at maturity."

As pointed out by Mr. Hogan in the opinion referred to by the county auditor, this section of the constitution requires the levy of a tax sufficient to provide a sinking fund for the redemption of bonds. In that opinion Mr. Hogan had before him the question as to whether under this provision of the constitution serial bonds could be issued. He came to the conclusion that the issuance of such serial bonds was not prohibited by the constitution inasmuch as the method of payment of such bonds as ordinarily issued is such as to meet the substantial requirement of amortization aimed at by the accumulation of a sinking fund. In the course of that opinion Mr. Hogan, who was then considering the case of a municipal corporation, used the following language:

"Of course, strictly speaking, a sinking fund is a fund accumulated by annual or other periodical *investment* which by accretion will equal the principal of an indebtedness due at a future date. Given the number of years which the indebtedness has to run, and the average rate of the investment available to the managers of the fund, the amount required to be set aside and added to the principal of the fund each year can be determined * * *.

* * * there is also present the idea that any amount annually set aside to the credit of the sinking fund shall be, roughly speaking, an aliquot part of the total indebtedness, ascertained by dividing the whole of the number of years, or other periods of time between the date of issue and the date of maturity. Of course, the periodical investments will not be precisely equal, because of accretions to the fund through its *investment.*

* * * This idea of equality of burden is the ruling and determining factor. * * *

In short, then, that is a 'sinking fund' which is accumulated by the periodical setting aside of approximately the same amount, and its investment with a view to accumulating a fund equal to the principal of the indebtedness, when the latter matures.

This is the public policy that is embodied in the constitutional amendment under discussion."

As I have said, Mr. Hogan evidently had in mind the provisions of the municipal code, which expressly authorized the investment of the sinking fund in income-producing securities, when he wrote this opinion which was addressed to a city solicitor. As he points out, however, the idea of "investment" which he brings out by repeated use of that term in the text from which I have made excerpts, is not the controlling one present in the constitutional amendment; and he did not hold, either expressly or by implication, that the constitutional amendment of itself carries with it authority in any given public officer to invest the proceeds of sinking fund levies in any particular income-producing securities.

A little thought will convince one that such an interpretation of the constitution is impossible; or at the very least that if this idea be present in the constitutional amendment the latter is not in this particular self-executing. For the constitution, silent as it is on the whole subject of investment save by implication, if there be such implication, does not point out what public officer shall make the investment nor create any public functionary for that purpose; nor does it prescribe the securities in which the investments shall be made. Being silent in this particular it cannot be looked to as the source of the authority of the *county commissioners* to invest county sinking fund levies in particular bonds.

It is palpable, then, that we must consult the statutes to find whether the county commissioners are given such control over the proceeds of sinking fund levies as to authorize them to act as a sinking fund commission for the county and, if so, what, if any, investment they are authorized to make of such proceeds.

The auditor refers to several sections of the General Code which I shall examine. Among these he mentions sections 5649-1 of the General Code, which is a part of the Smith one per cent law. It provides as follows:

> "In any taxing district, the taxing authority shall, within the limitations now prescribed by law, levy a tax sufficient to provide for sinking fund and interest purposes for all bonds issued by any political subdivision, which tax shall be placed before and in preference to all other items, and for the full amount thereof."

This section imposes upon the county commissioners as the levying authority for the county the duty of levying a sufficient sum for sinking fund purposes on account of all bonds issued by the county. It does not, however, save by the same inference which has already been discussed and rejected, authorize them to invest the proceeds of such levies in any particular securities or otherwise. In the same connection other sections of the Smith law might be quoted to show that it makes no discrimination among different political subdivisions with respect to debt and interest levies. In point of fact it concerns itself only with the levying of taxes and not with the payment of the debt itself. It uses the term "sinking fund" as if it had application to all subdivisions and, as we shall see, it does not stand alone in this respect. But it does not follow, for reasons already pointed out, that the term "sinking fund" implies, in the case of a county, all the machinery which is expressed in the statutes in dealing with municipal corporations and school districts.

What I have just said makes it unnecessary for me to quote section 5649-1a of the General Code, the import of which I have just discussed.

Section 1465-58 G. C. is a part of the workmen's compensation act and requires, in general terms, "the boards or officers of the several taxing districts of the state * * * to offer in writing to the state liability board of awards, * * * all such issues as may not have been taken by the trustees of the sinking fund of the taxing district so issuing such bonds; * * *." It is too much to draw from

this provision, even in connection with those which have already been quoted, the inference that every taxing district in the state has a board of trustees of the sinking fund.

Sections 2294 and 2295 G. C. are general provisions of the law dealing, *inter alia*, with bonds issued by county commissioners. Section 2295 provides, in part, that

> "All moneys from premiums and accrued interest on the sale of such bonds shall be credited to the sinking fund from which said bonds are to be redeemed."

Here again we have reference to a county sinking fund and an assumption that such fund exists—perhaps indeed enough, together with the provisions of section 5649-1 et seq. and others which will hereinafter be quoted, to establish a county sinking fund, as such, either under that name or under another appropriate name. But we have nothing on which to base the conclusion that the county commissioners are to constitute a board of trustees of this sinking fund with authority to deal with it like the trustees of a municipal sinking fund may deal with such fund of a municipality.

I find myself able to add several sections, similar in tenor to section 2295, to the catalogue of sections of the general kind referred to by the auditor.

Section 5654 General Code distinctly refers to the "sinking fund of such * * * county."

Section 2462 General Code assumes that the county may be the owner of securities of the United States or other securities, for it authorizes the commissioners to execute bonds to indemnify the United States or the person, corporation or municipality bound to pay such securities against loss or liability for or on account of such securities if lost, destroyed or stolen; but it does not go so far as to authorize the purchase of such securities for any purpose.

Section 5634 General Code authorizes the commissioners of a county owning or wholly or partly maintaining a hospital for the insane (Hamilton county) to "levy the amount of taxes required to pay the interest on such bonds (issued for the purpose of enlarging, etc., the hospital) and create a *sinking fund* for the redemption thereof at maturity." I may say, however, that Hamilton county was at the time this act was passed operating under a special statute expressly authorizing the commissioners to act as the trustees of the county sinking fund.

There are, of course, many statutes specifically requiring the commissioners to levy taxes to pay the interest on particular bonds and the principal thereof at maturity. I refer to a few, such as sections 2439, 5659 and 5644 of the General Code. In point of fact these statutes are probably all supplanted or duplicated by section 5649-1 of the General Code, which has been quoted. None of them, even as to the bonds as to which they relate, authorizes the commissioners to invest the proceeds of sinking fund levies in designated securities. In fact none of them imposes any duty whatsoever upon the county commissioners, as such, with respect to the payment of the bonds; they all deal with the machinery of tax levying only.

On the other hand, certain other officers seem to have specific duties to discharge in connection with the payment of county debts. I deem it proper to quote entire sections 2609 to 2614 of the General Code, which provide as follows:

> "Sec. 2609. The auditor of a county owing a funded debt, bearing interest payable at stated periods, shall draw at the proper times, his warrants upon the treasurer of the county for the payment of the gross sum

of such installments of interest as may be then due, or for such sum of money in the treasury as may be applicable to that purpose, and deliver them to the treasurer of the county. Upon receipt of any such warrant, the treasurer shall pay the installment of interest of such debt, at the times and places of payment specified in the security therefor, from any money in his hands applicable to that use. Upon payment of the installment of interest, the treasurer shall take up and hold the interest warrant so paid until it is cancelled, as herein provided. If the interest is provided for in the obligation, and not by separate warrants, he shall endorse the payment thereof on the obligation and take from the holder a separate receipt, specifying the date, amount, number, and time of maturity of the obligation, the date of the maturity of the installment so paid, and amount and date of the payment."

"Sec. 2610. If such installment of interest is not paid at the time and place of maturity, the county treasurer, at any time afterward, shall pay it, as funds in his hands applicable to that purpose admit. If the treasurer was ready with funds, at the time and place of maturity thereof, to make payment of any installment of interest thereon, and the holder of the evidence thereof did not have it then and there present and in readiness to be surrendered, or to have the payment indorsed thereon, the county shall not thereafter be bound to pay interest thereon until payment is afterward demanded at the office of the county treasurer, and refused."

"Sec. 2611. The county treasurer shall enter in a book provided for that purpose, to the credit of 'funded debt,' the amount of money in gross then in his hands applicable to the payment of such debt. On the first Monday of each succeeding month, in like manner, he shall enter therein to the credit of the same account, all sums of money received by him during the preceding month, applicable to the payment of such debt, specifying from what sources received, and at the proper dates, enter in the same book to the debit of the same account, all sums disbursed by him from such fund, specifying to whom and on what account. Such book shall be open at all times to the inspection of all persons interested in the fund, and shall be kept in the treasurer's office, and delivered over with the office to his successor."

"Sec. 2612. The auditor of each county, owing a funded debt, shall furnish the treasurer of the county an abstract of the funded debt, specifying the dates, amounts, numbers, times of maturity, of principal, rates and times of maturity of interest installments thereon, and where payable. The treasurer shall open such accounts thereon in the book so provided, as are expedient and proper to show at all times the amount and several classes of the funded debt of the county, the rate of interest accruing thereon, the payment made on account thereof, and the amount due and unpaid."

"Sec. 2613. At his stated settlements, the treasurer shall exhibit to the county commissioners and auditor all obligations for interest warrants by him redeemed, and all receipts for interest paid in cases in which there are no separate warrants. After they are compared with his accounts, and the accounts corrected to correspond with the vouchers so produced, the interest warrants shall be cancelled so as to prevent their being used or put into circulation, and, with the vouchers for interest paid other than upon warrants, shall be filed and preserved in the office of the county auditor. The county commissioners at any time may require the treasurer to surrender for cancellation the obligations and warrants by him redeemed, subject to his right to be credited therewith. At any time, on rea-

sonable notice, the treasurer may require the county commissioners and auditor to receive such obligations and warrants for cancellation."

"Sec. 2614. If the principal of any of the obligations of the county is, by its terms, payable elsewhere than at the county treasury, payment thereof may be provided for and made by the means and in the manner prescribed for the payment of interest, and preparation shall be made by the treasurer for the payment at such place. Money provided or deposited at such place for that purpose, shall not be left there more than ten days after the maturity of such principal, but shall be replaced in the treasury, and thereafter such obligations shall be payable at the county treasury, and no interest shall be paid after maturity."

If it were possible to draw any inference from repeated reference to the existence of a county sinking fund found in the statutes which have been quoted, and the duty of the county commissioners thereunder to make levies therefor, to the effect that the county commissioners are authorized to act as sinking fund trustees of the county, the group of statutes which I have last quoted would dispel such an inference; for by their terms it appears that the funded debt of a county is to be paid, in the absence of refunding of course, by the auditor and treasurer. Obviously, these statutes require that the money to pay the funded debt shall be in the county treasury subject to the warrant of the county auditor. These express provisions of law render further consideration of the implied powers of the commissioners wholly unnecessary. There are no such implied powers in the respect under consideration. The function of the commissioners is exhausted when they have made the proper levy. They have no authority to invest the proceeds of the levy, withdrawing money from the county treasury for this purpose.

But for the provisions of section 2737, which I shall presently quote, it would probably be proper for the commissioners in making their levies to take into account the depositary interest that the proceeds of the sinking fund levies when paid into the county treasury would produce, until their withdrawal for the payment of the bonds or interest would be necessary. But even this result is obviated by the section to which I have just referred, which provides as to the disposition of depositary interest as follows:

"Sec. 2737. All money deposited with any depositary shall bear interest at the rate specified in the proposal on which the award thereof was made, computed on daily balances, and on the first day of each calendar month or at any time such account is closed, such interest shall be placed to the credit of the county, and the depositary shall notify the auditor and treasurer, each separately, in writing of the amount thereof before noon of the next business day. All such interest realized on the money belonging to the undivided tax funds shall be apportioned by the county auditor to the state, cities, city school district and county taxing or assessing districts in the proportion that the amounts collected for the respective political divisions or districts bear to the entire amount collected by the county treasurer for such undivided tax funds and deposited as herein provided, due allowance being made for sums transferred in advance of settlements. All interest apportioned as the county's share together with all interest arising from the deposit of funds belonging specifically to the county shall be credited to the general fund of the county by the county treasurer. The county auditor shall inform the treasurer in writing of the amount apportioned by him to each fund, district or account."

It will be observed that this statute makes no special provision for interest on money belonging to the sinking fund or the "county debt fund"—whichever name be employed. All interest on funds belonging to the county is to be credited to the general fund.

It follows that as to a county the idea of "investment" which Mr. Hogan quite properly discussed when speaking of a municipal corporation, is absent from the machinery of administering the sinking fund. Its absence results from the statutes which are found on the books, which not only do not furnish adequate machinery for the administration of a sinking fund in the strictest sense, but by express provisions prevent even such accretions to the levies as would take place by operation of law in the absence of such express provisions. I agree with Mr. Hogan in his opinion that the controlling mandate of the constitutional provision found in article XII, section 11 lies in another direction. It aims to require the annual levying of taxes in an amount constituting, roughly speaking, such aliquot part of the total principal of the fund as is indicated by the number of years for which the debt has to run. It stops with requiring such a levy. It does not require the investment of the proceeds of the levy in the case of straight sinking fund bonds. Therefore the statutes as we find them cannot be regarded as unconstitutional, but must be given effect.

It is my opinion, therefore, that the proceeds of levies intended to meet the principal and interest on bonds issued by the county should be placed in the county treasury to the credit of the county debt or sinking fund and there treated as other moneys in the county treasury are treated, remaining in the depositary drawing interest for the benefit of the general county fund until they have to be withdrawn for the purpose of meeting the principal and interest, and for no other purpose.

This conclusion demonstrates that the procedure of the commissioners of Adams county has been wholly illegal. The commissioners and all officers concerned therewith have misapplied the county funds, and technical liability exists. However, the liability which does exist is that of a trustee who has made an unauthorized investment of the funds of his trust. The *cestui que* trust has an option in such case to claim from the trustee the income of the illegal investment, together with the principal illegally invested. Where the commissioners have paid back into the county treasury the proceeds of securities purchased by them and subsequently sold and the interest accruing on such securities, the county is entitled, of course, to retain the entire sum so paid in. This amount should be credited to the sinking fund, deduction being allowed for the interest which would have accrued on inactive deposits during the time the money was invested in the securities. In other words, I do not think that section 2737 has enough force to constitute the entire income of the illegal investment moneys belonging to the general county fund. The result is that by the illegal investment which they have made the county commissioners may have benefited the county debt or sinking fund to the extent of the difference between the rate of depository interest and the net income on the securities.

It follows from what I have said that all the securities now in the possession of the county commissioners should be immediately sold and the proceeds thereof paid into the county treasury to the credit of the county debt or sinking fund and the general county fund in the manner which I have indicated.

If such securities have been or should be sold for a sum less than the principal thereof, plus interest at the rate allowed on inactive deposits, there would be liability in favor of the county for the difference. This liability, in my judgment, would exist against the auditor and treasurer in the first instance, it being their joint duty under the sections above cited to administer the county debt fund.

In the course of the above discussion I have answered the auditor's first question in the negative, and his second question by the statement that such part of the earnings to which the auditor refers as represents the current rate of interest on inactive deposits should go to the general county fund, the remainder, if any, to the accretion of the sinking fund.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1263.

ELECTRIC RAILWAY—FRANCHISE—DUTY OF COUNCIL TO FIX RATE OF FARE—MAY STIPULATE FOR PAYMENT OF SUM INTO CITY TREASURY ANNUALLY.

In granting the use of the streets of a city to an interurban railroad council is required to stipulate as to the rate of fare within the limits of the city.

Council may also stipulate for the annual payment of a certain fixed sum of money into the treasury of the city for the use of the streets, and such stipulation, if agreed to by the company, will be binding.

COLUMBUS, OHIO, June 10, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I have been requested by a city solicitor to express an opinion upon questions which seem to me of sufficient importance to justify an official opinion addressed to the bureau. The questions are as follows:

> "1. May a city provide in a franchise that an interurban traction company shall pay annually a certain fixed sum of money into the treasury for the use of the streets?
> 2. If not, is there any way whereby the city may collect any sum of money for the use of the streets?
> 3. In lieu of not being able to assess a certain fixed sum for use of streets, may the city fix the rate of fare to be collected by said traction company within the city limits?"

The following sections of the General Code must be considered in answering these questions:

> "Sec. 3778. The council of any municipality may grant a franchise upon such terms and conditions as it may prescribe for the building of any interurban railroad having, constructing, or building, ten miles or more of track outside of such municipality, to any company or companies using electric or other motive power, save steam, for the purpose of securing to such company or companies access to or terminals within such municipality. The council may authorize such company to build and construct tracks and to operate cars thereon, on any street or streets, or parts of streets, of such municipality, upon which tracks have not already been laid and where the consent of the owners of a majority foot frontage has already been obtained by such company."
> "Sec. 9100. Street railways, with single or double tracks, side tracks

and turnouts, may be constructed or extended within or without, or partly within and partly without, any municipal corporation. Offices, depots and other necessary buildings therefor, also may be constructed."

"Sec. 9101. The right to construct or extend such railway within or beyond the limits of a municipal corporation, may be granted only by its council, by ordinance; * * *."

"Sec. 9113. Council, * * * may fix the terms and conditions upon which such railways may be constructed, operated, extended and consolidated."

"Sec. 9114. Upon the granting of franchises to traction companies throughout this state for the use of streets, roads and highways for the transportation of passengers, it must be provided, as one of the considerations for such use of the public highways, that such traction companies shall carry free as passengers on any and all regular cars, policemen and firemen, when on duty and in uniform."

"Sec. 9122. Such (interurban) companies shall be subject to the regulations provided for street railways and have all the powers, in so far as they are applicable, that other street railway companies possess."

It will be observed that section 3778 authorizes council in granting a franchise to an interurban railroad to impose "such terms and conditions as it may prescribe," and that section 9113 contains an essentially similar provision.

With respect to street railroads proper section 3768 provides as follows:

"No corporation, individual or individuals shall perform any work in the construction of a street railroad, until application for leave is made to the council in writing, and the council by ordinance has granted permission, prescribed the terms and conditions upon, and the manner in which, the road shall be constructed and operated, and the streets and alleys to be used and occupied therefor, but the council may renew any such grant at its expiration upon such conditions as may be considered conducive to the public interest."

I see no essential difference between this section in so far as it refers to prescribing "terms and conditions" and those of the statutes previously quoted. Indeed section 9113 applies both to interurban and street railroads.

Under the street railroad section the following have been held to be lawful "terms and conditions:"

That the street railroad company shall widen a bridge occupied by it, or in lieu thereof pay a stipulated amount to the municipal corporation, at the option of the latter.

Elyria vs. Railway, 8 N. P. n. s. 85.

That transfers to lines owned by other companies shall be given.

Raynolds vs. Cleveland, 8 C. C. n. s. 278.

That a street railway shall pay annually four dollars per lineal foot on each car run.

Cincinnati vs. Railway, 6 N. P. 140.

That a street railway company shall pay two and one-half per cent of its gross earnings annually to the municipal corporation.

Cincinnati vs. Railway, 11 Dec. Rep. 667, 28 Bull. 276.

The fare to be collected. Section 3770 G. C. applicable to street railroads not only authorizes but requires the rate of fare to be the subject of contract between the city and the company, and by section 9122, which has been quoted, the same requirement is extended to interurban railroads.

In some of these cases the power of council was assumed.

To my mind, however, we have a very clear expression of the authority of a municipal council to deal with an interurban railroad in the case of *Interurban Railway and Terminal Co.* vs. *City of Cincinnati,* 93 O. S. 108. The facts therein necessary to be noted in connection with this discussion are as follows:

In November, 1901, the council of the village of Pleasant Ridge passed an ordinance granting a franchise to the Rapid Railway Company, an interurban railway company, by the terms of which not only the rate of fare for city passengers within the corporate limits of the village was fixed, but it was also stipulated that passengers should be carried from any point within the village to a terminus in the city of Cincinnati, for a continuous ride in either direction at a rate of seven cents, with a further provision that "Should the village of Pleasant Ridge be annexed to the city of Cincinnati the rate of fare charged for a ride in either direction between any point in said village and the Cincinnati terminus shall not exceed five cents and transfers." The Rapid Railway Company later entered into a consolidation known as "The Interurban Railway & Terminal Company," and the village of Pleasant Ridge was annexed to the city of Cincinnati. The city sued the Interurban Railway & Terminal Company to enjoin it from charging more than five cents for the ride between points located in the former village of Pleasant Ridge and the Cincinnati terminus of the railway.

The court sustained the city's suit. In the opinion per Johnson, J., the following language appears:

> "The attack upon the judgments below is based upon the claim that the provision of the franchise quoted is without any validity or binding force.
>
> "The position of the Interurban company substantially is that the village was wholly without authority to prescribe or contract for fares beyond the municipal limits, and that notwithstanding that clause was, by agreement of the parties, included in the ordinance as adopted, which was thereafter accepted by the grantee, * * * nevertheless it is entitled to disregard and eliminate the provision objected to, and yet retain and enforce the rights and privileges granted to it by the other terms of the franchise.
>
> * * * Section 9113, General Code, provided that the 'council * * * shall have the power to fix the terms and conditions upon which such railways may be constructed, operated, extended and consolidated.'
>
> * * * * * * * * * * *
>
> * * * It follows that as to villages * * * the village council was empowered to grant the right to construct or extend the line within or beyond the limits of the village, and by section 3443 (R. S.) (Sec. 9113 General Code above quoted) to fix the terms and conditions thereof.
>
> In *The Citizens' Electric Rd. Co. vs. County Commissioners,* 56 Ohio St., 1, it was held that an ordinance adopted by a city council * * * simply confers on a street railroad company the corporate power to extend its road over a state or county road. In the exercise of the power the right to so extend its road can only be acquired by agreement with the

commissioners or by condemnation. The court say: 'Without such ordinance a company could not extend its road within or without the municipality. As a corporation it has, without the ordinance, no such power.'

* * * * * * * * * * *

In the absence of statutory provision to the contrary *the village was empowered to stipulate as one of the 'terms and conditions' which it was authorized to fix* * * * for a certain rate of fare for a road from any point in its limits to a point outside of its limits. It would not be disputed that the rate of fare to be charged to and from points in the village to points outside is a matter of interest to the municipality and its residents and a proper subject of negotiation with the company in connection with the grant. It was a matter for mutual consideration and agreement between the parties. Therefore, when the grant was made and accepted with the provision as to the fare included, it became one of the considerations of the grant and one of the elements in the making of the binding contract between the parties. * * *

* * * * * * * * * * *

It is insisted that the enforcement of the terms of the franchise under inquiry here will work hardship and irreparable injury to the company; and cases are cited in support of the accepted proposition that neither the state nor any of its agencies can, by regulation or legislation, withhold from the owners of the railroad just compensation for its services. But in this case we are dealing with the subject of contract. * * *

We are not able to see how the court can alter the terms of the contract in this case as the parties made it. * * *"

This case establishes, it seems to me, the principle that where power is delegated to a city council or board of commissioners to fix the terms and conditions of the right to use the public highways for the construction and operation of a street or interurban railway that power includes, in the absence of prohibitory or limiting statutes to the contrary, the authority to represent the public in agreeing upon any terms whatsoever which may be in furtherance of the public right and of the purpose for which the grant is made. The power does not seem to be narrower than that possessed by city councils under section 10129 of the General Code with respect to gas companies. Indeed, the language now under consideration appears to be broader in natural scope than that of section 10129, which gives to council in granting the use of streets and alleys the power to prescribe "regulations and restrictions;" yet the supreme court in the late case of *Federal Gas & Fuel Co.* vs. *City of Columbus,* 96 O. S. 530, held, in the language of the syllabus, that:

"1. Prior to the constitutional amendments of 1912 municipalities in Ohio, under favor of sections 3714 and 10129, General Code, had the power to contract with a gas company, or other public utility, for the use and occupation of the streets in laying its gas lines, maintaining the same and keeping the same in repair, by providing compensation to the municipality, either in a lump sum or based on a certain percentage of its gross receipts.

2. Where a statute grants the power to a municipality to grant a franchise, either upon 'terms and conditions' or 'regulations and restrictions' that it may prescribe, large latitude must be allowed for the discretion of the municipality and its officers in the provisions made in such franchise contract; and unless expressly limited by the statute authorizing the grant, the municipality may exercize its discretion in any reasonable man-

ner compatible with the best service and the greatest advantage, pecuniary or otherwise, to the municipality and its inhabitants."

In that case it was stated by Wanamaker, J. (p. 538):

"The gas company admits that had section 3878, Revised Statutes (Sec. 10129 of the General Code), used the words 'subject to such terms and conditions as they (the council) prescribe' instead of 'subject to such regulations and restrictions as they (the council) prescribe' the franchise ordinance would be a valid contract and obligatory upon the company.

It must be conceded of course that the grant of power by the general assembly to the municipal government * * * was 'to grant franchises to gas companies in its streets,' etc. Necessarily such grant of power must be in general terms, and such grant must be reasonably and liberally construed so as to effect the purposes of the statute. * * *

Now by what sort of reason, or want of it, can it be held that the word 'restriction' can apply to the use and occupation of the streets and other public places, and the repair of them; but cannot apply to a restriction upon rates, upon profits, and cannot provide that when the rate shall exceed a stipulated sum a certain percentage thereof shall go to the municipality? * * *."

To the same effect see the interpretation of the statutes as applying to telephone companies in *Columbus Citizens Telephone Co.* vs. *City of Columbus*, 88 O. S. 466 (requirement that a certain percentage of the gross annual receipts must be paid into the municipal treasury for the use of the general expense fund, assented to by the company, held to be a valid contractual obligation and not an assessment in the nature of a tax).

In view of all the foregoing authorities, and because I believe that either of the classes of stipulations referred to by him is in furtherance of the public right and of the purpose of the grant, I answer the questions submitted by the city solicitor in the affirmative.

In point of fact, as I have stated, the council must stipulate as to the rate of fare within the municipality by virtue of the joint operation of sections 3770 and 9122 of the General Code; so that the fixing of the rate of fare is not really a thing that may be done "in lieu of not being able to assess a certain fixed sum for the use of streets," as the solicitor puts it, but is something that must be done at all events whether such a sum is exacted in the franchise contract or not.

I have not considered in this opinion whatever significance may attach to the fact that the traction company which he has in mind is probably a foreign corporation. This point might affect the question as to whether the railroad company might enter the city at all, i. e., as to whether it is such a company as to which the council may lawfully grant the use of the streets; but admitting that it can enter the city at all, I am satisfied that it may do so only upon the same terms and conditions as would be exacted from domestic companies.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1264.

DIRECTOR OF PUBLIC SERVICE—WATER RATES FOR SCHOOLS, HOSPITALS AND LIBRARIES.

A director of public service in establishing water rates has authority to charge lower meter rates, if substantial and reasonable, for water furnished to public school buildings when the school district is not entirely within the boundaries of the city and to libraries open to the public and operated not for profit; but he is required by section 3963 of the General Code to furnish water free to all hospitals open to the public and operated not for profit.

He may not, however, apply such lower rate generally to all hospitals and libraries so as to make it include such institutions when operated for profit.

COLUMBUS, OHIO, June 10, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Under date of April 5th you requested my opinion as follows:

"STATEMENT OF FACTS.

The court of common pleas and court of appeals of Stark county held that the schools of the Canton city school district shall pay the municipal waterworks for water consumed. Whereupon the board of control, acting for the service director, made a rate of 30 cents per one thousand cubic feet for public schools, hospitals and library, while the prevalent rate to consumers is 52½ cents per one thousand cubic feet. While we know the director of public service has authority to fix the rates of waterworks and may fix a sliding scale owing to the quantity consumed, we have ever been holding that no discrimination in rates can be shown under any other basis than that of quantities.

Question: Has the director of public service in the city of Canton, Ohio, authority to fix special rates for institutions of a certain nature, such rate differing from the general rate prevalent for water consumers?"

Although you state in your inquiry that the rate fixed was by the board of control acting for the service director instead of by the service director himself, I do not suppose that you mean to raise any question relative to the authority who fixed the rate, assuming that the board of control simply acted in an advisory capacity for the service director, since the question that you ask is whether the director of public service has the authority to fix the rate in the manner specified.

"So far as the consumption of water or light is concerned it is immaterial to the consumer whether the supply be furnished by the municipality or by a public service corporation. As a general rule the obligations to the consumer are the same in either case. The organization supplying the water or light, whether it be a municipal or a private corporation, is under a duty to consumers to supply the water or light impartially to all reasonably within the reach of its pipes, mains and wires. * * *

The organization furnishing a supply cannot act capriciously or discriminate against anyone who is able to pay for the service furnished. The law will not permit any undue advantage to be given to a consumer by doing for him what is not done for others *under circumstances substantially the same.* * * *

The principle that the city or the company must supply all impartially and without discrimination does not prevent it from entering into reasonable special arrangements or agreements with consumers growing out of special circumstances, and the fact that by reason of such special circumstances a reduced rate, reasonable under the circumstances, is given to particular individuals does not affect the validity of the arrangement. *But this is delicate ground, and the rates we think must be the same unless the circumstances are substantially dissimilar and reasonably justify a difference.* Questions arise as to the rights of consumers growing out of the number and *character* of the buildings supplied; and it sometimes becomes important to determine whether each building owned by a consumer is to be treated separately in determining the rights and relations of the parties, or whether the fact that they are all owned by one person is to control."

Dillon on Municipal Corporations, Sec. 1317.

"Water rates must be uniform, or at least free from unreasonable discrimination as to all consumers using substantially the same amount of water or having the opportunity to do so. *The company may, however, classify consumers with reference to the various lines of business,* or with reference to the quantity of water used, and give a more favorable rate to the large consumer than to the small, or require large consumers to have a meter and to pay meter rates, while ordinary consumers are charged a flat annual rate, or make special rates for those whose situation or the character of whose demand for water makes it specially expensive or troublesome to serve them."

40 Cyc., 802.

"The furnishing of water to the inhabitants of a municipal corporation being a matter of public concern and the plant being established for the common welfare of the community, all are entitled to the equal benefit of it, and unjust discrimination cannot be made between patrons; nor can it be used for enhancing the value of certain property to the detriment of other property by giving the former more favorable rates. Special contracts, therefore, cannot be made which are in contravention of the rates established by law. *But absolute uniformity is not required where the conditions under which the water is to be used by different consumers are sufficiently different to warrant a difference in rate.* Water may be furnished free or at special rates to city departments and to charitable or educational institutions in which the city is more or less interested. It may also be furnished in large quantities at less relative rates than is charged to small consumers. And different methods of ascertaining the amount to be paid may be adopted, so that one class shall pay a flat rate for the service rendered, and another pay only for the quantity used * * *."

1 Farnham on Waters and Water Rights, p. 865.

It is apparent from the citations above from the text writers that different water rates may be established for different lines of business as well as on the basis of quantity, and the buildings supplied with water may be classified. It is, of course, to be determined whether or not in each case the classification is reasonable and that there is no unjust discrimination exercised.

In the case of St. Louis Brewing Asso. vs. St. Louis, 140 Mo. 419, the facts were that by ordinance a water rate was established of one cent for one hundred gallons to municipal establishments, which are located on one or more adjoining blocks of a city, consuming over a given amount of water for purely manufacturing purposes. The same ordinance provided a general rate for manufacturing purposes of one and one-fourth cents per gallon. Held, such a fixing of rate was not a violation of the constitutional provision that taxes shall be uniform upon the same class of subjects; a water rate not being a tax, but a charge for service.

In Ladd vs. Boston, 170 Mass. 332, the court say on page 335:

> "Considerable discretion in determining the methods of fixing rates is necessarily given by the statute to the water commissioner. Money must be obtained from water takers to reimburse the city wholly or in part for the expense of furnishing water. *An equitable determination of the price to be paid for supplying water does not look alone to the quantity used by each water taker.* The nature of the use and the benefit obtained from it, the number of persons who want it for such use, and the effect of a certain method of determining prices upon the revenues to be obtained by the city and upon the interests of property holders, are all to be considered. Under any general and uniform system other than measuring the water some will pay more per gallon than others."

In Souther vs. Gloucester, 187 Mass. 552, the syllabus is as follows:

> "In fixing the amount of water rates to be charged in a particular locality other things may be considered besides the amount of water used, and it may be reasonable and lawful to charge the inhabitants of an outlying section of a city as much for the water they use in only a part of the year as the inhabitants of the heart of the city are charged for the water used by them during the whole year." Citing with approval Ladd v. Boston.

There are a great many cases which have been decided by the various courts in regard to whether or not a certain building came within a certain classification on which the water rent was different from that in another classification. In none of such cases, however, was the question raised as to whether or not water could be classified in other than quantity used, the right to classification apparently having been conceded by all parties. Such cases are the following:

Cromwell vs. Stephens, 2 Daly (N. Y.) 15;
Berends vs. Bellevue W. & F. G. Co., 119 Ky. 8;
U. S. vs. American Water Works Co., 37 Fed. 747;
Wilson vs. Tallahassee W. W. Co., 47 Fla. 351;
Birmingham W. W. Co. vs. Truss, 135 Ala. 530.

As to whether or not certain consumers can be required to pay a flat rate in advance while other consumers are required to pay a meter rate at the end of the month see Ramsey vs. Columbus, 12 O. D. (N. P.) 725.

I am not unmindful of the cases of Bailey vs. Lafayette Gas Fuel Co., 193 Pa. St. 175, and Richmond Natural Gas Co. vs. Glawson, 155 Ind. 659, to the effect that a gas company could not charge one price for the use of gas for lighting and another for heat in the same premises.

I would also call particular attention to the case of Fretz vs. Edmond, et al., 168 Pac. 800 (Okla.), wherein the court held in the second and third branches of the syllabus as follows:

> "2. Municipal corporations in operating a water plant exercise business and administrative functions, rather than those strictly governmental in their nature, and in the exercise of such functions are governed largely by the same rules applicable to all individuals or private corporations engaged in the same business.
>
> 3. Municipal corporations operating water plants are not required to give absolute equality of service or rates, but are only required not to act arbitrarily in exercising discretion vested in them in such matters, and not to maintain a discrimination between patrons which is essentially unjust."

The court in its opinion in the above case cites several cases from other states which bear out the decision.

It is true that the law on this subject has undergone a decided change from the time when the first principles were worked out by the courts to the present time. There was at one time a doctrine that no individual could complain of discrimination *per se,* but only as evidence of the unreasonableness of the charge exacted for the service furnished to him.

As put by Professor Bruce Wyman, in his work on Public Service Corporations, volume II, section 1281:

> "It must be plain to all who have followed the course of events with the least attention that there has been distinct evolution in the law governing public employment during the last twenty-five years. The rule against discrimination is the most recent development in the definition of public duty. A comparatively few years ago it was held that if a public service company served all at reasonable rates it performed its obligation, but modern industrial conditions require the further law that it shall serve all with equality."

Again, in section 1288, the same author, after quoting numerous earlier cases, some of them quite recent in date, uses the following language, which is especially interesting to us in the present connection:

> "It is not surprising that the distinction just discussed has fallen into disrepute. Whether the complainant is charged more than the regular rates which others are called upon to pay, or whether he is compelled to pay the regular rates while others are given reductions, there is the same inequality in treatment and the same disadvantage in business. That this distinction is ignored in modern times is shown in several recent years in many cases, but in none is it better set forth than in a water rate case where the complaint made by certain takers was that certain others were getting much lower rates. The company explained that these others had threatened to start a rival water company and that these concessions had been necessary to ward off this project; but the North Carolina court held this no justification. (Citing Griffin vs. Goldsboro Water Co., 122 N. C. 206, 30 S. E. 319, 41 L. R. A. 240 (1898). Mr. Justice Clark wrote a striking opinion well worth full quotation to show the modern way of looking at the wrong of discrimination: 'The acceptance by a water company of its franchise

carries with it the duty of supplying all persons along the lines of its mains, without discrimination, with the commodity which it was organized to furnish. All persons are entitled to have the same service on equal terms and at uniform rates. If this were not so, * * * the business interests and the domestic comfort of every man would be at their mercy. They could kill the business of one and make alive that of another and instead of being a public agency created to promote the public comfort and welfare these corporations would be the masters of the cities they were established to serve * * * The law will not and cannot tolerate discrimination in the charges of these quasi-public corporations. There must be equality of rights to all and special privileges to none, * * *.'"

Proceeding, he states in section 1290 that:

"By the better view, it is submitted, the common law today forbids all discrimination between two applicants who ask the same service. This is the modern view reached after some bitter experiences with the results of discriminations by the railroads in disturbing the normal industrial order, in suppressing competition and fostering monopoly. * * *"

(Citing, *inter alia,* the comparatively early Ohio cases of Scofield vs. Railroad Co., 43 O. S. 571; State vs. Railway Co., 47 O. S. 130; Brundred vs. Rice, 49 O. S. 640; Railroad Co. vs. Coal Co., 61 O. S. 242; and Railroad Co. vs. Bowling Green, 57 O. S. 336. In fact it is quite apparent that Ohio is a pioneer in the judicial condemnation of the railroad rebate without the aid of statutes.)

From the first of these Ohio cases the following quotation is made by Professor Wyman (Sec. 1291):

"The principle is opposed to a sound public policy. It would build and foster monopolies, add largely to the accumulated power of capital and money, and drive out all enterprise not backed by overshadowing wealth. With the doctrine as contended for by the defendant, recognized and enforced by the courts, what will prevent the great grain interests of the northwest, or the coal and iron interests of Pennsylvania, or any of the great commercial interests of the country, bound together by the power and influence of aggregate wealth, and in league with the railroads of the land, driving to the wall all private enterprises struggling for existence, and with an iron hand thrusting back all but themselves?"

It might seem from the cases which I have quoted in the earlier part of this opinion that the right to service without discrimination is one which is limited to the members of a given class, so that those of one class cannot complain of differences in the charges for service existing as between that natural class and another natural class, but only of discriminations between members of the same class. Professor Wyman says on this point, however, that (Secs. 1299-1300):

"As has been seen what forced the development of the law against discrimination was the necessity of preventing discrimination between shippers who were competitors in business. This has already been seen from the language of many of the judges whose opinions have been quoted; but few of these judges limited the operation of this rule against discrimination to those cases in which the discrimination was between competitors, for al-

most all of them relied upon the legal argument that the common right of all involved the duty to give equal rates to all. * * *

It should therefore be appreciated that the rule against discrimination has outgrown its original occasion to protect those in competition and become a universal rule to protect all who are being served. * * * Householders are not competitors and yet they must have water, for example, at equal rates."

This admirable statement of the general law on the subject of discrimination and its history leads me to accept with some reservation the seemingly broad language which I have quoted from some of the cases. It must be admitted, however, that now discrimination is illegal, but that within the purview of the principle as I have already quoted it, in the language of Professor Wyman, it is only when two customers have asked the same service under the same conditions and different charges have been exacted that discrimination exists. Whether or not discrimination is illegal, therefore, depends upon whether service conditions are substantially identical.

In chapter XXXVIII of his work, Professor Wyman deals with this problem, and in the course of that chapter considers some of the cases from which I have quoted. He also deals with justifiable differences not amounting to illegal discrimination in chapter XXXIX, classifying them under the following headings:

Actual Differences in Total Costs;
Service in More Convenient Units;
Facilities Furnished by Customers;
Independent Consideration for Reductions.

I do not find it necessary to discuss this particular topic because the facts upon which you request my opinion present a question somewhat narrower than that which you base upon them. You have asked me whether the director of public service may fix special rates for institutions of a certain nature, but the facts are that the service director has fixed special rates for public schools, hospitals and library. I shall limit by conclusion to the precise facts thus disclosed.

In section 1303 et seq. of Professor Wyman's work above cited he uses the following language:

"Sec. 1303. The argument has been made in several cases, most of them early cases, that it could not be contrary to law for the carrier to make occasional concessions in particular cases, as no harm of any considerable sort would be done to others by the granting of such special favors. The example usually given of such occasional favors is that the railroad might carry for charity in particular instances. If this be so, it must according to modern ideas be subject to the most strict limitations; and if this exception remains in modern common law it can only be with the qualification expressed by Chief Justice Doe in one of his great cases (McDuffee vs. Portland & R. R. R., 52 N. H. 430, 13 Am. Rep. 72-1873): 'This question may be made unnecessarily difficult by an indefiniteness, confusion and obscurity of ideas that may arise when the public duty of a common carrier, and the correlative common right to his reasonable service for a reasonable price, are not clearly and broadly distinguished from a matter of private charity. If A receives, as a charity, transportation service without price, or for less than a reasonable price, from B, who is a common carrier, A does not receive it as his enjoyment of the common

right; B does not give it as a performance of his public duty; C, who is required to pay a reasonable price for a reasonable service, is not injured; and the public, supplied with reasonable facilities and accommodations on reasonable terms, cannot complain that B is violating his public duty. There is, in such a case, no discrimination, reasonable or unreasonable, in that reasonable service for a reasonable price which is the common right. A person who is a common carrier may devote to the needy, in any necessary form of relief, all the reasonable profits of his business. He has the same right that anyone else has to give money or goods or transportation to the poor. But it is neither his legal duty to be charitable at his own expense, nor his legal right to be charitable at the expense of those whose servant he is.'"

"Sec. 1304. It is generally said that special reductions or even free service may be given a government, of whatever grade it may be, without its being considered undue preference or illegal discrimination. Thus the supreme court of the United States has squarely said (citing Interstate Comm. Comm. vs. Baltimore & O. R. R. Co., 145 U. S. 163, 36 L. ed. 699, 12 Supt. Ct. 844-1892) that as a common law matter regardless of whether the exception was specifically made in the legislation the property of United States, state, county or municipal governments might be transported on more favorable terms than for other parties without its being illegal discrimination. It is certainly true that a municipal government operating its own plant may serve its own departments without making charges against itself without any taxpayers having any complaint. It is, moreover, well established that in granting any legal privileges to a public service company, if the franchise conferred be no more than incorporation itself, the granting government, of whatever grade it may be, may stipulate for free service for its own public purposes. And it may also be provided that certain public employes shall have transportation at special rates. It should be noted, however, that there is often special legislation forbidding public officers to accept free transportation."

"Sec. 1305. The suggestion is made in several cases that general reductions may be made to further certain policies, provided that the public interests are thereby promoted. It is urged that such concessions if permitted will turn out for the best interests of all concerned in the end. The weight of this line of argument may be judged by the following abstract of part of the opinion of Judge Baxter in Hays vs. Pennsylvania Company (12 Fed. 309-1882). He said in effect that it is only when the discrimination inures to the undue advantage of one man, in consequence of some injustice inflicted on another, that the law intervenes for the protection of the latter. Harmless discrimination such as a concession to a general class might be indulged in. For instance, he said that the carrying of supplies at nominal rates to communities scourged by disease or rendered destitute by floods or other casualty would not entitle other communities to have their supplies carried at the same rate. Furthermore it is the custom as he pointed out for railroad companies to carry fertilizers and machinery for mining and manufacturing purposes to be employed along the lines of their respective roads to develop the country and stimulate productions, as a means of insuring a permanent increase of their business at lower rates than are charged on other classes of freight; and such discrimination while it tends to advance the interest of all worked no injustice, he thought, to anyone."

"Sec. 1306. It should be noted, however, here as throughout this whole

discussion, that there is no common law obligation resting upon the company to give concessions of any kind from the rates others pay for the same service. This makes one doubtful of the legal character of these exceptions; for were there imperative reasons dictating such exceptions a company could not refuse to make them in any case. But it is well agreed that the company need not make any such concessions. It may even refuse to the United States government a party rate ticket for soldiers which it usually sells to other managers of travelers in groups, as one extreme case holds. (Citing United States vs. Chicago & N. W. R. R., 127 Fed. 785-1904.) Moreover it may discriminate in granting its favors, which is proof positive that this is no part of its legal obligation. Thus a particular minister of the gospel whom a carrier refused to carry for the customary reduced fare charged such persons has no right of action against the carrier because of the discrimination. (Citing Illinois C. R. Co. vs. Dunnigan (Miss.) 50 So. 443, 24 L. R. A. (N. S.) 503-1909.) The most that these exceptions amount to, therefore, is that there is a sufficient public policy in them to justify the proprietors of a public business in extending these special favors."

The text here is amply supported by the authorities cited which I need not go into.

It is my opinion that the director of public service has the right to discriminate in rates in favor of institutions of the character mentioned, all of which I assume to be of a public or semi-public and charitable nature. I may say, however, that if the reduced rate for hospitals is granted to such hospitals as are operated for profit I do not think that it can be justified to that extent, and limit my conclusion accordingly. I take it for granted that the library which is mentioned is a public one, at least in the sense that it is not operated for profit.

Returning to the first principle upon which my opinion has proceeded, I may say that the director's right to extend such favors to public or charitable institutions is based upon the breadth of the managerial powers reposed in him by the statute. Were he not made practically the operator of a public utility in the business sense, he would not have this power, unless expressly granted. However, though the municipality is the owner of the utility which it operates through him, he does not conduct in its behalf a governmental enterprise, and under the broad statutes which exist on the subject I am satisfied that the quotation which I have made from Dillon on Municipal Corporations, in so far as it states that the powers and duties of a municipality are the same as those of a private water company, is applicable.

In this connection see *Butler* vs. *Karb*, 96 O. S. 472, the syllabus of which is as follows:

"1. Municipalities of the state are authorized to establish, maintain and operate lighting, power and heating plants and furnish the municipality and the inhabitants thereof light, power and heat. The powers thus conferred are proprietary in their character and in the management and operation of such plant municipal officials are permitted wide discretion. Courts are without authority to interfere therewith upon complaint merely that the capacity of the plant is overtaxed and streets of the municipality are insufficiently lighted by reason of furnishing current to private consumers, and that the rates charged for current are inadequate to meet the cost of production and transmission thereof.

"2. But where the council of any such municipality fails to adopt and use a system or schedule of rates for current furnished private consumers

as contemplated by section 3616, General Code, but leaves the matter of rates to the administrative officers of the municipality, who arbitrarily fix and determine the rates in each case, and in so doing unjustly discriminate between citizens in the matter of rates and service, such action constitutes an abuse of corporate power which may be restrained by the court upon suit instituted by the city solicitor, or by a taxpayer if the city solicitor refuses upon written request to bring suit."

I have thus far not considered the application of section 3963 of the General Code, which formed the basis of the opinion of the court in the case cited by you. It provides as follows:

"Sec. 3963. No charge shall be made by the director of public service in cities, or by the board of trustees of public affairs in villages, for supplying water for extinguishing fires, cleaning fire apparatus, or for furnishing or supplying connections with fire hydrants, and keeping them in repair for fire department purposes, the cleaning of market houses, the use of any public building belonging to the corporation, or any hospital, asylum, or other charitable institutions, devoted to the relief of the poor, aged, infirm, or destitute persons, or orphan or delinquent children, or for the use of public school buildings; but, in any case where the said school building, or buildings, are situated within a village or cities, and the boundaries of the school district include territory not within the boundaries of the village or cities in which said building, or buildings, are located, then the directors of such school district shall pay the village or cities for the water furnished for said building or buildings."

It is obvious that this section to some extent controls the powers which the director of public service would have were it not in existence. It prohibits him from making any charge for supplying water for "any hospital, asylum, or other charitable institutions, devoted to the relief of the poor, aged, infirm, or destitute persons, or orphan or delinquent children." It seems to me that the word "hospital" as used here is employed in a general sense indicative of any hospital operated not for profit, and is not modified by the phrase "devoted to the relief of the poor, aged, infirm, or destitute persons, or orphan or delinquent children," because as a matter of fact there are few, if any, hospitals devoted, for example, to the relief of the aged or destitute, or orphan or delinquent children. As I see it, therefore, the director of public service is not entitled to make any charge whatsoever for water furnished to hospitals which are in point of fact charitable institutions, by which I mean that, whether they make a charge to those who are able to pay or not, they are not operated for profit. To this extent I would say that, in my opinion, the rule inquired about is ineffectual; for as applied to charitable hospitals it is invalid because it exacts a charge where none can be exacted, while as applied to private hospitals operated for profit it is probably invalid as constituting an illegal discrimination.

I have assumed that the library referred to is open to the public on equal terms and is not operated for profit. It is therefore not within any of the provisions of section 3963; while the decision of the court settles the point that the school buildings in question are not within the terms of this section. The question now arises as to whether or not section 3963 is to be taken as a complete statement of the law with respect to discriminations by municipal waterworks in favor of public and charitable consumers. If it is, then it would follow that the director of public service has no power to make discriminations in favor of such consumers except

those which the statute directs him to make. But if the statute is not to be so construed then as to cases within the general class indicated by the foregoing discussion, but not within the terms of section 3963, he has the general powers which I have referred to.

Now, section 3963 says that the director of public service shall make no charge in certain cases. This department has on several occasions considered the question as to whether or not this section, which is in terms prohibitory, is exclusive. The last and most exhaustive of these opinions was given to the bureau on February 13, 1918, No. 1008, and I refer you to it for a complete discussion of the questions involved. In that opinion I did not directly pass upon the question as to whether charitable institutions, other than those named in the section under discussion, could be furnished with free water, but did hold that free water could be furnished by the director of public service for *municipal* purposes not enumerated therein, and that the statute is not exclusive in this respect. Of course, as to school buildings there is a specific requirement in the statute that unless the district is entirely within the municipality the "'directors" thereof shall "pay the city for water furnished."

However the statute be interpreted with respect to the furnishing of free water to institutions other than those enumerated, it does not follow that because the director of public service may not furnish water free to such institutions he may not make a classification on grounds such as have been suggested, and include within the benefits of the lower rate institutions of the same general character not specifically enumerated in section 3963. As to such institutions the implied provision of the law would be no more than that expressed as to school buildings situated within a city, the boundaries of the school district not being within the boundaries of the city, to wit, that "the directors of such school district shall pay the * * * city for the water furnished for said building or buildings." In other words, the law would be that something must be paid; but section 3963 stops short of saying that exactly the same rate shall be paid as is exacted of domestic or manufacturing consumers.

On the whole I am satisfied that the section is not exclusive in the sense in which I have employed that term, and that the director of public service has the power to create for the purpose of rate making a class which may be described as "charitable institutions not enumerated in section 3963 of the General Code." In fixing the rate he must, of course, exercise reasonable discretion. He cannot evade the implied and partly expressed requirement of section 3963 by furnishing water at a merely nominal charge; he must exact a substantial rate. But I cannot say as a matter of law, and without further facts, that a rate of thirty cents per one thousand cubic feet for public schools and library, while the prevailing rate to domestic consumers is fifty-two and one-half cents, is either unjustly discriminatory as against domestic consumers or nominal and insubstantial as a charge.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1265.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN ALLEN COUNTY.

COLUMBUS, OHIO, June 11, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your letter of June 3, 1918, in which you enclose for my approval final resolutions on the following improvements:

Lima-Ottawa road—I. C. H. No. 129, Sec. "H," Allen county, types A, B, C.

Lima-Kenton road—I. C. H. No. 128, Sec. "A," Allen county, types A, B, C.

I have carefully examined said resolutions, find them correct in form and legal and am therefore returning same to you with my approval endorsed thereon in accordance with section 1218 G. C.

In passing I might suggest that the resolution on the improvement of the Lima-Kenton road, I. C. H. No. 128, Sec. "A" (type B), sets out that the preliminary application of the board was made to the state highway department on December 30, 1918. This of course is a typographical error and I suggest that correction be made.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1266.

DISAPPROVAL OF BOND ISSUE OF GRATIS VILLAGE SCHOOL DISTRICT, PREBLE COUNTY—$4,220.00.

COLUMBUS, OHIO, June 11, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

In re bonds of Gratis village school district, Preble county, Ohio, in the sum of $4,220.00, for the purpose of extending the time of payment of indebtedness which from its limits of taxation said school district is unable to pay at maturity.

GENTLEMEN:—The only transcript of the proceedings of the board of education of Gratis village school district, relating to said bond issue, which has been submitted to me, is a letter directed to me by the clerk of the village, in which is set out a copy of the resolution of the board of education providing for said issue of bonds. This resolution, as set out in the letter of the clerk, is as follows:

"*Resolved,* By the board of education of Gratis village school district, Preble county, Ohio, all the members elected thereto concurring, that it is deemed necessary by said board of education to extend the time of payment of an indebtedness which from its limits of taxation such Gratis village school district is unable to pay at maturity.

Resolved further, That it is necessary, for the accomplishment of said purpose, to issue and sell the bonds of said district in the amount of four thousand two hundred and twenty dollars ($4,220.00), for the purpose of extending the time of payment of an indebtedness which from its limits of taxation such Gratis village school district, Preble county, Ohio, is unable to pay at maturity."

This proposed issue of bonds is under the assumed authority of sections 5656 and 5658 G. C. With respect to bond issues of this kind, section 5658 provides that no indebtedness of a school district shall be funded, refunded or extended unless

such indebtedness is first determined to be an existing, valid and binding obligation of such school district by a formal resolution of the board of education. It is obvious that the resolution of the board of education above quoted is fatally defective in not making the finding required by the provisions of section 5658 G. C., above noted.

The resolution providing for this bond issue is defective in the further additional particulars:

1. The same does not set out the amount and nature of the indebtedness to be refunded by the proposed issue of bonds, nor does it state the time when said indebtedness matures.

2. Said resolution does not fix the denomination and maturities of bonds covering the proposed issue, nor the date that said bonds shall bear.

3. The resolution does not provide the rate of interest to be borne by said bonds, nor when the same shall be payable.

4. The purpose of said proposed issue is to pay an existing indebtedness, and in this view the transcript of the minutes relating to the adoption of this resolution is defective in not showing affirmatively that said resolution was adopted on a yea and nay vote of the board.

In addition to the defects above noted, the information furnished me with respect to the adoption of the above noted resolution is defective in not advising as to the character of the meeting of the board of education at which the resolution was adopted. This defect is probably cured by the recital that all the members of the board of education concurred therein. Nevertheless, full information with respect to the character of the meeting at which the resolution was adopted is always required by this department, in passing upon the validity of the acts of a board of education or other deliberative body.

The letter of the clerk advises that said issue of bonds was first offered to the "sinking fund" and rejected. I do not know from this expression whether the clerk intended to convey the information that said bonds had first been offered to the board of commissioners of the sinking fund of the village school district, or to the trustees of the sinking fund of the village. Full information with respect to this matter is likewise required.

The transcript sent me is otherwise defective, in not setting out certain information always required in passing on bond issues of this kind, but inasmuch as a number of the defects in the proceedings, above noted are fatal to the validity of the bond issue, I do not deem it necessary to point out such further defects.

I am of the opinion that this bond issue is invalid and that you should not purchase same.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1267.

ELECTRIC CARS—USE OF SEATS BY MOTORMEN AND CONDUCTORS.

Section 9007-1 G. C. makes it unlawful to operate an electric street car or interurban railroad car unless it is provided at all times during operation with seats for the motorman and conductor, but neither said section nor the law of which it is a part anywhere provides for rules and regulations as to the use of said seats.

COLUMBUS, OHIO, June 11, 1918.

HON. WALTER W. BECK, *Prosecuting Attorney, Lisbon, Ohio.*

DEAR SIR:—You have asked an official ruling in reference to certain provisions

of an act found in 107 O. L. 590, now known as section 9007-1 et seq. of the General Code. The facts are as follows:

A traction company operates interurban service between East Liverpool, O., and Beaver, Pa., and between East Liverpool, O., and Steubenville, O., and city cars in East Liverpool, O., Chester, Pa., Wellsville, O., and Steubenville, O. Claim is made that on these various routes there are several congested places. It appears further that the pay-enter system is in vogue and that the conductor on the car is required to open and close the safety doors to permit the passengers to get on and off. These cars, I understand, are equipped with seats for the motorman and conductor and question is raised regarding a regulation requiring the motorman not to use this seat when operating his car through the congested districts and the conductor not to use said seat when opening and closing the safety doors. Claim is made that under the regulations of the company stool limits permit the motorman using his stool more than fifty per cent and the conductor about seventy per cent of the time when on duty. I understand this applies to the city cars and on the interurban lines the motorman and conductor are permitted to use stools about seventy per cent of the time.

Section 9007-1 G. C. reads:

> "That it shall be unlawful to operate in Ohio any electric, street or interurban railroad car unless it be provided at all times during operation with seats for the motorman and conductor."

Section 9007-2 G. C. reads:

> "A violation of section 1 hereof shall constitute a violation thereof by the president, general manager, general superintendent, or other officer in charge of operation, and shall be punishable by a fine of not less than fifty dollars nor more than one hundred dollars or by imprisonment for not less than ten nor more than thirty days for each offense. An offense on any calendar day and as to any car shall be a separate and distinct offense from a violation on any other such day."

These two sections constitute all the provisions of the act necessary to be considered under the facts stated. Section 9007-1 merely makes it unlawful to operate any electric, street or interurban railroad car unless it is provided at all times during operation with seats for the motorman and conductor. The act nowhere attempts to provide for the use of said seats. The title of the act recites that it is "an act requiring persons, associations and corporations owning or operating street or interurban electric railroad cars to provide for the well being of their employes." This is sought to be done by requiring that no car should be operated unless a seat for the motorman and conductor be provided. The act is wholly silent as to whether the employes are to have the right to use such seats during every moment of the time they are on duty, or whether the company is to make rules governing the times or places when such seats shall be used. I can well see that questions may arise as to the reasonableness of certain rules of the company made in reference to the use of the seats necessary to be provided under this law, but the language of the law gives no aid, nor would the construction of the language used in House Bill 144 aid, in solving such questions. The right to make a rule being conceded, the reasonableness or unreasonableness would depend upon the facts, and the absence of the particular facts, other than the general state-

ment that there are congested districts on the lines, would preclude my giving an official opinion as to the reasonableness or unreasonableness of such regulation.

This is a matter that should be worked out satisfactorily between the employer and employe, which I trust may be done. Very truly yours,

JOSEPH MCGHEE,
Attorney-General.

1268.

INCREASE OF TAX LEVY BY SCHOOL DISTRICT—WHEN ELECTION MAY BE HELD.

When a board of education, acting under section 5649-5 *G. C., certifies to the deputy state supervisors a copy of resolution required under said section, the proposition shall be submitted to the electors of the school district at the November election that occurs more than twenty days after the adoption of such resolution as is provided in section* 5649-5a *G. C.*

COLUMBUS, OHIO, June 11, 1918.

HON. HARRY S. CORE, *Prosecuting Attorney, Ottawa, Ohio.*

DEAR SIR:—You have asked for an official opinion on the following: Kalida village school district, Putnam county, passed a resolution asking for a vote to increase the levy of taxes under section 5649-5 G. C. You state you advised the board that said election could not be held until the next November general or regular election, under section 5649-5a G. C.

I cannot understand the contention of the board. The language of the statute is so plain that he who runs may read, and I concur with the opinion that you have given the board.

Section 5649-5 G. C. provides that certain officers and boards, including the board of education, may proceed under said section when the maximum tax rate is insufficient.

Section 5649-5a G. C., the succeeding section, makes provision for the vote on such proposition and fixes, among other things, the time at which such vote shall be had. The language is as follows:

> "Sec. 5649-5a. Such proposition shall be submitted to the electors of such taxing district *at the November election* that occurs more than twenty days after the adoption of such resolution. * * *."

So it is readily apparent that the November election occurring more than twenty days after the adoption of the resolution is the proper time at which to submit the proposition. Very truly yours,

JOSEPH MCGHEE,
Attorney-General.

1269.

WORKMEN'S COMPENSATION LAW—WHEN WORKMAN DIES AFTER FILING NOTICE OF INJURY AND APPLICATION FOR COMPENSATION WITH INDUSTRIAL COMMISSION, HIS RIGHT TO COMPENSATION PASSES TO HIS PERSONAL REPRESENTATIVE.

When a regular employe of an employer paying full premiums into the state

insurance fund sustains an injury in the course of and arising out of his employment which results in his being permanently and totally disabled, and the said employe files a first notice of injury and preliminary application for compensation with the industrial commission, but dies as the result of said injury before his claim is passed on and allowed by the said commission, the right of said injured employe to receive compensation for said injury for the period from the date of said injury, less the first week, up to the date of death passes to his personal representative, and upon application of said personal representative said compensation should be awarded and paid to him.

COLUMBUS, OHIO, June 13, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have your communication requesting my opinion on the following:

> "In re: Claim No. 411616—Joseph Crawford, deceased.
>
> Joseph Crawford, while in the employ of the American Tool Works Company, of Cincinnati, Ohio, sustained an injury in the course and arising out of his employment on the eighteenth day of December, 1917, from which injury death resulted on February 6, 1918. Medical and funeral expenses have been paid by the industrial commission out of the state insurance fund. The decedent left no dependents surviving him.
>
> Under this state of facts, the commission desires your opinion as to whether or not payment of compensation accruing between the date of injury and the date of death may be lawfully paid to the administrator of decedent's estate, who has made application therefor."

In addition to the facts stated in your communication an examination of your file in regard to this claim discloses the fact that on January 14, 1918, the said Joseph Crawford filed with you a first notice of injury and preliminary application for compensation. It also appears from your file that as a result of the injury which the said Joseph Crawford sustained on December 18, 1917, he was totally and permanently disabled from that time up until his death on February 6, 1918.

Paragraph two of section 1465-68 General Code, being section 21 of the workmen's compensation act (103 O. L. 79), vests the general right in injured employes and the dependents of killed employes of private employers under the workmen's compensation act to receive compensation, medical expenses, etc., and reads:

> "Every employe mentioned in subdivision two of section fourteen hereof, who is injured, and the dependents of such as are killed in the course of employment, wheresoever such injury has occurred, provided the same was not purposely self-inflicted, on and after January 1, 1914, shall be entitled to receive, either directly from his employer as provided in section twenty-two hereof, or from the state insurance fund, such compensation for loss sustained on account of such injury or death, and such medical, nurse and hospital services and medicines, and such amount of funeral expenses in case of death as is provided by sections thirty-two to forty inclusive of the act."

Section 1465-81 General Code, section 34 of the workmen's compensation act (103 O. L. 86), provides for the payment of compensation in the case of permanent total disability, and reads, in part:

"In cases of permanent total disability, the award shall be sixty-six and two-thirds per cent of the average weekly wages, *and shall continue until the death of such person so totally disabled,* but not to exceed a maximum of twelve dollars per week and not less than a minimum of five dollars per week, unless the employe's average weekly wages are less than five dollars per week at the time of the injury, in which event he shall receive compensation in an amount equal to his average weekly wages. * * *"

It seems clear from the provisions of the foregoing section that an injured employe who has suffered a permanent total disability is entitled to receive the rate of compensation therein provided from the date of his injury, less the first week which is excepted by section 1465-78 G. C., up to the time of his death.

Section 1465-82 General Code, as amended in 107 O. L. 450, and as in effect at the time of the death of the said Joseph Crawford, provides for the payment of compensation when injury results in death within two years after the injury was sustained and reads, in part:

"In case the injury causes death within the period of two years, the benefits shall be in the amount and to the persons following:

1. If there be no dependents, the disbursements from the state insurance fund shall be limited to the expenses provided for in section forty-two hereof.

2. If there are wholly dependent persons at the time of the death, the payment shall be sixty-six and two-thirds per cent of the average weekly wages, and to continue for the remainder of the period between the date of the death and eight years after the date of the injury and not to amount to more than a maximum of five thousand dollars, nor less than a minimum of two thousand dollars.

3. If there are partly dependent persons at the time of the death, the payment shall be sixty-six and two-thirds per cent of the average weekly wages, and to continue for all or such portion of the period of eight years after the date of the injury, as the board in each case may determine, and not to amount to more than a maximum of five thousand dollars."

* * * * * * * * * * *

The only difference between section 1465-82 G. C. as amended in 107 Ohio Laws 450, and the said section as enacted in 103 Ohio Laws 86, relates to the amount of compensation that is to be awarded in case of death and the length of the period during which same is paid, which are not material so far as the instant question is concerned.

When sections 1465-81 and 1465-82 G. C. are read together, it is seen that an injured employe who has suffered a permanent total disability is entitled to compensation from the date of his injury, less the first week, up to the time of his death; then, in the event that he leaves wholly dependent persons, it is provided in subparagraph 2 of section 1465-82 that these wholly dependent persons are entitled to receive compensation for the remainder of the period between the date of the death and eight years after the date of the injury. In other words, where an injury causes death within the period of two years and there are wholly dependent persons it was evidently intended by the legislature that compensation for a period of eight years should be allowed for said injury and death; the injured employe himself being entitled to compensation for whatever disability he suffered during the period between his injury and the date of his death and those persons who were wholly dependent upon him for support compensation for his death for the

balance of said eight year period. I feel convinced that in such a case there are two separate and distinct rights, one being the right of the injured employe himself for compensation up to the date of his death, and the other being the right of those persons who were wholly dependent on him for support for compensation on account of his death.

Nothing is stated expressly in the act about the disposition of any compensation that might be due and unpaid to an injured employe at the time of his death —as to whether it should go to his dependents or to his personal representative. As has been noted heretofore, the compensation or benefits to the wholly dependent persons dates only from the time of the death of the injured employe.

In so far as the present question is concerned section 1465-88 G. C., section 41 of the act (103 O. L. 88), contains the only express limitations in regard to the payment or status of compensation, and reads:

> "Compensation before payment shall be exempt from all claims of creditors and from any attachment or execution, and shall be paid only to such employes or their dependents."

Since this section provides that compensation shall be paid only to injured employes or to the dependents of killed employes, it might be argued that it would not authorize the payment of compensation to the personal representative of an injured employe or the personal representative of a deceased dependent. However, in the case of *State ex rel. Munding* vs. *Industrial Commission*, 92 O. S. 434, at page 454, it was said in the opinion of the court in reference to the purpose of this part of the section:

> "The intent apparent and expressed throughout the act that compensation is to be paid only to dependents, was not for the purpose of securing an abatement of unpaid compensation upon the death of a dependent. The purpose is to insure that compensation shall go intact to the injured employe or his dependents without any shrinkage by passing through or into the hands of assigns, agents, attorneys, friends or relatives, it being common knowledge that if a sum of money on its journey from the one from whom to the one to whom it is due passes through the hands of others it is inevitable that it suffer diminution, sometimes almost to the vanishing point."

Hence, since it was considered by the supreme court that this section only prohibited an injured employe or the dependents of a killed employe from assigning his right to compensation, it was held in the Munding case, supra, that a personal representative of a deceased dependent of a killed employe could claim as assets of the estate of said deceased dependent any compensation which had been awarded said deceased dependent, but remained unpaid at the time of his said death.

Of course, there is a difference between the facts in the instant case and the facts in the Munding case, supra, in that in the Munding case the award had been made by the industrial commission at the time of the death of said dependent, and the only thing that remained to be done was to pay same in accordance with the schedule of compensation provided in the workmen's compensation law. However, in the instant case there can be no controversy as to the amount that the said Joseph Crawford would have been entitled to at the time of his death, since it would be in accordance with the schedule fixed in section 1465-81 G. C. for the period, less the first week, from the date of the injury to the date of his death. Crawford had filed his first notice of injury and his preliminary application for said com-

pensation, but same had never been passed upon by you. Still, I cannot see that the mere fact that you had not passed on his claim, when as a matter of fact the said injured employe was entitled to said compensation, would make any difference so far as his individual right was concerned. His right was to have compensation for the above mentioned period. If it had been possible for all the various steps to have been taken and everything completed on the date of his death, the said Joseph Crawford would have been awarded and would have received compensation for the above mentioned period up to the date of his said death.

There being no express provision in the workmen's compensation law itself as to the payment of any compensation due and unpaid to an injured employe at the time of his death, and there being no express or implied prohibition in the law so far as I have been able to ascertain against the payment of said compensation to the personal representative of a deceased workman, I see no reason why a claim for compensation due an injured employe at the time of his death, but unpaid, should not pass to his personal representative just the same as any other claim for money due and unpaid.

It cannot be controverted that the said deceased employe Crawford was entitled to a certain amount of money out of the state insurance fund by way of compensation for the injury that he sustained in the course of his employment. This right was given him under the workmen's compensation law on the theory he would receive same in lieu of the wages he lost by reason of his injury. If there had been a certain amount of wages due and unpaid at the time of his death unquestionably the right to collect and receive same would pass to his personal representative. Hence, it would seem that the same rule should apply in regard to compensation due and unpaid at the time of the death of a claimant.

I, therefore, advise you that it is my opinion under the foregoing state of facts that the personal representative of the said Joseph Crawford is entitled to receive the compensation that was due him for the injury that he had sustained for the period from the date of said injury on December 18, 1917, less the first week, up to February 6, 1918.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1270.

LIMITATION OF BOND ISSUE BY VILLAGE TO PAY ITS SHARE OF COST OF INTER-COUNTY HIGHWAY IMPROVEMENT—HOW ASSESSMENTS MADE.

When an inter-county highway improvement is constructed in or through a village with its consent, in the manner provided by section 1193-1 *G. C.* (107 *O. L.* 123), *and at the same width as that of the balance of the improvement, bonds issued by the village to pay its assumed share of the cost and expense of such improvement are charges against the tax duplicate of the taxable real and personal property in the village, and the village in issuing such bonds is limited by the provisions of the Longworth law* (*Secs.* 3939 *et seq. G. C.*).

In such case where the improvement is initiated by an application for state aid made by the board of county commissioners, such board of county commissioners is authorized to levy assessments to pay the share of the cost and expense of said improvement to be borne by the owners of benefited property, upon the lots and lands abutting upon said improvement, whether the same be within or without such

village; or if the county commissioners have taken appropriate action to that end under the provisions of section 1214 *G. C.* (107 *O. L.* 129), *they may levy assessments to pay the share of the cost and expense of such improvement to be borne by the owners of benefited property, upon lots and lands lying within one mile or one-half mile, as the case may be, of either side of said improvement, whether the real estate so assessed be within or without such village.*

COLUMBUS, OHIO, JUNE 13, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—This department is in receipt of your favor of May 21, 1918, in which you ask opinion on the questions submitted as follows:

> "Referring to section 1193-1 of the General Code providing for the improvement of inter-county highways and main market routes within a village, I respectfully ask for your opinion on the following points in question:
>
> First: In establishing the amounts of the cost of the improvement, can the county commissioners collect that portion of the cost assumed by agreement by the council of the village without the vote of the people?
>
> Second: Can the county commissioners assess the property within one mile of each side of the improvement without the vote of the people?"

Your questions, as I have been advised, have reference to the proposed Ashtabula-Conneaut inter-county highway No. 2 improvement, through the village of North Kingsville, Ashtabula county.

I am further advised that this improvement is one initiated by an application for state aid made by the board of county commissioners of Ashtabula county. On this consideration the statutory provisions applicable to your question are those of section 1193 G. C. and the sections enacted supplementary thereto (Secs. 1193-1 and 1193-2, 107 O. L. 123-4), rather than the provisions of section 1231-3 G. C., which have primary, and I may say sole, application to cases where an inter-county highway or main market road improvement is projected into or through a village by the state highway commissioner without the co-operation of county commissioners or township trustees.

Again I am informed that the proposed improvement of this inter-county highway through the village of North Kingsville is to be of the same width as that contemplated by the state highway commissioner and the county commissioners of Ashtabula county with respect to the balance of said proposed improvement, and this fact requires us to apply to the questions here presented the provisions of section 1193-1 G. C., rather than those of section 1193-2 G. C. which has immediate and sole application to cases where an inter-county highway or main market road improvement, initiated by application of county commissioners or township trustees, is constructed in or through a village at a width exceeding that contemplated by the proceedings for such improvement by the state highway commissioner and the county commissioners or township trustees.

Section 1193 G. C. provides that each application for state aid in the construction, improvement, maintenance or repair of inter-county highways or main market roads shall be accompanied by a properly certified resolution of the county commissioners or township trustees, stating that the public interest demands the improvement of the inter-county highway or main market roads therein described, which may include any portion of a highway in the limits of any village, when the same is a continuation of the proposed improvement, or it may cover any portion

of a highway in the limits of any village, when the same is a continuation of an inter-county highway or main market road already improved, and the consent of the village has been obtained, which consent shall be evidenced by proper legislation of the council of said village entered upon its records.

Section 1193-1, supra, provides as follows:

"When, upon the application of county commissioners or township trustees and under the supervision of the state highway department, the improvement of an inter-county highway or main market road is extended into or through a village, or an improvement constituting an extension of an improved inter-county highway or main market road is constructed within a village, it shall not be necessary for the village to assume any part of the cost and expense of the proposed improvement. If no part of the cost and expense of the proposed improvement is assumed by the village, no action on the part of the village, other than the giving of its consent, shall be necessary; and in such event all other proceedings in connection with said improvement, including the making of assessments, shall be conducted in the same manner as though the improvement was situated wholly without a village. The village may, however, by agreement of its council made with the county commissioners or township trustees, assume and agree to pay all or any part of the cost and expense of that part of the improvement within the village assumed in the first instance by the county commissioners or township trustees and to be paid by general taxation. A village agreeing to pay any portion of the cost and expense of the improvement is hereby authorized to levy taxes upon all the taxable property of such village under the same conditions and restrictions imposed by law in the case of taxes levied for the purpose of providing funds for the payment of the village's share of the cost of street improvement under the exclusive jurisdiction and control of the council of a village and is further authorized to sell its bonds in anticipation of the collection of such taxes under the same conditions and restrictions imposed by law in the sale of bonds for street improvements under the exclusive jurisdiction and control of the council of a village. The village shall pay to the county or township treasury, as the case may be, its proportion of the estimated cost and expense of said improvement as fixed in the agreement between the council and the county commissioners or township trustees, and after the completion of said work and the payment of the cost and expense thereof any balance of the funds contributed by said village shall be refunded to it to be disposed of according to law. All special assessments shall be made by the county commissioners or township trustees upon whose application the improvement is constructed. This section shall apply where the council of a village does not desire to improve all or any part of said road within such village to a greater width than is contemplated by the proceedings for said improvement by the state highway commissioner and the county commissioners or township trustees; and shall also apply to so much of said road as it was designed to improve by the state highway commissioner and county commissioners or township trustees in cases where the council of said village desires to improve all or any part of said road within such village to a greater width than is contemplated by the proceedings of the state highway commissioner and county commissioners or township trustees."

With respect to your first question, which I take it is whether this village may

provide for the share of the cost and expense of this improvement assumed by it without a vote of the electors, it will be noted that under the provisions of section 1193-1 of the General Code, just quoted, if this village not only consents to the construction of the proposed improvement in or through the same, but also, as it may do, assumes and agrees to pay a part of the cost and expense of the improvement, it may sell bonds therefor in anticipation of the collection of taxes to be levied on all the taxable property of the village.

I speak of the sale of bonds by the village, for practically this is the only way that it can raise the money to pay its assumed share of the cost and expense of the improvement. Under the provisions of said section it will be noted that the authority of the village to sell bonds for this purpose is subject to the same conditions and restrictions imposed by law in the sale of bonds for street improvements under the exclusive jurisdiction and control of the village. It will be noted that the statute in terms speaks of the conditions and restrictions imposed by law in the "sale" of bonds for street improvements. The "conditions and restrictions" here mentioned have reference, I take it, to something other than the regulations prescribed by sections 3922 to 3924 inclusive, and section 1465-58, with respect to the sale of municipal bonds after their issue has been provided for. Such regulations would apply to a *sale* of bonds authorized by the section of the General Code here under consideration without any express mention therein and, as I view it, the conditions and restrictions mentioned in this section refer to the limitations as to amount applicable to the *issue* of bonds for street improvements under the exclusive jurisdiction and control of the village. The issue of bonds for street improvement under the exclusive jurisdiction and control of a village as a municipal corporation is authorized by section 3821 G. C. and subsection 22 of section 3939 G. C.

Bonds issued by a municipal corporation under the authority of either or both of these statutory provisions, for the purpose therein mentioned, are subject to the limitations of the Longworth law, so called, which prescribes specific purposes for which bonds may be issued by a municipal corporation and provides for certain limitations on the amount of bonds that may be so issued.

> Smith vs. Village of Rockford, 4 N. P., n. s., 476; s. c. 4 N. P., n. s., 513; 9 N. P., n. s., 465; City of Cleveland, etc., vs. City of Cleveland, et al., 16 C. C., n. s., 471; 76 O. S., 594.

It follows therefore that bonds issued by this village under authority of section 1193-1 G. C., to pay its assumed share of this improvement, will be subject to the limitations as to the amount prescribed by the Longworth law. I do not deem it necessary to discuss the provisions of this law, it being sufficient to say that the same are found in sections 3939 to 3954-1 inclusive of the General Code.

Bonds may be issued by the village of North Kingsville for the purpose above indicated, without a vote of the electors, subject to the limitations as to amount prescribed by section 3940 G. C., as amended (107 O. L. 578), which provides that total indebtedness created in any one fiscal year by the council of a municipal corporation shall not exceed one-half of one per cent of the total value of the property in such municipal corporation as listed and assessed for taxation.

Bonds issued by said village for this purpose, without a vote of the electors, will likewise be subject to the limitation prescribed by sections 3941 and 3954-1 G. C., which provide that the "net indebtedness" (section 3949 G. C.) created or incurred by council in the issue of bonds, subject to the limitations of said law, shall not exceed two and one-half per cent of the total value of all property in the municipal corporation as listed and assessed for taxation.

It therefore follows that if said village desires to assume a portion of the cost and expense of said improvement, which will exceed the limitations above noted, and desires to issue its bonds therefor, the approval of the electors of the village must first be obtained as to the issue of such bonds in the manner provided by sections 3942 to 3947 inclusive of the General Code, in which case bonds issued for the purpose will be subject only to the five per cent limitation prescribed by sections 3948 and 3954-1 G. C. This, I believe, answers your first question.

With respect to your second question, it will be noted that whether this village assumes or agrees to pay any portion of the cost and expense of said improvement or not, the assessments to pay the share of the cost and expense of said improvement to be paid by the owners of benefited property to be assessed therefor are to be made by the county commissioners. Unless otherwise provided by appropriate action of the board of county commissioners, this share will be ten per cent of the cost and expense of the improvement, excepting therefrom the cost and expense of bridges and culverts, and the assessments therefor will be made upon the lands and lots abutting upon the improvement. However, section 1214 G. C., as amended (107 O. L. 129), provides that the county commissioners, by resolution adopted by unanimous vote, may increase the percentage of the cost and expense of the improvement to be specially assessed, and may order that all or any part of the cost and expense of the improvement contributed by the county and the interested township or townships be assessed against the abutting property; and that the county commissioners, by resolution passed by unanimous vote, may make the assessment of ten per cent or more, as the case may be, of the cost and expense of the improvement against the real estate within one-half mile of either side of the improvement or against the real estate within one mile of either side of the improvement.

Other than the provisions of section 1214 G. C., according to the individual owners of property assessed for the construction of an inter-county highway or main market road improvement, a right to a hearing with respect to their assessments, there is nothing in the provisions of the statutes relating to the construction of improvements of this kind which gives the electors of the village in or through which such improvement is constructed under the authority of section 1193 and section 1193-1 G. C., any voice in the matter of assessments made to pay the share of the owners of such benefited property in the cost and expense of the improvement, whether such benefited properties or the owners thereof are wholly within or partly within and partly without the village in or through which such improvement is extended.

Assuming, therefore, that the county commissioners of Ashtabula county have taken or will take appropriate action under the authority of section 1214 G. C., assessing benefited property within one mile of either side of the improvement, such assessments can be made with respect to property both within and without the village without a vote of the electors thereof, and your second question is accordingly answered in the affirmative. Very truly yours,

JOSEPH MCGHEE,
Attorney-General.

1271.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN PERRY AND LOGAN COUNTIES.

COLUMBUS, OHIO, JUNE 13, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of June 6, 1918, enclosing, for my approval, final resolutions for the following named improvements:

Bryan-Pioneer road—I. C. H. No. 306, Sec. "L," Williams county.
Zanesville-New Lexington road—I. C. H. No. 350, Sec. "E-1," Perry county.
Lima-Bellefontaine road—I. C. H. No. 130, Sec. "B," Logan county.
Lima-Bellefontaine road—I. C. H. No. 130, Sec. "A-2," Logan county.

I have carefully examined said resolutions, find the same correct in form and legal and am therefore returning them to you with my approval endorsed thereon in accordance with the provisions of section 1218 G. C.

In passing I might suggest that the final resolution made by the commissioners of Perry county, for the improvement of the Zanesville-New Lexington road, I. C. H. No. 350, Sec. E-1, does not state the month nor the day of the month upon which the commissioners acted, but the certificate of the clerk of the board of county commissioners sets forth the fact that it was adopted on May 1, 1918. This I think cures the defect, which at any rate is not of vital importance.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1272.

APPROVAL OF BOND ISSUE OF LORAIN COUNTY—$17,500.

COLUMBUS, OHIO, JUNE 13, 1918.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of Lorain county in the sum of $17,500, for the purpose of relocating and rebuilding Houghton bridge No. 145 over Charlemonte creek in Wellington township, on Medina-Norwalk Inter-County Highway No. 291.

I have carefully examined the transcript of the proceedings of the board of county commissioners of Lorain county, relating to the above issue of bonds, and find said proceedings to be in conformity to the provisions of the General Code of Ohio relating to bond issues of this kind. I am therefore of the opinion that properly prepared bonds covering said issue will, when the same are executed and delivered, constitute valid and subsisting obligations of said county to be paid in accordance with the terms thereof. No bond form has been submitted as a part

of said transcript and I am therefore holding the transcript of the proceedings relating to this bond issue until such bond form is submitted and approved.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1273.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN HIGHLAND COUNTY.

COLUMBUS, OHIO, June 14, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of 13th inst. enclosing for my approval final resolutions (in duplicate) for the following named improvements:

Highland county—Milford-Hillsboro road, I. C. H. No. 9, Sec. "I."
Highland county—Milford-Hillsboro road, I. C. H. No. 9, Sec. "K."

I have carefully examined said resolutions, find the same correct in form and legal, and am therefore returning them to you with my approval endorsed thereon.

However, I wish to call your attention to what is apparently a typographical error in the resolution pertaining to I. C. H. No. 9, Sec. "I," wherein it is stated that the preliminary application of the board to the state highway department was made on November 5, 1918.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1274.

APPROVAL OF LEASES OF WATER RIGHTS TO LANG MILLING CO., A. W. BAXTER, VILLAGE OF SPENCERVILLE, SIDNEY ELECTRIC COMPANY, CITY ICE DELIVERY COMPANY, THE PENNSYLVANIA IRON AND COAL CO., THE STAR BREWING CO., THE RABE MANUFACTURING COMPANY, THE RICHARDSON PAPER COMPANY, RICKER BROS., THE TUCKER WOOD WORKS COMPANY, AND THE OHIO GAS & ELECTRIC COMPANY.

COLUMBUS, OHIO, June 14, 1918.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your letter of June 10, 1918, enclosing for my approval various leases of water rights (in triplicate) from the state to the following named persons and companies:

George F. Lang Milling Company, Delphos, O.
A. W. Baxter, Ft. Loramie, O.

Village of Spencerville, Board of Public Affairs.
The Sidney Electric Company, Sidney, O.
The City Ice Delivery Company, Cincinnati, O.
The Penn Iron & Coal Co., Canal Dover, O.
The Star Brewing Company, Minster, O.
The Rabe Manufacturing Company, New Bremen, O.
The Richardson Paper Company, Lockland, O.
Ricker Bros., Delphos, O.
The Tucker Wood Works Company, Sidney, O.
The Ohio Gas & Electric Company, Middletown, O.

I have carefully examined these leases, find them correct in form and legal and therefore approve the same. I am forwarding them to the governor of Ohio for his consideration.

In approving said leases, I am assuming they in no way interfere with the rights of the city of Akron as provided in section 14009 G. C. (107 O. L. 418).

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1275.

APPROVAL OF LEASE OF CANAL LANDS TO BENJAMIN L. JOHNSON AND JOHN W. BUSH, OF PORTSMOUTH, OHIO.

COLUMBUS, OHIO, June 14, 1918.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have examined the lease of canal lands made by you to Benjamin L. Johnson and John W. Bush, of Portsmouth, Ohio, for cottage site purposes, and find the same to be correct in form and legal. I am therefore forwarding it, with my approval endorsed thereon, to Hon. James M. Cox, governor, for his consideration.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1276.

STREET IMPROVEMENTS—WHEN TWO CONTRACTS HAVE BEEN ENTERED INTO WITH CONTRACTOR AND OVERPAYMENT MADE ON ONE MUNICIPALITY MAY DEDUCT AMOUNT OF OVERPAYMENT FROM SECOND CONTRACT.

Where a municipality has entered into two certain contracts with a particular contractor for certain street improvements and one contract has been completed and the said contractor has been paid a certain amount in excess of what he is entitled to under the terms of the contract and the said municipal corporation has a right to recover the amount of said overpayment in a proper action, and the second con-

tract is in the course of being performed and there is more than a sufficient amount due on the second contract to satisfy said overpayment to said contractor, HELD:

That said municipal corporation may deduct a sufficient amount from the moneys due on said second contract to satisfy the overpayment that was made to the contractor on said first contract.

COLUMBUS, OHIO, June 17, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I have your communication of May 31, 1918, requesting my opinion on the following:

> "The city of 'A' has two street improvement contracts with John Smith, contractor. The final estimate has been paid on one contract while the other contract is not yet completed nor all payments made. It is discovered that the contractor has been paid more than he was rightfully entitled to on the completed contract.
>
> *Question*: Can the city officials legally withhold from his payments on the second contract an amount sufficient to aggregate the amount overpaid him on the contract for which he has been paid in full and erroneously too much?"

You do not state in your communication the facts which show how it happened that the contractor was paid more than he was legally entitled to on the first contract. However, I am assuming that the overpayment on said contract was illegal and that the municipality is entitled to recover same in an action properly brought against the contractor for money had and received. This action, of course, would arise out of the implied contract of the contractor to repay to the municipality moneys that he had received illegally and to which the said municipal corporation was entitled.

Sections 11319 and 11321 G. C. read:

> "*Sec.* 11319. A set-off is a cause of action existing in favor of a defendant against a plaintiff between whom a several judgment might be had in the action, and arising on contract or ascertained by the decision of a court. It can be pleaded only in an action founded on contract."
>
> "*Sec.* 11321. When cross-demands have existed between persons under such circumstances that if one had brought an action against the other a counterclaim or set-off could have been set up, neither can be deprived of the benefit thereof by assignment by the other, or by his death. The two demands must be deemed compensated so far as they equal each other."

Section 5077 Revised Statutes, which provided substantially the same in effect as section 11321 G. C., in so far as the instant question is concerned, and section 5075 Revised Statutes, which gave the right of set-off and had substantially the same effect as section 11319 G. C., were considered by the supreme court in the case of *Bank vs. Brewing Co.*, 50 O. S. 151. Beginning at the bottom of page 157 it was said by the court:

> "The bank owed Schlegel on his deposit account, when he gave the Brewing Company his check, more than the amount for which it was

drawn; at the same time, Schlegel owed the bank on his note, a sum greater than the bank's indebtedness to him; these mutual debts existed between the parties in the same relation, were both past due, and each was founded on contract. Our statute secures the right of set-off to parties sustaining the relation of debtor and creditor, between whom there are such cross demands, and those existing between banks and their customers are not excepted from its operation; so that, if Schlegel, when the check was drawn, had brought an action on his claim against the bank, the latter could have set off against it the debt which Schlegel owed the bank. And it is clear the right of set-off was not defeated or impaired by the check, even if it be treated as an assignment. The statute plainly protects the right of set-off, when it existed between the parties, notwithstanding the assignment, by either, of his demand. Its language is, 'when cross demands have existed between persons, under such circumstances that if one had brought an action against the other a counter claim or set-off could have been set up, neither can be deprived of the benefit thereof by assignment by the other, but the two demands must be deemed compensated, so far as they equal each other.' Revised Statutes section 5077. By force of the statute, the indebtedness of the bank to Schlegel was paid by a corresponding amount of the indebtedness of Schlegel to the bank; and crediting Schlegel's note with the amount due on his deposit account, as was done by the bank, was but giving effect to the provisions of the statute."

In so far as their legal effect is concerned we have present the same facts in substance as those in the above mentioned case. The municipality has the right to recover from the contractor the amount of money he has received improperly on his first contract and the contractor upon his performance of the second contract has the right to demand from said corporation the amount that is due him under said last mentioned contract. The amounts of these respective obligations are apparent, of course, from the facts which are not stated by you as to the amount of money that is or was due the contractor on each contract and the amounts that have been paid.

Following the holding and reasoning of the aforesaid case and the provisions of the above mentioned sections of the General Code in reference to cross-demands, I advise you that the officials of the city you have reference to in your communication may legally withhold a sufficient part of the money due on a contract entered into with the particular contractor to satisfy an illegal payment which has been made to the same contractor on another contract and which said overpayment on said last mentioned contract could have been recovered by said municipality in a proper action.

Very truly yours,
JOSEPH MCGHEE,
Attorney General.

1277.

APPROVAL OF ARTICLES OF INCORPORATION OF THE FLORISTS AND GARDENERS INSURANCE ASSOCIATION.

COLUMBUS, OHIO, June 17, 1918.

HON. WILLIAM D. FULTON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have carefully examined the corrected articles of incorporation

of The Florists and Gardeners Insurance Association and find same to be in substantial conformity to the provisions of sections 9593 et seq. of the General Code and not in conflict with the constitution and laws of the state of Ohio or of the United States and the same are accordingly hereby approved.

I am returning to you check for $25.00 submitted with your letter.

Very truly yours,

JOSEPH MCGHEE,

Attorney General.

1278.

ROADS AND HIGHWAYS—VERDICT—IN CASES INVOLVING THE ASSESSMENT OF COMPENSATION AND DAMAGES AND IN THE MATTER OF ESTABLIHING A ROAD.

COLUMBUS, OHIO, June 17, 1918.

HON. A. C. MCDOUGAL, *Prosecuting Attorney, Woodsfield, Ohio.*

DEAR SIR:—I have your communication of May 29, 1918, which reads as follows:

> "I would be pleased to have an opinion on the question as to whether or not a three-fourths jury can return a verdict on an appeal on a road case from the county commissioners either as to compensation and damages or as to the establishment?"

It is my understanding, from your communication, that you are making inquiry in reference to a case which might arise under section 6891 G. C., which reads as follows:

> "Sec. 6891. Any person, firm or corporation interested therein, may appeal from the final order or judgment of the county commissioners made in the proceeding and entered upon their journal determining either of the following matters:
>
> 1. The compensation for land appropriated.
> 2. The damages claimed to property affected by the improvement.
> 3. The order establishing the proposed improvement.
> 4. The order dismissing or refusing to grant the prayer of the petition for the proposed improvement."

The section which bears more particularly upon the matter about which you inquire is section 6894-6 G. C., the latter part of which reads as follows:

> "The rules of law and procedure governing civil cases in the common pleas court shall apply to the trial of the cause in the probate court."

This will make it necessary for us to examine into the question as to what is the rule of law in the common pleas court which governs civil cases in reference to whether the jury must be unanimous in rendering an opinion in civil cases, or whether three-fourths of the jury concurring may render a valid verdict. The provisions pertaining to this question are found in section 11455 G. C., which reads as follows:

"In all civil actions a jury shall render a verdict upon the concurrence of three-fourths or more of their number. The verdict shall be in writing and signed by each of such jurors concurring therein, and they must then be conducted into court, where their names shall be called by the clerk, and the verdict handed to the clerk by the foreman. The clerk must then read the verdict to the jury and make inquiry if it is the verdict of three-fourths or more of their number."

I am of the opinion that the provisions of this section apply to the particular case you have in mind.

Hence answering your question specifically, it is my view that if three-fourths of a jury concur in a case involving the assessment of compensation and damages for lands taken in road cases, a verdict can be rendered by the jury. I think the same principle would apply in establishing a road, and if three-fourths of a jury concur, a verdict can also be rendered upon this proposition.

Very truly yours,
JOSEPH MCGHEE,
Attorney General.

1279.

TAXES AND TAXATION—FAIR GROUNDS WHEN EXEMPT.

Real estate used for the purpose of holding agricultural fairs conducted by county or so-called "independent" agricultural societies, organized not for profit and complying with the provisions of sections 9880 *et seq. General Code, is exempt from taxation, whether the title to such lands is in the society or in the county.*

COLUMBUS, OHIO, June 17, 1918.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your letter of June 6th, requesting my opinion, as follows:

"Is the real estate, the fee of which is in the name of an agricultural society organized under sections 9880-9880-1 G. C., and complying with sections 9881, 9882 and 9883, liable for taxation?

If the fee of the real estate is in the name of the county of such society, is it liable for taxation?

We fail to find any law exempting the real property of agricultural societies, and the only opinions, by a former attorney general, do not seem to cite any law for exempting this property, although it is not generally taxed. We refer to opinions of Attorney-General J. A. Kohler, February 9, 1886, Volume 3, 1883-1888, page 813, and on page 998 of the same volume."

Of course, in case of doubt considerable, if not controlling, weight should be given to the administrative rulings and practices with respect to a question of this kind; especially where the conditions giving rise to the question have existed for a long time and the practice has been uniform. On the other hand, where the law is clear it cannot yield to any such practice, however uniform.

The following language of Spear, J., in *Lee vs. Sturges,* 46 O. S. 153-176, is pertinent here:

"The omission of the taxing officers of the state in previous years to assess this property cannot control the duty imposed by law upon their successors or the legal construction of a statute under which its exemption is claimed. *Vicksburg Railroad Co. vs. Dennis*, 116 U. S. 665. If it could, the consequence would be the lodging in their hands of the very power of exemption which the general assembly alone can validly wield, and that under the limitations of the constitution. Nor can laches be imputed to the state. * * * The extent of the claim for 'uniform construction' seems to be that in case of doubt as to proper construction, the construction by state and county officers should prevail. This has been at large argued and considered. * * *

Our conclusion is that there is not such doubt present as will make this claimed 'uniform construction' available as against the claim for taxes here made. * * *"

It will not do, therefore, to dispose of the questions submitted by you upon the short ground that the general or uniform practice has been to regard either or both of the classes of property inquired about by you as exempt from taxation. The inappropriateness of doing so in this case becomes peculiarly apparent when the ruling of this office to which you have called attention is examined in its historical setting.

The second of the two opinions of Attorney-General Kohler cited by you is, so far as it relates to the question under consideration, in full as follows:

"Last winter the question as to the exemption of the grounds of an agricultural society from taxation was submitted to me, and after consulting with the auditor of state I gave an opinion that, under section 2732, such grounds were exempted from being taxed.

The circuit court of Brown county has recently held, in an action against an agricultural society for damages received by a person on the fair grounds, that the society was not liable for the reason that it was not organized for profit, but was, in its nature, a public institution for public purposes. I must admit that it is a very close question and very many eminent lawyers take the position that the property is taxable and does not come within the legal exemptions of subdivision 8 of section 2732.

The question can easily be put to the test of a judicial decision if the auditor will place upon the duplicate the name of the society, which will then ask for an injunction restraining the tax. I wish it could be done. I am advised that, as a rule, agricultural societies in this state pay no taxes on their fair grounds."

The Brown county case referred to by Attorney-General Kohler is evidently that of *Dunn vs. Agricultural Society*, which about a year and a half after Mr. Kohler's opinion was rendered was decided by the supreme court, 46 O. S. 93. The judgment of the court was that the judgment below should be reversed, and its decision on the point of law involved was summarized in the syllabus as follows:

"A county agricultural society, organized under the act of February 28, 1846 (44 O. L. 70), and amendments thereto, which has constructed seats on its fair grounds for the use of its patrons, is liable, in its corporate capacity, to an action for damages, by a person who, while at-

tending a fair held by it, and rightfully occupying the seats, sustains an injury in consequence of its negligence in their construction."

I quote the following from the opinion, per Williams, J.:

"There is a class of public corporations, sometimes called civil corporations, and sometimes *quasi* corporations, that, by the well settled and generally accepted adjudications of the courts, are not liable to a private action in damages, for negligence in the performance of their public duties. * * *

Of this class, are counties, townships, school districts and the like. * * * Organizations of the kind referred to, are mere territorial and political divisions of the state, established exclusively for public purposes. * * * They are involuntary corporations * * * created by the state, without the solicitation, or even consent, of the people within their boundaries. * * *

This rule of exemption, however, extends no further than its reason, and therefore has no application to corporations called into being by the voluntary action of the individuals forming them, for their own advantage, convenience or pleasure. * * *

When, therefore, it is determined to which of these classes of corporations the defendant belongs, a decision of the case is reached. * * *

From this summary of the statutes, it is apparent, that corporations formed under them, are not mere territorial or political divisions of the state; nor are they invested with any political or governmental functions, or made public agencies of the state, to assist in the conduct of its government. * * * It is evident that societies organized under the statutes are the result of the voluntary association of the persons composing them, for purposes of their own. It is true, their purposes may be public, in the sense that their establishment may conduce to the public welfare, by promoting the agricultural and household manufacturing interests of the county; but in the sense that they are designed for the accomplishment of some public good, all private corporations are for a public purpose. * * *

It is evident that the defendant has, or may have, a corporate fund. * * *

The income may * * * exceed the expenditure, and hence, not only may a corporate fund be acquired, but it may be distributed among the members, or held for other disposition, at the pleasure of the society, and the corporation may thus become one of pecuniary profit, with the control and management of property, real and personal; and we see no reason why, for private injuries, caused by the improper management of its corporate property, it should not be held to the same general liability, as natural persons who own and manage the same kind of property."

I might stop here for the purposes of at least one of your questions, but I do not feel that I ought to do so because, in my opinion, the reasoning of Judge Williams in this case will not bear close scrutiny. The first proposition he advances is that liability for negligence exists unless the corporation be a public one. This, of course, is not true, and our own supreme court, adhering to the rule well settled in other jurisdictions, has since held that a private corporation not for profit engaged in the management of a charitable institution is exempt from such liability (Taylor vs. Hospital Assn., 85 O. S. 90). Judge Williams in his

opinion seems to have had this principle vaguely in mind, for he seeks to support his conclusion by the additional statement that because an agricultural society may have a corporate fund it may be converted into a corporation for pecuniary profit, distributing the fund periodically by way of dividends among its members. This statement is palpably erroneous. It does not follow that every corporation having assets and the capacity to reap income has the power to distribute the assets among its members (Snyder vs. Chamber of Commerce, 53 O. S. 1). Indeed the general statutes of this state declare that

> "If a corporation be organized for profit it must have a capital stock."
> * * * (Sec. 8667 G. C.)

and it is difficult to understand upon what basis the property of an agricultural society which is not authorized to have a capital stock could be distributed among its members, prior to dissolution at least.

In fact, if agricultural societies are corporations for profit, the whole scheme of legislation involved in chapter 2, part second, title IX, division VI, would be unconstitutional, as numerous provisions of the related statutes authorize the levy of taxes in aid of the enterprise conducted by such societies, which, if the latter were organized for the profit of their members, would be a palpable violation of sections 4 and 6 of article VIII of the constitution.

This question has been raised and it was decided in *Commissioners vs. Brown,* 1 N. P. n. s. 357, that county agricultural societies organized in the usual way are corporations not for profit, that is, without capacity to distribute dividends among their members; so that the provisions of law authorizing the state and the counties to contribute public revenues to their support are not unconstitutional.

From these considerations it appears that whatever may be the fact as to the correctness of the decision in *Dunn vs. Agricultural Society,* it was based upon reasoning which cannot be supported. Had the court determined that county agricultural societies are liable for injuries resulting from the negligence of their officers and agents because, though organized not for profit they do not constitute such charitable institutions as are entitled to the benefits of the rule laid down in *Taylor vs. Hospital Assn.,* supra, the case would, for reasons which will hereafter appear, be of some service, but so far as I am able to ascertain this was not the ground of the decision in the case under consideration.

I might add in this connection that in the opinion in *Taylor vs. Hospital Assn.,* supra, Johnson, J., uses the following language respecting the Dunn case (page 102):

> "In *Dunn vs. Agricultural Society* the fair grounds were kept and the fair conducted not as a thing free to the public; Judge Williams in declaring the judgment of the court says as to the rule of exemption from liability that 'it has no application to corporations called into being by the voluntary action of the individuals forming them for *their own* advantage, convenience or pleasure.'"

This is, of course, a satisfactory distinguishment of *Dunn vs. Agricultural Society* from *Taylor vs. Hospital Assn.;* but I do not think that it would be fair to say that the court in *Taylor vs. Hospital Assn.* meant to approve the correctness of Judge Williams' dictum that an agricultural society is formed for the advantage, convenience or pleasure of its organizers.

What I have said so far has been directed to the point that neither Attorney-General Kohler's opinion, based upon the reversed decision of the circuit court of Brown county, on the one hand, nor on the other the decision of the supreme

court in the same case is of much weight in the determination of the question now presented. I am disposed therefore to ignore both of them in the further consideration of the question. I do not feel that it is necessary to quote article XII, section 2 of the constitution, which authorizes the general assembly to exempt property of certain classes from taxation. It is sufficient to state the obvious and now well recognized proposition that, with an exception which it is not necessary now to note, this provision of the constitution of its own force does not exempt anything from taxation; it is not self-executing; by which we mean, of course, that it is a mere grant of authority to the legislature.

I turn, therefore, to the statutes relating to exemptions from taxation, with the remark that there is no exemption provision in the chapter relating to agricultural societies, as such, and find the following provisions which are worthy of consideration in this connection:

> "Sec. 5352. Buildings belonging to counties and used for holding courts, and for jails or county offices, with the ground, not exceeding ten acres in any county, on which such buildings are erected, shall be exempt from taxation."
>
> "Sec. 5353. Lands, houses and other buildings belonging to a county, township, city or village, used exclusively for the accommodation or support of the poor, or leased to the state or any political subdivision thereof for public purposes, and property belonging to institutions of public charity only, shall be exempt from taxation."
>
> "Sec. 5358. Stocks, or certificates of stock, in a corporation or railroad company, owned by a county, township, city or village, the money to acquire which was originally raised by taxation upon such county, township, city or village, shall be exempt from taxation."
>
> "Sec. 5359. Funds raised and set apart for the purpose of building monuments to the soldiers of this state, and monuments and monumental buildings, shall be exempt from taxation."
>
> "Sec. 5362. Real estate held or occupied by an association or corporation, organized or incorporated under the laws of this state, relative to soldiers' memorial associations, monumental building associations, or cemetery associations or corporations, which in the opinion of the trustees, directors or managers thereof, is necessary and proper to carry out the object intended for such association or corporation, shall be exempt from taxation."

In the same connection see section 5356 General Code. It does not relate to counties, but provides as follows:

> "Sec. 5356. Market houses, public squares or other public grounds of a city, village or township, houses or halls used exclusively for public purposes or erected by taxation for such purposes, notwithstanding that parts thereof may be lawfully leased, shall be exempt from taxation."

I call attention to the fact that there is nothing like the broad provisions of section 5356 just quoted in the statutes relative to the exemption of county property from taxation. The county is entitled to hold as exempt from taxation its court house, jail and county offices and the ground on which they are located not exceeding ten acres in extent; its lands and buildings used exclusively for the accommodation and support of the poor, any stocks owned by it, and its funds set apart for the purpose of building monumental buildings. Children's homes

are exempted from taxation by section 5353-1 of the General Code, if not by section 5353 as above quoted itself. Memorial buildings and the lands on which they are situated are not exempted from taxation by any of the provisions which I have quoted nor by any other provision which I can find, unless they come under the heading of "institutions of public charity only," which will be hereinafter discussed. The same remark applies to county and district tuberculosis hospitals and detention hospitals, unless these can be identified with the lands and buildings "used exclusively for the accommodation or support of the poor." There is other county property, such as county parks, county experiment farms and the like, none of which is, so far as I am able to find, specifically exempted from taxation, though the legislature has undoubted authority to make an exemption under article XII, section 2 of the constitution.

Without further comment, therefore, I arrive at the conclusion that the fact that the title to fair grounds or to buildings and improvements thereon may be in the county does not in any way affect the question of their exemption from taxation.

Looking again at the statutes which I have quoted I call attention to the fact that specific provision is made for the exemption of the property of certain incorporated societies, such as monumental associations and the like, and no such specific provision is found for the exemption of the property of agricultural societies. This fact is not without its significance; but before I can reach a conclusion on either of the questions submitted by you I must determine whether or not an agricultural society is "an institution of purely public charity" or, as the constitution and statutes now have it, "an institution of public charity only."

As I have already stated, I do not think that this question is foreclosed by the decision in *Dunn vs. Agricultural Society*. The following cases deserve examination in this connection:

> *Cleveland Library Assn. vs. Pelton*, 36 O. S. 253 (*Syllabus*):
> "1. A library association, incorporated under the laws of this state, whose objects and purposes are: 'The diffusion of useful knowledge, and the acquirement of the arts and sciences, by the establishment of a library of scientific and miscellaneous books for general circulation, and a reading room, lectures and cabinets;' open to all persons, without distinction, upon equal terms, and the income and revenues of which are devoted exclusively to such objects and purposes, is 'an institution of purely public charity,' within the meaning of the 6th clause of the act of March 21, 1864. S. & S. 761."

The statement of facts in this case shows that the library association was organized under a law and articles of incorporation by virtue of which "any person, without distinction of color, sex or faith, can become a member, and * * * the annual fee is * * * one dollar * * *; that if a member withdraws more than one book at a time a further charge of ten cents per week is added; that its library and reading room are open to the members daily, and its natural history and historical collections are open free during two days a week to the public; the association has no stockholders, and no member or officer of the plaintiff has any pecuniary benefit from the plaintiff or is entitled to any."

In the opinion, per Johnson, J., the following language is used (p. 257):

> "The purposes of this association * * * are, * * * 'The diffusion of useful knowledge and the acquirement of the arts and sciences

by the establishment of a library * * * and a reading room, lectures and cabinets.'

It is open to all without distinction, and all its income is devoted exclusively to said purposes.

That this association, in its objects and purposes, is 'an institution of purely public charity' * * * is, we think settled by the cases of *Gerke vs. Purcell, 25 Ohio St. 229; Cincinnati College vs. State,* 19 *Ohio* 111; and *Humphreys vs. Little Sisters of the Poor, 29* Ohio St. 201."

The cases thus relied upon establish the following points:

In *Cincinnati College vs. State,* the court had before it a statute exempting "all buildings belonging to scientific, literary or benevolent societies." The statute was passed in 1848, prior to the adoption of the constitution of 1851, and the case arose and was decided before that constitution was adopted. In the case the court really did not therefore have to construe the phrase "institutions of purely public charity;" but in *Library Association vs. Pelton* it was apparently assumed that the latter phrase included "scientific, literary or benevolent societies" when open to the membership of all upon the same terms.

In *Gerke vs. Purcell* the following language appears in the syllabus:

"2. In section 2, article 12, of the constitution, which authorizes the general assembly to exempt from taxation the classes of property therein described, the word 'public' is used, in some instances, to describe the ownership of the property, in others as merely descriptive of the use to which the property is applied. As applied to schoolhouses, it is used in the former sense; and by 'public schoolhouses' is meant such as belong to the public, and are designed for schools established and conducted under public authority.

3. The fact that the use of property is free, is not a necessary element in determining whether the use is public or not. If the use is of such a nature as concerns the public, and the right to its enjoyment is open to the public upon equal terms, the use will be public, whether compensation be exacted or not. Whether the use is free or not, becomes material only where some other element is involved than that of its public character, as, for instance, whether the use is charitable as well as public.

4. A charity, in a legal sense, includes not only gifts for the benefit of the poor, but endowments for the advancement of learning, or institutions for the encouragement of science and art, without any particular reference to the poor.

5. Schools established by private donations, and which are carried on for the benefit of the public, and not with a view to profit, are 'institutions of purely public charity' within the meaning of the provision of the constitution, which authorizes such institutions to be exempt from taxation.

6. The constitution, in directing the levying of taxes and in authorizing exemptions from taxation, has reference to property, and the uses to which it is applied; and where property is appropriated to the support of a charity which is purely public, the legislature may exempt it from taxation, without reference to the manner in which the title is held, and without regard to the form or character of the organization adopted to administer the charity.

8. In the description of the property exempted from taxation in section 3 of the tax law, as amended March 21, 1864, the word public, as therein applied to schoolhouses, colleges, academies, and other institu-

tions of learning, is descriptive of the uses to which the property is devoted. The schools and instruction which the property is used to support must be for the benefit of the public; and when private property is thus appropriated without any view to profit, it constitutes a 'purely public charity' within the meaning of the constitutional provision."

As is apparent from the syllabus itself, the question involved was as to whether or not parochial schools, the legal ownership of the property belonging to which was in the archbishop of the appropriate diocese and the use of which was available to the children of the parents of all denominations upon substantially gratuitous terms, were exempt from taxation. The opinion, per White, J., contains a careful analysis of the meaning of the two words "public" and "charity." As the syllabus indicates, he declared that the word "public" did not refer in this context, either in the constitution or in the statutes, to the ownership but rather to the use of the property. Respecting the meaning of the word "charity" he has the following to say (p. 245 et seq.):

> "The meaning of the word 'charity,' in its legal sense, is different from the signification which it ordinarily bears. In its legal sense it includes not only gifts for the benefit of the poor, but endowments for the advancement of learning, or institutions for the encouragement of science and art, and, it is said, for any other useful and public purpose. Lord Camden described a charity as a 'gift to a general public use, which extends to the rich as well as the poor.' * * *
>
> The maintenance of a school is a charity. * * * and in the case of the *American Academy vs. Harvard College,* 12 Gray, 594, it was said to be well established, that 'a gift designed to promote the public good, by the encouragement of learning, science, and the useful arts, without any particular reference to the poor, is a charity.'"

Then coming to consider the two words as used together in a single term "institution of purely public charity" he says:

> "For the purpose of determining the public nature of the charity, it is not material through what particular forms the charity may be administered. If it is established and maintained for the use and benefit of the public, and so conducted that the public can make it available, this is all that is required.
>
> But is it competent for the legislature to treat the buildings and lands connected therewith, used for carrying on the schools, as institutions, or as property belonging to institutions? The term 'institution' is sometimes used as descriptive of the establishment or place; * * * at other times it is used to designate the organized body. It is used in both senses in the third section of the tax law brought under consideration in this case. * * * In the sixth clause of the section it is used in the latter sense, and the property referred to is described as belonging to the institutions named. * * *
>
> Laying out of view the nature of the organization by which the charity is administered, the property in question stands on the same footing as the property devoted to the support of colleges and other higher institutions of learning not founded by the state. All of these institutions stand, as respects their claim to exemption from taxation under the constitution, on the ground of their being institutions of purely public charity.

> If property is appropriated to the support of a charity which is purely public, we see no good reason why the legislature may not exempt it from taxation, without reference to the manner in which the legal title is held, and without regard to the form or character of the organization adopted to administer the charity. To illustrate: If the organization by which these schools are maintained were incorporated, no question could be made as to the existence of authority to exempt their property from taxation. Now, if the property is appropriated to the same public uses, and the same ends are accomplished, we see no constitutional obstacle to prevent the legislature from exempting it as fully without incorporation as with it; * * *
>
> But admitting the constitutional power of the legislature to make the exemption, the next question is, whether the exemption is authorized by the statute."

But in *Humphries vs. Little Sisters of the Poor,* supra, the following proposition is laid down in the syllabus:

> "2. The word 'institutions,' in the sixth clause of sec. 3 of the tax law, is used to designate the corporation or other organized body instituted to administer the charity, and the real estate described as belonging to such institutions has reference to property owned by them; and to entitle such institutions to hold the property exempt from taxation, they must not only own it, but it must be so used as to fulfill the requirements of the statute."

This case raised squarely the question as to the meaning of the phrase "property *belonging to* institutions of purely public charity." In the opinion, per White, J., the following language appears (pp. 206-207):

> "It seems clear to us that the word 'institutions' in this clause is used to designate the corporation or other organized body instituted to administer the charity, and, that the real estate described as belonging to such institutions has reference to property owned by the institutions; and that to entitle them to hold the property exempt from taxation, they must not only own it, but it must be so used as to fulfill the requirements of the statute.
>
> That such is the meaning of the word 'institutions' is manifest from the last part of the sentence, which exempts moneys and credits. * * *
>
> The word 'belonging' is used in the same sense throughout the clause, and, as there used, means ownership.
>
> We do not say that the legal title must be vested in the institution. If the legal title were held in trust for the sole use and benefit of the institution, the property, in such case, would be regarded as belonging to the institution."

There are other cases on the same general points, such as *Watterson vs. Halliday,* 77 O. S. 150; and *Little vs. Theological Seminary,* 72 O. S. 417. The former of these two cases deserves some consideration because of its apparent modification of the doctrine of the last two cases cited. It was held in that case that the Roman Catholic church was, as such, not an "institution of purely public charity" in its primary sense. The legal result of the distinctions to be inferred from this and the other cases is that the property the legal title of which is in the bishop

or archbishop is to be regarded as vested in substantially different beneficial ownerships when it is managed and conducted for purely church purposes, on the one hand, and when it is managed and conducted for the purposes of schools open to the public, on the other hand; for the court did not overrule or in any way modify either *Gerke vs. Purcell* or *Humphries vs. Little Sisters of the Poor.*

These cases were all elaborately reviewed and applied to section 5353 General Code in its present form in *Myers vs. Rose Institute*, 92 O. S. 238, and *Rose Institute vs. Myers*, 92 O. S. 252. In the latter of these two cases the language which I have quoted from *Humphries vs. Little Sisters of the Poor* was quoted as an epitome of the settled policy of the state (per Nichols, C. J., p. 270):

It is believed, then, that the foregoing cases establish the following principle:

In order that real estate may be exempt from taxation under section 5353 General Code, two things must concur, viz.:

> (1) Ownership in an institution, i. e., organization of some kind as distinguished from an individual.
>
> (2) Exclusive use for a purpose charitable in the sense that it aims to alleviate human suffering or meet great public needs, such as the advancement of science or useful arts, and is carried on without gain to the members of the organization; and public in the sense that its benefits are available to all without distinction and upon the same reasonable terms.

But in connection with the first of these propositions it is to be observed that the place where the legal title is found is immaterial. The ownership that is requisite is the equitable or beneficial use, and not the legal title.

It remains for me to apply these principles to property in the state familiarly known as "fair grounds."

In the first place, the legal title to this property, as is intimated, may be either in an agricultural society organized under sections 9880 et seq. of the General Code or, under certain circumstances and conditions, in the county (see sections 9887, 9888, 9894, 9895, 9898, 9900, 9901, 9906, etc.). But regardless of the location of the legal title, it is clear that so long as fairs are held the beneficial use of fair ground property is in the organization known as the "county agricultural society." The following section brings this out:

> "Sec. 9906. When the title to grounds and improvements occupied by agricultural societies is in the county commissioners, the control and management of such lands and improvements shall be vested in the board of directors of such society so long as they are occupied and used by it for holding agricultural fairs. * * *"

In the light of this section I reaffirm the conclusion expressed earlier in this opinion to the effect that the ownership of the legal title of fair grounds by the county is of no legal significance in connection with the question now under consideration. I then held that it does not make exempt from taxation property which might otherwise not be exempt; I now hold that if it should appear that the property would be exempt from taxation if "belonging to" the agricultural society as an "institution of public charity only," the ownership of the legal title by the county would not deprive it of that exemption, because in the sense in which the word "belonging" is used in the statute as interpreted by our supreme court the ownership is, nevertheless, in the society.

Of course, I do not need to quote the statutes to show that county agricultural societies are "institutions," that is, voluntary organizations as distinguished from

mere collections of individuals. There is therefore left in your inquiry the single question as to whether or not the character of such societies and the use which they make of such real estate are such as to constitute the latter "property belonging to institutions of public charity only."

At the outset let me state again that, *Dunn vs. Agricultural Society* to the contrary notwithstanding, I am satisfied that the better view is that agricultural societies are not corporations for the pecuniary benefit of their members, and that the better reasoning supports the view to this effect expressed in *Commissioners vs. Brown,* supra. For what purpose, then, do agricultural societies conduct their enterprises? This question is answered, I think, by the provisions of sections 9881, 9882 and 9884 of the General Code, which provide as follows:

> "Sec. 9881. The several county or district societies formed under the provisions of the preceding section, annually shall offer and award premiums for the improvement of soils, tillage, crops, manures, implements, stock, articles of domestic industry, and such other articles, productions, and improvements, as they deem proper, and may perform all acts they deem best calculated to promote the agricultural and household manufacturing interests of the district and of the state. They shall regulate the amount of premiums, and their different grades, so that small as well as large farmers may have an opportunity to compete therefor. In making their awards special reference shall be had to the profits which accrue, or are likely to accrue from the improved mode of raising the crop, or of improving the soil, or stock, or of the fabrication of the articles thus offered, so that the premium will be given for the most economical mode of improvement."
>
> "Sec. 9882. Persons offering to compete for premiums in improved modes of tillage, or the production of crops or other articles, before such premium is adjudged, shall deliver to the awarding committee a full and correct statement of the process of the mode of tillage or production, and the expense and value thereof, with a view to showing accurately the profits derived or expected to be derived therefrom."
>
> "Sec. 9884. County and district societies annually shall publish a list of awards, and an abstract of the treasurer's account, in a newspaper of the district, and make a report of their proceedings during the year, and a synopsis of the awards for improvement in agriculture and household manufactures, together with an abstract of the several descriptions of these improvements; also make a report of the condition of agriculture in their county or district, which shall be made in accordance with the rules and regulations of the state board of agriculture, and be forwarded to the state board at its annual meeting in January of each year. No subsequent payment shall be made from the county treasury unless a certificate be presented to the auditor, from the president of the state board, showing that such reports have been made."

Your question assumes that these statutes have been complied with. It is clear to me that the promotion of the "agricultural and household manufacturing interests of the district and of the state" constitute the sole object of the activities of these societies. It is possibly true that in the course of years abuses may have grown up and that many activities may have been carried on in connection with county agricultural fairs that have no real place in such enterprises; but I would hesitate to take cognizance of such conditions to the extent of holding as a matter of law that they constituted such a perversion of the objects of such so-

cieties as to deprive their activities of the essential character which they are required to have and the legal benefits that accrue therefrom. I would be particularly hesitant to take such a stand in view of the fact that section 9880 of the General Code provides, in effect, that the president of the state board of agriculture shall pass upon this very question in issuing certain certificates and orders which he is authorized and required to issue by that section.

I feel, therefore, that I must assume, as to all agricultural societies which have received the sanction of the state, that they are engaged in the promotion of agricultural and domestic manufacturing, with a view not only to benefiting such interests in the district or county, but also in the state at large, through reports which they are required to make to the state board of agriculture. In my opinion, these activities constitute the promotion of the agricultural and domestic manufacturing sciences and to that extent bring the activities of such societies within the broad definition of the word "charity" which I have quoted from *Gerke vs. Purcell,* supra.

The one remaining question is as to whether the notorious fact that an admission fee is charged by these associations in connection with all fairs conducted by them, not merely of those who are able to pay but also of the poor if they would receive admittance, is sufficient to deprive the activities of such societies of a purely public character. It will be remembered that whatever may be the income of such societies it cannot be distributed as dividends to its members; and that all accumulations derived from the successful prosecution of its enterprises are to be devoted to the making of necessary improvements and the offering of attractive premiums, etc. The public are admitted without discrimination upon the payment of the proper fee. As pointed out in *Gerke vs. Purcell,* a thing does not lose its character as a charity in the broad sense because it is administered without reference to the needs of the poor, as such. On the whole, I am of the opinion that the charging of a reasonable admission fee of all who enter is of itself a fact of no significance in this connection.

Davis vs. Camp Meeting Association, 57 O. S. 257.

For all the foregoing reasons, I arrive at the conclusion that property belonging to agricultural societies which comply with the laws of this state, or the legal title to which is vested in the county for the use of such societies so long as they comply with such laws, is exempt from taxation as "property belonging to institutions of public charity only."

As to the application of section 9880-1 G. C. referred to by you, I refer you to the enclosed copy of opinion addressed to the secretary of the board of agriculture under date of January 30, 1918 (No. 979), and to an opinion addressed to Hon. Walter Beck, prosecuting attorney, Lisbon, Ohio, under date of December 7, 1917, and found in Opinions of Attorney-General for 1917, Volume III, page 2252. Whatever the phrase "independent agricultural society" as used in section 9880-1 G. C. may mean, the section can have no constitutional application to a society conducted for profit. It follows that if there be any such societies to which it can apply such societies are in substantially the same situation as those which are not "independent."

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1280.

JUVENILE COURT—DELINQUENCY, ETC., CASES—JURISDICTION WHEN ACTS COMMITTED OUTSIDE OF COUNTY.

The juvenile court has jurisdiction over and with respect to all deliquent, neglected and dependent minors within the county, and the fact that some or all of the acts of misconduct upon which a delinquency charge is based were committed outside of the county does not rob the court of its jurisdiction to determine the status of the child and proceed accordingly.

COLUMBUS, OHIO, June 17, 1918.

HON. HARRY M. RANKIN, *Prosecuting Attorney, Washington C. H., Ohio.*

DEAR SIR:—I have your letter of May 8, 1918, as follows:

> "A party from Ross county appeared in the probate court of this county of Fayette, seeking to file charges against two minors under the age of eighteen years, in such court and in the juvenile division thereof. These minors are residents of Fayette county and a few days ago entered a school house in Ross county and destroyed considerable property therein.
>
> Has the juvenile court of this county jurisdiction to entertain a complaint and issue a citation requiring them to appear in such court regarding the offense committed in Ross county?"

Section 1642 of the General Code reads:

> "Such courts of common pleas, probate courts, insolvency courts and superior courts within the provisions of this chapter shall have jurisdiction over and with respect to delinquent, neglected and dependent minors, under the age of eighteen years, not inmates of a state institution, or any institution incorporated under the laws of the state for the care and correction of delinquent neglected and dependent children, and their parents, guardians, or any person, persons, corporation or agent of a corporation, responsible for, or guilty of causing, encouraging, aiding, abetting or contributing toward the delinquency, neglect or dependency of such minor, and such courts shall have jurisdiction to hear and determine any charge or prosecution against any person, persons, corporations, or their agents, for the commission of any misdemeanor involving the care, protection, education or comfort of any such minor under the age of eighteen years."

As has been repeatedly noted in opinions of this department and of the courts, there is a vast difference between what is known as juvenile delinquency in this state and crime. There is never a conviction of delinquency—simply a finding by the court that the child is a delinquent. The child is not accused of any crime and the procedure determining whether or not the child is a delinquent does not move along the same lines as the procedure in criminal cases.

In the matter of Frank Januszewski, 10 O. L. Rep. 151, the second branch of the syllabus reads:

> "Delinquency has not been declared a crime in Ohio, and the Ohio juvenile act is neither criminal nor penal in its nature, but is an admin-

istrative police regulation of a corrective character; and while, as in the case at bar, the commission of a crime may set the machinery of the juvenile court in motion, the accused was not tried in that court for his crime, but for incorrigibility."

At page 156 the court say:

"The purpose of the statute is to save minors under the age of seventeen years from prosecution and conviction on charges of misdemeanors and crimes, and to relieve them from the consequent stigma attaching thereto; to guard and protect them against themselves and evil-minded persons surrounding them; to protect and train them physically, mentally and morally. It seeks to benefit not only the child, but the community also, by surrounding the child with better and more elevating influences and training it in all that counts for good citizenship and usefulness as a member of society. Under it, the state, which through its appropriate organs, is the guardian of the children within its borders (Van Walters vs. Board, 132 Ind. 569) assumes the custody of the child, imposes wholesome restraints and performs parental duties and at a time when the child is not entitled, either by the laws of nature or of the state, to absolute freedom, but is subjected to the restraint and custody of a natural or legally constituted guardian to whom it owes obedience and subjection. It is of the same nature as statutes which authorize compulsory education of children, the binding of them out during minority, the appointment of guardians and trustees to take charge of the property of those who are incapable of managing their own affairs, the confinement of the insane, and the like. The welfare of society requires and justifies such enactments. The statute is neither criminal nor penal in its nature, but an administrative police regulation (State vs. Marmouget). A consideration of the acts enumerated which respectively constitute delinquency precludes the thought that it was the legislative intent that they or any of them, when committed by infants within the specified age, should for correctional purposes be treated as a crime—such purposes, as regards such minors, being the only ones contemplated by the statute. The intent to disassociate juvenile from criminal cases is evidenced by the provision of section 1649 that the former shall not be heard, if it can be avoided, in a room used for the trial of the latter, and by the prohibition against the detention of any delinquent child in the county jail pending the disposition of its case (section 1652)."

And again at page 158 the court say:

"The legislature of Ohio has not declared delinquency, as defined by the juvenile act, to be a crime. The state's highest judicial tribunal, whenever called upon to review proceedings had under laws akin to those authorized by the act now in question, has declared such laws to be special, statutory, corrective but not criminal, and constitutional, and indictment before a hearing thereunder not necessary. The juvenile act, in its omission to direct that a hearing should be preceded by presentment or indictment, does not conflict with the constitution of the United States."

At page 159 it is said:

"The commission of a crime may set the machinery of the juvenile court in motion, but not to try the delinquent minor for his crime. For

that, he must be tried in another forum, after indictment, and by a jury."

It will be noted that section 1642, in conferring jurisdiction upon the juvenile court, does not give it jurisdiction over offenses committed by juveniles or over the acts constituting delinquency, but confers upon such court jurisdiction "over and with respect to delinquent, neglected and dependent minors, under the age of eighteen years." The language used by the legislature in this statute again emphasizes the distinction between delinquency and crime. Criminal jurisdiction is always conferred on the courts through the offense and when it is to be determined whether or not a court has jurisdiction of the subject-matter in a criminal proceeding, the test is whether or not it has jurisdiction not over any certain person or persons, but whether it has jurisdiction over the offense committed. In the juvenile statute the delinquent children of the county are placed within the jurisdiction of the court for the purposes of discipline and protection and if after a hearing the court finds that the child within its jurisdiction is delinquent, it is the duty of the court to assume control over the child. The thing to determine is the child's status—whether or not it is delinquent—and when the child is before the court the only important thing for the court to determine is whether the child is really in need of the court's protection. It makes no difference whether the facts at the hearing disclose that some of the acts of misconduct of the child were committed in an adjoining county. The child is not being tried for these things and it is not a question of whether they were committed, but whether or not in fact they were committed. If they were, they tend to establish the delinquency of the child. If they were not, the court's protection is unnecessary. The important question for the court, when the court stands before it, is to determine whether the child is good or bad, whether it needs correction or whether it does not, and the locality in which any acts of misconduct may have been committed by the child can have no bearing upon the question.

I am, therefore, of the opinion that the juvenile court has jurisdiction over and with respect to all the delinquent, neglected and dependent minors within the county, and that the fact that some or all of the acts of misconduct upon which a delinquency charge is based were committed outside of the county does not rob the court of its jurisdiction to determine the status of the child and proceed accordingly.

I would advise you, therefore, that in the case submitted the juvenile court of Fayette county has jurisdiction over the minor residents of Fayette county referred to, and that court may, if it sees fit in determining the status of the juveniles, hear evidence of whatever misconduct these children are guilty of when they were in Ross county.

Very truly yours,

JOSEPH MCGHEE,
Attorney-General.

1281.

APPROVAL OF BOND ISSUE OF JACKSON TOWNSHIP RURAL SCHOOL DISTRICT, ASHLAND COUNTY—$22,000.00.

COLUMBUS, OHIO, June 17, 1918.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In re:—Bonds of Jackson township rural school district, Ashland county, Ohio, in the sum of $22,000, for the purpose of erecting and equipping a school building therein.

I have carefully examined the corrected transcript of the proceedings of the board of education and other officers of Jackson township rural school district, Ashland county, Ohio, relating to the above noted issue of bonds. I find said proceedings to be in conformity to the provisions of the General Code of Ohio relating to bond issues of this kind and I am, therefore, of the opinion that properly prepared bonds covering the above issue will, when the same are properly executed and delivered, constitute valid and binding obligations of said school district to be paid according to the terms thereof.

No bond form was submitted with and as a part of said transcript and I am, therefore, holding same until such bond form is submitted and approved.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1282.

ROADS AND HIGHWAYS—WHEN INTERURBAN RAILWAY MAY BE ASSESSED FOR PART OF COST OF IMPROVEMENT—DUTY OF TOWNSHIP TRUSTEES.

1. *A strip of land owned or occupied by an interurban railway company and lying along a public highway may be assessed for a part of the cost and expense of improving said highway, the assessment to conform to the benefits received.*

2. *The township trustees are authorized to make the assessment and they in good faith must decide on the amount that shall be assessed, in any case not to exceed thirty-three per cent of the value of the property for the purposes of taxation.*

COLUMBUS, OHIO, June 17, 1918.

HON. C. C. CRABBE, *Prosecuting Attorney, London, Ohio.*

DEAR SIR:—I have a communication addressed to you by the Ohio Electric Railway Company. You request my opinion on the matters therein set out. Said communication contains the following:

> "The specific question which is to be presented to the attorney-general, together with the facts upon which the inquiry is based, would be substantially as follows:
>
> The Urbana-London road is to be improved by the state, county, township and property owners acting jointly. Through Union township, on the north side of the road, the Ohio Electric has a narrow strip of right of way, in which it has rights for railway purposes, with reverter in the event of the discontinuance of such use. The company has been assessed $470.14, which is at the rate of $25.00 an acre, an assessment much more than the assessment per acre of abutting farm lands.
>
> The claim is made by the Ohio Electric railway that the improvement of the road is of no benefit to it, but, on the contrary, the furnishing of increased facilities for other transportation is a distinct detriment and will result in loss of earnings.
>
> The statute provides that assessments should be made in accordance with the benefits, and that such assessment may be divided between abutting property owners and the railway occupying a strip along the pike; both classes being considered abutters.

On the basis of the above facts, can an electric interurban railway right of way be assessed on the basis of abutters owning small residential strips, where there is no showing of any benefit other than such benefit as might be incident to any farm land in the vicinity?'

Upon inquiry from the state highway commissioner I learn that the contract for the construction of the road in question was entered into prior to June 28, 1917, and hence the procedure in connection with said improvement would be controlled by the provisions of the Cass highway act, rather than by the White-Mulcahy law which is now in force.

Section 1215 G. C. reads as follows:

"Where property is separated from a road improvement by a canal, street railway, steam railway or in any other similar manner, such property shall be regarded for the purposes of assessment under the provisions of this chapter (G. C. Secs. 1178 to 1231-3) as property bounding and abutting upon said improvement, and both such strip of land owned or occupied by such street railway and the land lying back thereof shall be assessed on account of said improvement as provided herein."

An interurban railway is not specifically mentioned in the section. The words "canal," "street railway" and "steam railway" are used therein. But there is also found in this section the phrase "in any other smiliar manner," and apparently an interurban railway would come under this phrase.

Under said section the strip of land and the property lying immediately back of said strip, which is separated by the canal, street railway, steam railway, etc., from the road improvement, are subject to being assessed for a portion of the cost and expense of a road improvement. It is not essential that the railroad company should own the land in fee simple upon which its road is built, because this section provides that "both such strip of land owned or *occupied*" shall be assessed on account of said improvement. But provision is made therein that the assessment should be made "as provided herein;" that is, as provided in the chapter of which the section is a part. So it will be necessary for us to look further to note the conditions under which an assessment may be made.

Section 1211 G. C. provided in the Cass act:

"Upon completion of the improvement the chief highway engineer shall immediately ascertain the cost and expense thereof, and apportion the same to the state, county, township or townships and abutting property. He shall certify the total cost and expense of the improvement, and his apportionment thereof to the county commissioners, and the trustees of the township or townships interested therein."

Section 1214 G. C. provided in part as follows:

"* * * Ten per cent of the cost and expense of improvement, excepting therefrom the cost and expense of bridges and culverts, shall be a charge upon the property abutting on the improvement, provided the total amount assessed against any owner of abutting property shall not exceed thirty-three per cent of the valuation of such abutting property for the purposes of taxation. * * *"

Hence under this provision in no case shall this assessment exceed thirty-three per cent of the valuation of the abutting property for the purposes of taxation,

although under section 1215 G. C. the strip of land owned or occupied by an inter-urban railroad company shall be considered as abutting upon a road being improved and shall be liable for an assessment to take care of a part of the cost and expense of the improvement.

Section 1214 G. C. further provided as follows:

> "* * * The township trustees shall apportion the amount to be paid by the owners of the abutting property according to the benefits accruing to the owners of the land so located. At least ten days' notice of the time and place of making such apportionment shall be given to the persons affected thereby, and an opportunity given them to be heard. The township trustees shall cause a notice to be served upon abutting property owners, stating the time and place for hearing on the apportionment and the amount to be paid by each abutting property owner. In case any of the abutting property owners are non-residents, such notice shall be given by one publication in some newspaper of general circulation in the county."
> * * * *

This gives the assessed property owners notice of the amount assessed against them and an opportunity to be heard if they have objections to the assessment as it was made by the township trustees, and while there is no direct provision in this section to this effect, yet it is my opinion that the township trustees could modify or change the assessment as it was first made by them; otherwise the notice given to the assessed property owners of the apportionment would be of no force or effect whatever.

Section 1216 G. C. provided:

> "The township trustees shall certify the assessments so made to the county auditor, who shall place them upon the tax duplicate against the several properties benefited as shown by said assessment list. The county treasurer shall collect such assessments in the same manner as other taxes are collected. The township trustees shall pay to the county the portion of the cost and expense apportioned to the township, in the same manner as other claims against the township are paid."

From the sections above quoted it is evident that the Ohio Electric Railway Company may be assessed for a part of the cost and expense of the improvement of the public highway which lies parallel to the strip of land which said electric railway company owns or occupies; that the amount assessed against said railway company shall be according to the benefits accruing to said railway company from the improvement, but cannot exceed thirty-three per cent of the valuation of such property for the purposes of taxation; and that the township trustees are given authority in law to apportion the amount to be paid by the owners of the abutting property and assess against each piece of property the part to be paid by the owner of said property.

Said railway company raises the question that it will not be benefited in the least by the improvement, but on the other hand said improvement will be detrimental to the company, in that it will have a tendency to take freight and traffic away from said company. The apportionment of the cost and expense to be borne by abutting property owners and the making of the assessment against each piece of property of that amount which is to be borne by the owner thereof rest entirely with the township trustees. They are necessarily the judges as to the benefits which any particular piece of property will receive by the improvement and what amount ought to be assessed against each particular piece of property. There

is no provision made in the statute for an appeal from the decision of the township trustees and unless they have not acted honestly and in good faith, but have grossly abused the power vested in them, it is my opinion that an abutting property owner would have no relief as against the assessment made by the township trustees.

So it is clear that the question as to whether a particular piece of property will be benefited by the improvement of a public highway is one of fact, and not of law to be decided by this department. Very truly yours,

JOSEPH MCGHEE,
Attorney-General.

1283.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN HIGHLAND, LAWRENCE, SCIOTO AND TUSCARAWAS COUNTIES.

COLUMBUS, OHIO, June 17, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your letter of June 13, in which you enclose for my approval final resolutions for the following named improvements:

Milford-Hillsboro Road—I. C. H. No. 9, Sec. "L," Highland county (in duplicate).
Hillsboro-Chillicothe Road—I. C. H. No. 258, Sec. "A," Highland county (in duplicate).
Ohio River Road—I. C. H. No. 7, Sec. "J," Lawrence county.
Ohio River Road—I. C. H. No. 7, Sec. "O," Scioto county.
Ohio River Road—I. C. H. No. 7, Sec. "P-1," Scioto county.
Millersburg-Canal Dover Road—I. C. H. No. 341, Sec. "O-1," Tuscarawas county.

I have carefully examined said resolutions, find them correct in form and legal, and am therefore returning same to you with my approval endorsed thereon in accordance with section 1218 G. C.

In passing I will call attention to what is apparently a typographical error in the final resolution covering the improvement of the Milford-Hillsboro road, I. C. H. No. 9, Sec. "L," Highland county, wherein it is stated that the application of the board to the state highway department was under date of November 5, 1918.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1284.

APPROVAL OF AMENDMENT OF ORDER OF STATE BOARD OF HEALTH RELATIVE TO THE CORRECTION OF THE POLLUTION OF COUNTY INFIRMARY LATERAL DITCH BY CITY OF AKRON.

COLUMBUS, OHIO, June 17, 1918.

HON. JAMES M. COX, *Governor of Ohio, Columbus, Ohio.*

DEAR SIR:—Under date of June 8, 1918, Dr. A. W. Freeman, commissioner of health, submitted to me the enclosed memorandum of the action of the com-

missioner of health to the public health council, amending the order of the state board of health under date of February 17, 1916, to the city of Akron, the amendment extending to April 25, 1920, the time within which the city of Akron shall correct the pollution of county infirmary lateral ditch.

Having examined the memorandum and finding that the extension is granted at the request of the city council of Akron, I have this day approved the same and transmit the same to you for your approval. Should you approve the action taken, kindly return the papers to the state department of health.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1285.

DISAPPROVAL OF BOND ISSUE OF PHILLIPSBURG VILLAGE SCHOOL DISTRICT, MONTGOMERY COUNTY—$50,000.00.

COLUMBUS, OHIO, June 17, 1918.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

In re: Bonds of Phillipsburg village school district, Montgomery county, Ohio, in the sum of $50,000.00, for the purpose of purchasing a site for, erecting and equipping a school building in said school district and for the purpose of purchasing school wagons to convey the pupils to and from said school in said village of Phillipsburg.

I am herewith returning to you, without approval, the transcript of the proceedings of the board of education of Phillipsburg village school district relating to the above bond issue. The board of education of this school district has provided for the issue of these bonds in the aggregate sum of $50,000.00 pursuant to an affirmative vote of the electors of the school district on a submission of the question of said bond issue to said electors by the board of education under the provisions of section 7625 General Code. The resolution of the board of education, in so far as any question arising on the same is concerned, provides as follows:

"WHEREAS, The board of education of Phillipsburg village school district, Montgomery county, Ohio, deems it necessary for the proper accommodation of the schools of said district to purchase ground, erect a school building and equip the same, and to purchase school wagons to convey the pupils to and from said school in said village of Phillipsburg, and the funds at the disposal of said board are not sufficient to accomplish that purpose and that a bond issue is necessary, and said board having already estimated that the probable amount of money required for said purpose will be fifty thousand dollars ($50,000.00); be it

Resolved, That the question of issuing bonds for the purpose of purchasing ground, erecting and equipping a school building and purchasing school wagons for the purpose of conveying the pupils to and from said school district, to the amount of said estimate, to wit, of fifty thousand dollars ($50,000.00), shall be submitted to the electors of said village school district in the manner provided by law for school elections."

The resolution providing for the issue of the bonds pursuant to the vote of the electors is identical in purpose with that indicated in the resolution adopted by the board submitting the bond issue proposition to the vote of the electors of the school district. The bond issue proposition was submitted to the electors as a single proposition for the issue of bonds, in the specified amount, covering the purpose of purchasing school wagons for the transportation of pupils as well as for the purpose of purchasing a site for, erecting and equipping a school building; and inasmuch as there is nothing in the provisions of sections 7625 of the General Code, authorizing the board of education to issue bonds for the purpose of obtaining money to purchase vehicles for the transportation of pupils, and as no means are available for ascertaining what portion of said bond issue was voted and issued for such unauthorized purpose, it necessarily follows that the whole bond issue proposition is illegal by reason of the inclusion of said unauthorized purpose in the purposes for which the bonds were voted and issued.

You will perhaps recall that the question above discussed was involved in the consideration of the validity of the bonds of Belle Center village school district, Logan county, Ohio, which were disapproved by this department for the reasons above stated in Opinion No. 464, under date of July 23, 1917. In the opinion above referred to I followed the decision of the court of common pleas of Crawford county, Ohio, in the case of *Shell vs. Bevier et al.*, which was decided very shortly before said opinion was written.

As before noted herein, the bonds here in question are to be issued by the board of education pursuant to a vote of the electors of Phillipsburg village school district under the authority of section 7625 General Code. It has been repeatedly held by this department that a board of education is not authorized to submit the question of a proposed bond issue under the authority of section 7625 General Code unless the board affirmatively finds that the funds at the disposal of the board, or which can be raised under section 7629 General Code, are not sufficient for the purpose for which the bonds are to be issued. The resolution of the board of education in this case shows that it made a finding that the funds at the disposal of the board were not sufficient for the purpose that the board had in mind, but under the provisions of section 7625 General Code this is not sufficient; the board should have further determined that the funds which it could raise under the provisions of section 7629 General Code would not be sufficient for such purpose. The transcript fails to show that any such determination was made by the board in the submission of the question of this proposed bond issue to the electors of the school district, and for this reason the proposed bond issue is illegal.

I note some further defects in the transcript of the proceedings relating to this bond issue:

There is nothing in the transcript to show that the notice of the election on said bond issue, a copy of which notice is set out in the transcript, was ever published in the manner required by section 4839 General Code.

Again, there is a fatal defect in the provisions of the resolution of the board of education under date of May 21, 1918, providing for the maturity of some of the bonds covering this issue. With respect to this said resolution provides that the bonds covering said issue shall be numbered 1 to 47, inclusive, and makes specific provision with respect to the maturities of the first eleven bonds of said series. Said resolution further provides as follows:

> "Bonds Nos. 12 to 47 for one thousand dollars ($1,000.00) each to mature as follows:
>
> The odd numbered bonds from 13 to 47, inclusive, shall mature on

March 1st of the years 1930 to 1946, respectively, and the even numbered bonds from 12 to 46, inclusive, shall mature on September 1st of the years 1930 to 1946, respectively."

Without an extended discussion on this point, it may be observed that if the resolution had provided that said bonds should mature in the years 1930 to *1947*, respectively, adequate provision would have been made for the maturity of said bonds; but inasmuch as the resolution does not indicate any intention that more than two of said bonds from 12 to 47, inclusive, shall mature in any one year, sufficient time has not been provided for the maturity of said bonds.

Said transcript is further defective in not making any statement with respect to the fiscal condition of said school district. This is an objection, however, which could probably be obviated on further information, but inasmuch as the defects first noted herein are, in my opinion, wholly fatal to the validity of said proposed bond issue, I feel that I have no discretion to do otherwise than to disapprove said bonds and advise you not to purchase same.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1286.

DISAPPROVAL OF BOND ISSUE OF NEW CONCORD VILLAGE SCHOOL DISTRICT—$10,000.00.

COLUMBUS, OHIO, June 17, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In re: Bonds of New Concord village school district in the sum of $10,000.00, for the purpose of repairing and furnishing school house in said district.

I am herewith returning to you, without approval, transcript of the proceedings of the board of education of New Concord village school district, relating to the above bond issue. The issue of these bonds is provided for by resolution adopted at a meeting of the board of education on May 15, 1918, pursuant to the affirmative vote of more than a majority of the electors voting on said proposition at a special election held August 17, 1917.

With respect to the payment of the interest on said bonds, said resolution provides as follows:

"They shall bear interest at the rate of five per cent from date of sale, payable semi-annually on the 5th of March and the 5th of September thereafter, except said first payment of interest. This payment shall include all interest due on said bonds until that date, which date is when said first bond is due, and the bonds shall be paid as follows:

One bond in the sum of $500.00 to be due and payable on the 5th day of March, 1920; * * *."

In other words, by the provisions of this resolution, the payment of the first installment of interest on the bonds therein provided for is deferred until March

5, 1920, when the first bond becomes due. This provision is illegal for the reason that it is in conflict with the provisions of section 7627 G. C., which provides that the interest on bonds of this kind shall be paid semi-annually.

This department, in approving school bonds purchased by the industrial commission of Ohio, has permitted the first payment of interest on such bonds to be deferred past a period of six months from the date of the bonds, to such time as the board of education may be able to obtain the first proceeds of tax levies for interest and sinking fund purposes on said bonds. I do not think there is any legal warrant for permitting the first payment of interest on bonds of this kind to be deferred beyond this period.

After the adoption of the resolution providing for the issue of these bonds, it became the duty of the board of education of this school district, in making up its budget under the provisions of section 5649-3a G. C., to make a proper and sufficient levy for interest and sinking fund purposes with respect to these bonds, the proceeds of which would be available to the extent of one-half thereof on or about March 1, 1919. Said board of education, in providing for this issue of bonds, was not, therefore, authorized to defer the first payment of interest on said bonds for any substantial period of time beyond said date, and for the reason above stated this issue of bonds is disapproved.

On consideration of the proceedings set out in said transcript, some doubt arises in my mind with respect to the legality of the election at which the proposition of said bond issue was approved by the electors of the school district. As to this question the transcript shows that on July 9, 1917, the board of education adopted a resolution in proper form, providing for the submission of said bond issue proposition to the electors of the school district, and fixed the date of the election on said proposition for August 2, 1917.

Thereafter, proper and legal publication of the notice of the election on said date was published, but it appears that by reason of some misunderstanding between the board of elections and the clerk of the school district, election supplies for the election to be held on said date were not furnished, with the result that no election on said date was held.

Thereupon, the board of education, at a meeting held on August 2, 1917, adopted a resolution in the following terms:

> "*Resolved*, That inasmuch as the board of elections failed to prepare election supplies for our bond issue election to have been held on August 2, that we establish the date of August 17, 1917, by the sanction of the board of elections, and that the clerk be instructed to publish notices of said (election) on August 17, 1917."

Following the adoption of this resolution, the board of education, or the clerk thereof, caused a notice of the new date of said election to be published in a newspaper of general circulation in such school district. This notice in and of itself was insufficient as a notice of the election, the same not containing any statement with respect to either the purpose or amount of the proposed bond issue. As a matter of fact, this notice took the form of a statement to the electors and citizens of the school district, advising them as to the reasons for the election not being held on August 2, 1917, as originally intended and provided for, and advising them that said election would be held on August 17, 1917. This notice was published once on August 8, 1917, said publication being one day short of the ten day notice prescribed by section 4839 G. C.

As before indicated, this statement of the proceedings relating to the election on the proposition of said bond issue creates some doubt with respect to the legality

of said election, but on account of the fact that the present proposed issue of bonds has already been found to be invalid upon another ground, I do not feel called upon to express any final opinion on the question last above discussed.

My opinion, therefore, on a consideration of the whole transcript, is that said issue of bonds is illegal and that you should not purchase the same.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1287.

CLERK OF COURTS—COMMON PLEAS COURT WITHOUT AUTHORITY TO MAKE RULE ALLOWING DEPUTY TO RETAIN FEES FOR CERTAIN WORK.

A court of common pleas of a county in Ohio adopted the following rule:

"All pleadings, motions and briefs shall be prepared carefully in a legible manner, without unnecessary interlineations or erasures, and when filed a true copy thereof shall also be filed for the use of the opposite party, and upon failure to so file such copy, the clerk shall make the same and tax the cost against the party so failing to file such copy."

Assuming that the court had authority to adopt this rule, it was nevertheless without authority to provide, in approving the appointment of the deputy clerk of courts, that such deputy should receive the fees collected by virtue of this rule. Such fees when collected should be paid by the clerk of courts into the county treasury.

COLUMBUS, OHIO, June 17, 1918.

The Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I have your letter of May 16, 1918, as follows:

"One of the examiners of this department in a certain county found that rule 4 of the rules of the common pleas court of the county read as follows:

'All pleadings, motions and briefs shall be prepared carefully in a legible manner, without unnecessary interlineations or erasures, and when filed a true copy thereof shall also be filed for the use of the opposite party, and upon failure to so file such copy, the clerk shall make the same and tax the cost against the party so failing to file such copy.'

The court of common pleas of the county in question in approving the appointment of the deputy clerk authorized the following journal entry:

Deputy Clerk.

Said appointment to become effective January 1, 1917, and the salary is by law payable monthly to said deputy, out of the county treasury, upon warrant of the county auditor; also the fees for copies under rules of court.

Query: When the court prescribed rule 4, did it not impose upon the

clerk of courts a legal obligation under sections 2977 and 2978 of taxing the fees for such copies for the benefit of his fee fund, and could not recovery be made from the clerk of courts for the payment of such fees to his deputy as a personal fee?"

In this opinion I shall assume that the common pleas court had authority to adopt the rule set out in your communication, making it the duty of the clerk of courts, when the party filing a pleading fails to file a copy, to make a copy for the opposite party and tax the same in the costs against the party failing to file such copy.

Section 2977 G. C. reads:

"All the fees, costs, percentages, penalties, allowances and other perquisites collected or received by law as compensation for services by a county auditor, county treasurer, probate judge, sheriff, clerk of courts, or recorder, shall be so received and collected for the sole use of the treasury of the county in which they are elected and shall be held as public moneys belonging to such county and accounted for and paid over as such as hereinafter provided."

Section 2980 G. C. reads:

"On the twentieth of each November such officer shall prepare and file with the county commissioners a detailed statement of the probable amount necessary to be expended for deputies, assistants, bookkeepers, clerks and other employes, except court constables, of their respective offices, showing in detail the requirements of their offices for the year beginning January 1st next thereafter, with the sworn statement of the amount expended by them for such assistants for the preceding year. Not later than five days after the filing of such statement, the county commissioners shall fix an aggregate sum to be expended for such period for the compensation of such deputies, assistants, bookkeepers, clerks or other employes of such officer, except court constables, which sum shall be reasonable and proper, and shall enter such finding upon their journal."

Section 2981 G. C. provides:

"Such officers may appoint and employ necessary deputies, assistants, clerks, bookkeepers or other employes for their respective offices, fix their compensation and discharge them, and shall file with the county auditor certificates of such action. Such compensation shall not exceed in the aggregate for each office the amount fixed by the commissioners for such office. When so fixed, the compensation of each duly appointed or employed deputy, assistant, bookkeeper, clerk and other employe shall be paid monthly from the county treasury, upon the warrant of the county auditor."

It will be seen that under section 2980 the clerk of courts files with the county commissioners on the 20th of November of each year a statement of the probable amount necessary to be expended by him for deputies, clerks, etc., and under the same section it is the duty of the county commissioners to fix an aggregate sum to be expended for such period for the compensation of such deputies, assistants, clerks, etc. Under section 2981 G. C. the clerk of courts appoints his necessary deputies and fixes their compensation within the limits fixed by the

commissioners under section 2980. Under section 2871 G. C. the court of common pleas approves the appointments made by the clerk of courts. Nowhere is the court of common pleas given any authority to fix any compensation of such deputies and it is my opinion that the court is without authority in the case submitted to provide that the deputy clerk should receive the fees for making the copies of pleadings under the rule of the court above referred to.

Section 2977, above quoted, makes it the duty of the clerk of courts to pay all fees and costs collected or received by law by him as compensation for services into the county treasury. Assuming, as I have done in this opinion, that the court of common pleas in the case submitted had authority to adopt rule No. 4 referred to, it follows that whatever fees or costs have been collected by the clerk because of this rule have been collected by him, or have been "collected or received by law," and these fees must therefore be paid into the county treasury.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1288.

TOWNSHIP TRUSTEES—MAY NOT ERECT BUILDING TO STORE ROAD TOOLS AND MACHINERY.

Township trustees have no authority in law to purchase or lease real estate whereon to erect a building in which to store the road tools and machinery owned by the township.

COLUMBUS, OHIO, June 17, 1918.

HON. BENTON G. HAY, *Prosecuting Attorney, Wooster, Ohio.*

DEAR SIR:—I have your communication of May 30, 1918, which reads as follows:

> "Have township trustees the right to purchase or lease real estate and erect thereon a building for the storage of road tools and machinery belonging to the township, at the expense of the township?"

The powers of township trustees are generally held to be strictly limited to those conferred by statute, and those powers which are absolutely essential to enable the trustees to perform the express duties devolving upon them by statute.

Section 3244 provides in part as follows:

> "Each civil township lawfully laid off and designated, is declared to be, and is hereby constituted, a body politic and corporate, for the purpose of enjoying and exercising the rights and privileges *conferred upon it by law.*"

The court in Trustees of *New London Township vs. Miner, et al.* 26 O. S., 452, used the following language in their opinion:

> "It is settled that neither the township nor its trustees are invested with the general powers of a corporation; and hence, the trustees can ex-

ercise only those powers conferred by statute, or such others as are necessarily to be implied from those granted, in order to enable them to perform the duties imposed upon them."

Hence, from statute and from legal decisions, it is necessary to find some express authority by statute permitting the township trustees to do those things set out in your communication, or we must find that it is absolutely essential for them to have the powers mentioned in your communication in order to enable them to perform other duties which they have to perform.

If we cannot find this, then we must arrive at the conclusion that they cannot exercise the powers such as you set out in your communication.

I have examined the statutes pertaining to the powers and duties of trustees very carefully, and can find no provision which would authorize the township trustees to exercise the powers you suggest.

The next question is as to whether they are given the power and authority to do something, the performance of which would make it absolutely essential that they have the power to purchase or lease real estate and erect thereon a building for the storage of road tools and machinery.

In connection with this matter possibly the provisions found in section 3373 General Code, giving the township trustees authority to purchase such machinery and tools as may be deemed necessary for use in maintaining and repairing roads and culverts within the township, are as favorable as any that can be found in the statutes from which the implied power might be inferred authorizing the township trustees to do those things mentioned in your communication.

But I do not believe such a conclusion would be warranted in reference to the authority set out in said section; this is an authority *to purchase tools and machinery.* The authority to lease or purchase real estate and erect thereon a building for the purpose of storing said tools and machinery is not a power which is at all necessary to enable them to exercise the power to purchase.

To be sure, as a general proposition it must be said that the township trustees have a duty resting upon them to take such care of their tools and machinery in the manner in which persons would ordinarily care for such articles, but I do not believe that this general duty which rests upon the township trustees, and which is one that is not at all provided for by statute, would warrant the conculsion that they would have the implied power to purchase or lease real estate and erect thereon a building in order that they might perform the general duty which rests upon them of taking ordinary and reasonable care of the tools and machinery purchased. There is one provision of the statute which seems to throw some little light upon the question submitted by you. That is found in section 7200, and is as follows:

> "The county commissioners shall provide suitable places for housing and storing machinery, tools, equipment and conveyances owned by the county."

Just why the legislature should have seen fit to grant this power to the county commissioners and not grant it to the township trustees is not readily answerable; but the very fact that the legislature did grant this power to the county commissioners and failed to grant it to the township trustees seems to indicate an intention upon the part of the legislature that the township trustees should not exercise authority such as you suggest in your communication.

In reaching the conclusion to which I have arrived, I am not unmindful of a provision found in section 3244 General Code, which is as follows:

"It (the township) shall be capable of suing and being sued, pleading and being impleaded, and of receiving and holding real estate by devise or deed, or personal property for the benefit of the township *for any useful purpose.*"

This standing alone would almost seem to indicate that the township trustees have authority to purchase, because it gives them authority to receive real estate by deed and hold the same; but when we consider the phrase "receiving and holding," together with what follows in said section, it is readily seen that no such power was intended to be conferred upon the township trustees. This section proceeds further as follows:

"The trustees of the township shall hold such property in trust for the township for the purpose specified in the devise, bequest *or deed of gift.*"

This makes it clearly evident that the word "deed" as used in the former part of the section does not mean a deed of purchase, but means a deed of gift.

Hence, answering your question specifically, it is my opinion that the township trustees have no authority in law to purchase or lease real estate upon which to erect a building in which to store road tools and machinery belonging to the township.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

1289.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN WOOD COUNTY.

COLUMBUS, OHIO, June 18, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of June 18, 1918, in which you enclose the following final resolution for my consideration:

Bowling Green-Perrysburg Road—I. C. H. No. 282, section "F," Wood county.

I have examined said resolution and find the same correct in form and legal under the provisions of section 1218 G. C., and have therefore endorsed my approval upon the same.

However, I desire to call your attention to this technical irregularity in that the county commissioners appropriated the sum of $2,000.00, "being $8,117.06 of the total estimated cost." This was meant to read as follows: "Being $8,117.06 less than the total estimated cost." While this is purely technical, yet it possibly ought to be corrected.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1290.

APPROVAL OF BOND ISSUE OF LIBERTY UNION VILLAGE SCHOOL DISTRICT, FAIRFIELD COUNTY—$45,000.00.

COLUMBUS, OHIO, June 18, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

In re bonds of Liberty Union village school district, Fairfield county, Ohio, in the sum of $45,000.00, for the purpose of completing school building in said school district.

GENTLEMEN:—I have carefully examined the corrected transcript of the proceedings of the board of education of Liberty Union village school district, Fairfield county, Ohio, relating to the above issue of bonds and find said proceedings to be in conformity to the provisions of the General Code of Ohio relating to bond issues of this kind.

I am therefore of the opinion that properly prepared bonds covering this issue will, when the same are properly executed and delivered, constitute valid and binding obligations of said school district to be paid according to the terms thereof.

The bond form for the bonds to be printed covering this issue is not wholly satisfactory, and I am therefore holding the transcript until a proper bond form is submitted to me for approval.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1291.

BOND ISSUE—ORDINANCE PROVIDING FOR SAME MUST MAKE ANNUAL LEVY OF TAXES FOR INTEREST AND SINKING FUND PURPOSES.

DISAPPROVAL OF BOND ISSUE OF MANSFIELD—$35,000.00.

An ordinance of a city providing for an issue of city bonds which does not make provision for an annual levy of taxes for interest and sinking fund purposes with respect to such bonds, as required by section 11 of article 12 of the constitution, is defective, and such issue of bonds is unauthorized and should be disapproved.

COLUMBUS, OHIO, June 18, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In re bonds of the city of Mansfield, Ohio, in the sum of $35,000.00 for the purpose of more completely equipping the fire department of said city.

I have carefully examined the transcript of the proceedings of the council of the city of Mansfield, Ohio, relating to the above bond issue. Said issue is for the

purpose of adding to the equipment of the fire department of the city two motor pumping engines, one squad wagon, an aerial truck and necessary fire hydrants and equipment for extending the fire alarm system.

Assuming that the purposes of said issue are wholly within the authority of subsections 27 and 2 of section 3939 of the General Code (Akron vs. Dobson, 81 O. S., 66), I find that the proceedings relating to said issue are fatally defective for the reason that in the ordinance providing for the issue of said bonds no provision is made for an annual levy of taxes for interest and sinking fund purposes, as required by section 11 of article 12 of the state constitution, which reads as follows:

> "No bonded indebtedness of the state, or any political subdivision thereof, shall be incurred or renewed, unless, in the legislation under which such indebtedness is incurred or renewed, provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds, and to provide a sinking fund for their final redemption at maturity."

The above quoted provisions of the state constitution are obviously mandatory, and I feel I have no discretion to do otherwise than to disapprove said issue of bonds.

I am therefore of the opinion that said issue of bonds should be rejected.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1292.

CIVIL SERVICE LAW—APPLIES ONLY TO CIVIL EMPLOYES IN ADJUTANT-GENERAL'S OFFICE.

The military establishment of Ohio is not subject to the civil service law. This law applies to the adjutant-general's department just as to the other departments of the state government and civil employes in that office are subject to the civil service law just as in the other state departments.

COLUMBUS, OHIO, June 20, 1918.

State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—I have your communication of May 18, 1918, in which you request my opinion as follows:

> "Your advice and opinion is respectfully requested as to the interpretation of the phrase 'military appointees in the office of the adjutant-general,' appearing in paragraph 6 of section 486-8 of the civil service law.
>
> It is clear to the commission that all commissioned, non-commissioned officers and enlisted men in military service of the state are exempted from the classified service, but it is not clear just what is meant by military appointees."

Section 8 of the civil service law (Sec. 486-8) cited by you is the section defining the unclassified service, taking in eleven different sets or descriptions of employes, of which the sixth is as follows:

> "6. All commissioned, non-commissioned officers and enlisted men in the military service of the state, including military appointees in the offices of the adjutant-general."

This exception was unnecessary to make, as it is the civil service of the state that is included and regulated under the law and not the military service, so that this exception logically is out of place. It is true the definition of civil service found in section 1-a of the act is general. It is as follows:

> "1. The term 'civil service' includes all offices and positions of trust or employment in the service of the state and the counties, cities and city school districts thereof."

The term "offices," however, by the ordinary rules of construction in order that the definition might not do violence to the ordinary meaning of the words, would be restricted to offices in the civil service.

This construction is also rendered necessary by a comparison with the constitutional provision. The act was passed to comply with the requirement of article XV, section 10, which requires only appointments and promotions in the civil service to be according to merit and fitness. The constitutional provision bears no relation to the military service, neither does the act passed to enforce it, properly construed, have any effect upon the military service. Section 2 begins:

> "On and after the taking effect of this act, appointments to and promotions in the civil service of the state, * * * shall be made only according to merit and fitness, etc."

In all civilized governments there is a line of demarcation between the military and the civil service and the distinction between the two is constantly maintained so that it is proper to construe the civil service law just as though this clause in question were not in it at all, and it is logically necessary to construe it without any reference to this provision. This, of course, is in conflict with the ordinary rules of construction, nevertheless it is absolutely necessary in the nature of the case.

What, then, is the situation of your commission with reference to appointments in the adjutant-general's office? It is simply that the law and your duties under it are applicable to the civil service and to appointees therein in the adjutant-general's department just the same as in other departments. Take the war department of the general government for comparison—nobody claims that the army or any one in military service is subject to the national civil service law. On the other hand, there is no thought that merely civil appointees in the war department are exempt from the operation of that law. A stenographer or other mere employe in the war department is not distinguished in any manner from one in the state, postoffice or any of the other departments of the government. The same principle applies here. "Military appointees in the office of the adjutant-general" are such as after their appointment have a military character and are in the military service of the state. As the law stands at present they would all have some connection with the national guard and some rank in it.

It was the legislative intention that the language of the act should apply to future conditions if they should arise from changes in the laws with reference to employes. Sections 82, 83 and 84 G. C. provide for the appointment of a quarter-

master general, an assistant adjutant-general and an assistant quartermaster general, and define their duties. These are the only military appointees at present created by statute, although there may be others provided for in the appropriation act, as is the case in some of the departments. If there be such now or hereafter, the definition above will include them.

This seems to answer your inquiry, although it is not much more than saying that military appointees are not subject to the civil service law and that appointments in the civil service are.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1293.

COUNTY SURVEYOR—FULL LENGTH OF COUNTY LINE ROAD SHOULD BE CREDITED TO EACH COUNTY IN COMPUTING SALARY.

In computing the salary of the county surveyor, in so far as it is based upon road mileage, the full length of a road on a line between two counties should be credited to each county.

COLUMBUS, OHIO, June 21, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

DEAR SIR:—I have your communication of June 7, 1918, which reads as follows:

> "We respectfully request your written opinion upon the following matter:
>
> Section 7181 G. C., as amended, 107 O. L. 110, fixing the salary of the county surveyor, provides:
>
> '* * * One dollar per mile for each full mile of the first one thousand miles of the public roads of the county; * * *.'
>
> *Question*: Are county line roads to be considered in fixing this compensation, or are such roads only to be considered as one-half of their mileage in each county where they exist?"

The particular part of section 7181 G. C. (107 O. L. 110) upon which the answer to your question depends reads as follows:

> "The county surveyor shall give his entire time and attention to the duties of his office and shall receive an annual salary to be computed as follows: One dollar per mile for each full mile of the first one thousand miles of the public roads of the county; * * *."

If the road mileage in any county exceeds one thousand miles, your question is not a vital one, but if the mileage of either or both of the counties abutting on the county line road is less than one thousand miles, your question is vital. Our statutes make no provision for such a case as you submit; and no logical reasons can be given why one or the other of the above methods should be adopted. However, it is my view that a county line road should be considered in the com-

putation of the road mileage of those counties abutting upon said road. The legislature, in enacting the provision that the county surveyor should be allowed one dollar per mile of the first one thousand miles of the public roads of the county, evidently had in mind that the greater the road mileage of a county, the more labor would the county surveyor be called upon to perform in any one year.

I will now consider a few of the statutes pertaining to the duties of the county surveyor.

Section 6933 G. C. (107 O. L. 102) provides that in the improvement of a road located along the line between two or more counties the joint board of county commissioners shall appoint a county surveyor of one of the counties interested to make such surveys, plans, profiles, cross-sections, estimates and specifications as may be necessary for said improvement. Under this section it is discretionary with the board as to which of the surveyors will be selected to perform the work on the improvement. If the joint board cannot agree upon a surveyor, it becomes the duty of the state highway commissioner to designate a county surveyor of one of the interested counties to act in the premises.

Section 3298-15n G. C. (107 O. L. 82) makes the same provision for the selection of a surveyor in those cases in which two or more boards of township trustees act jointly in the improvement of a road on the line between the townships.

The same provision of law would apply to the improvement lying between two counties in those cases in which the state highway commissioner would assume jurisdiction over it.

I cite these provisions with a view to showing that it is altogether problematic which of the county surveyors will be selected by a joint board of county commissioners, or township trustees, or the state highway commissioner himself, to have charge of the construction, improvement, maintenance and repair of a road on a line between two or more counties. However, it is certain that one of the county surveyors of the counties interested will have the work to do.

While this argument has not much weight, still I am of the opinion that on account of the facts above stated each county should be given credit for the full length of the road on the line between two or more counties. I realize it might be held that in the long run each county surveyor possibly would be called upon to perform practically half of the work done on a county line road, and therefore each county ought to be credited with but half of said road, but as stated before this is problematic, and inasmuch as the statute makes no provision for such a condition as you suggest, it is my opinion that the county surveyors should be given the benefit of the doubt, and that therefore each county should be credited with the full length of the road on the line between the two counties.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1294.

OIL—INSPECTION FEE BASED UPON NUMBER OF BARRELS IN CAR REGARDLESS OF KIND—WHEN OIL AND GASOLINE SHIPPED IN COMPARTMENT CAR, FEE IS BASED ON NUMBER OF BARRELS OF EACH.

When the different kinds of oil which have been shipped in a compartment car, that is, a tank car that is divided to hold two or more kinds of oil, are in-

spected, the inspection fee is based not separately upon the number of barrels of each kind of oil found in the shipment, but such fee is to be based upon the total amount of barrels of oil in the shipment, regardless of kind.

When, however, a shipment in such compartment car contains gasoline and oil, the fee to be charged for such shipment is to be based not upon the entire number of barrels in the shipment, but to be computed upon the number of barrels of oil taken as one kind and the number of barrels of gasoline taken as another.

COLUMBUS, OHIO, June 21, 1918.

HON. CHARLES L. RESCH, *State Inspector of Oils, Columbus, Ohio.*

DEAR SIR:—I have your letter of May 18, 1918, as follows:

"I beg to call your attention to that part in particular of section 850 of the General Code which reads:

'When a lot inspected exceeds fifty barrels of fifty gallons each in the aggregate, for each barrel, three cents,'

and ask your opinion as to what fees are to be charged for inspections on what is known as a compartment car, that is, a tank car that is divided to hold two or more kinds of oil.

I cite for instance the case of a dealer receiving such car containing 30 barrels of gasoline and 40 barrels of refined oil, or 70 barrels in the aggregate

I would like to have your opinion as soon as possible as I now have such case pending."

Section 850 G. C. reads:

"Each owner of oil inspected under this chapter shall pay the state for inspection the following fees:

For a single barrel, package or cask, twenty-five cents.

When the lot inspected does not exceed ten barrels of fifty gallons each in the aggregate, for each barrel, fifteen cents.

When the lot inspected does not exceed fifty barrels of fifty gallons each in the aggregate, for each barrel, ten cents.

When the lot inspected exceeds fifty barrels of fifty gallons each in the aggregate, for each barrel, three cents.

All fees under this chapter shall be payable on demand of the treasurer of state and in no case shall the payment thereof be deferred beyond the tenth of the next month after the inspection is made, and such fees shall be a lien on the oil so inspected."

Section 865 G. C., relative to the inspection of gasoline, reads in part:

"For such inspections, the state inspector shall receive the same fees as for the inspection of oils, * * *."

From a reading of these sections it is my opinion that when different kinds of oil are shipped in a compartment car, that is, a tank car divided to hold two or more kinds of oil, the amount of oil shipped in the different compartments should be added together as a basis for determining the fee. For instance, if 30 barrels of fifty gallons each of one kind of oil and 40 barrels of fifty gallons each of another kind of oil, making 70 barrels altogether, are shipped, the fee should be a

fee of three cents for each barrel, under the provision of section 850 G .C., to the effect that when a lot inspected exceeds fifty barrels of fifty gallons each in the aggregate, the fee shall be three cents for each barrel.

I reach this conclusion because of the fact that section 850 is dealing with shipments of oil, meaning all kinds of oil, not one kind or the other, therefore, the fact that the shipment of oil contains different kinds should make no difference.

However, in the case you cite the shipment contains forty barrels of refined oil and thirty barrels of gasoline. The authority for the inspection fees to be charged for the inspection of gasoline is found in section 865, part of which is above quoted. This section deals with gasoline, not with oil, and although it provides the same fees for inspection of gasoline as is paid for the inspection of oil, nevertheless its provisions deal solely with gasoline. The "lot" to be inspected, referred to in section 850, is a "lot" of oil and the "lot" which the provisions of 865 G. C. adopts by reference is the "lot" of gasoline. Therefore, when determining the fees, the number of barrels of gasoline should be counted separate and apart from the number of barrels of oil and the fee to be charged for inspection of gasoline based upon the number of barrels of gasoline, and the fee to be charged for the inspection of oil based upon the number of barrels of oil.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1295.

APPROVAL OF BOND ISSUE OF DELAWARE COUNTY—$17,400.00.

COLUMBUS, OHIO, June 21, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In re: Bonds of Delaware county, Ohio, in the sum of $17,400.00, to pay the respective shares of Harlam township and of the owners of benefited property assessed of the cost and expense of constructing the Paul road improvement in said county and township.

I have carefully examined the transcript of the proceedings of the board of county commissioners of Delaware county, Ohio, relating to the above issue of bonds and find said proceedings to be in conformity to the provisions of the General Code of Ohio relating to bond issues of this kind.

I am, therefore, of the opinion that properly prepared bonds covering said issue will, when the same are properly executed and delivered, constitute valid and binding obligations of said county to be paid according to the terms thereof.

No bond form of the bonds to be printed covering said issue has been submitted for my approval. I am, therefore, retaining said transcript until a proper bond form is submitted and approved.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1296.

APPROVAL OF BOND ISSUE OF DELAWARE COUNTY—$17,300.00.

COLUMBUS, OHIO, June 21, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In re: Bonds of Delaware county, Ohio, in the sum of $17,300.00, for the purpose of paying the respective shares of Harlem township and of the owners of benefited property assessed of the cost and expense of constructing the Green road improvement in said county and township.

I have carefully examined the transcript of the proceedings of the board of county commissioners of Delaware county, Ohio, relating to the above issue of bonds and find said proceedings to be in conformity to the provisions of the General Code of Ohio relating to bond issues of this kind.

I am, therefore, of the opinion that properly prepared bonds covering said issue will, when the same are properly executed and delivered, constitute valid and binding obligations of said county to be paid according to the terms thereof.

No bond form of the bonds to be printed covering said issue has been submitted for my approval. I am, therefore, retaining said transcript until a proper bond form is submitted and approved.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1297.

APPROVAL OF BOND ISSUE OF DELAWARE COUNTY—$19,300.00.

COLUMBUS, OHIO, June 21, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

In re bonds of Delaware county, Ohio, in the sum of $19,300.00, to pay the respective shares of Harlem and Trenton townships and of the owners of benefited property assessed of the cost and expense of constructing the J. J. Cook road improvement in said county and townships.

GENTLEMEN:—I have carefully examined the transcript of the proceedings of the board of county commissioners of Delaware county, Ohio, relating to the above issue of bonds and find said proceedings to be in conformity to the provisions of the General Code of Ohio relating to bond issues of this kind.

I am therefore of the opinion that properly prepared bonds covering said issue will, when the same are properly executed and delivered, constitute valid and binding obligations of said county to be paid according to the terms thereof.

No bond form of the bonds to be printed covering said issue has been submitted for my approval. I am therefore retaining said transcript until a proper bond form is submitted and approved.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1298.

APPROVAL OF BOND ISSUE OF DELAWARE COUNTY—$8,500.00.

COLUMBUS, OHIO, June 21, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

In re bonds of Delaware county, Ohio, in the sum of $8,500.00 to pay the respective shares of Berkshire and Kingston townships and of the owners of benefited property assessed of the cost and expense of constructing the Blayney road improvement in said county and townships.

GENTLEMEN:—I have carefully examined the transcript of the proceedings of the board of county commissioners of Delaware county, Ohio, relating to the above issue of bonds and find said proceedings to be in conformity to the provisions of the General Code of Ohio relating to bond issues of this kind.

I am therefore of the opinion that properly prepared bonds covering said issue will, when the same are properly executed and delivered, constitute valid and binding obligations of said county to be paid according to the terms thereof.

No bond form of the bonds to be printed covering said issue has been submitted for my approval. I am therefore retaining said transcript until a proper bond form is submitted and approved.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1299.

APPROVAL OF CONTRACT BETWEEN SAMUEL PLATO AND ACTING DIRECTOR OF STATE ARMORIES.

COLUMBUS, OHIO, June 22, 1918.

HON. J. E. GIMPERLING, *Acting Director of State Armories, Columbus, Ohio.*

DEAR SIR:—You have submitted to me contract entered into on the 21st day of June, 1918, between Samuel Plato, an individual, of Marion, Indiana, and yourself for the construction and completion of a state armory building to be built in Elberon avenue, Zanesville, Ohio, according to the approved plans and specifications, including the substitute of terra cotta for stone trim and the substitution of tile for cement floors as per alternate specifications and bid, said contract calling for the sum of $50,148.10. At the same time you have submitted a bond securing said contract in the penal sum of $50,000.00.

I have examined said contract and find the same to be in compliance with law, and having received from the auditor of state a certificate that there is money available for the payment of the contract price, I have this day approved said contract and filed the same in the office of the auditor of state.

I am returning herewith duplicate copies of said contract.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1300.

ROADS AND HIGHWAYS—LAYING OUT AND ESTABLISHING NEW ROADS—WHEN THEY MAY BE CONSTRUCTED AND IMPROVED —HOW COUNTY AND TOWNSHIP ROAD DETERMINED—NO JOINT ROADS.

The sole authority to lay out and establish a new road is vested in the county commissioners.

A road cannot be constructed and improved unless it has been previously laid out and established, except by the county commissioners, under section 6906 et seq. General Code. Township trustees, therefore, have no authority to construct a new road where none has been previously laid out and established.

The character of a road as a county or township road under existing laws depends upon the authority which has constructed or improved it. All unimproved roads are township roads.

In determining the character of a road by this test, its improvement under any of the plans outlined in section 6906 et seq. of the General Code makes it a county road though the township trustees may have participated in the proceeding. There are no "joint" roads.

COLUMBUS, OHIO, June 24, 1918.

HON. T. A. JENKINS, *Prosecuting Attorney, Ironton, Ohio.*

DEAR SIR:—I have your letter of June 7, in which you request my opinion as follows:

> "Query: Whose duty is it to look after the laying out and construction of township roads?
>
> Section 6860 provides as you will note that the county commissioners have power to establish and widen roads, etc. This same section provides that this power extends to all roads within the county except with certain exceptions. Other sections dealing with this proposition follow and provide for different steps in road construction, but it might be contended that all these sections have to do with county roads. Especially is this true when we come to consider that the General Code of Ohio, in section 3298-1 and other sections immediately following provide how township roads are to be constructed. Were it not for section 3298-1 and other sections immediately following, one would conclude that there would be no question but that the county commissioners have the duty of building all new roads. If the sections 6860 et seq. are held to deal only with county roads then sections 3298-1 et seq. would provide for the method and manner of constructing township roads and there would be no conflict, but if the first mentioned group of sections are held to permit county commissioners to build township roads, then there are two methods by which township roads may be constructed. Now the question is as set out above: Is it the duty of county commissioners to lay out and construct township roads, or does the filing of petitions with the county commissioners mean that any roads built in compliance with said petition are then county roads? And again: Can a county and a township jointly construct a new road? I think not. If they can would it be a county road or a township road?

I enclose herewith copy of an opinion to Hon. Roger D. Hay, prosecuting

attorney of Defiance county, under date of March 18, 1918, No. 1084, to which I refer you for the principles upon which a specific answer to your questions are to be found.

I held therein that the county commissioners had the sole authority to locate or establish a road; that the location and the establishment of a road are steps separate and distinct from the construction or improvement of the road—the one amounting merely to a dedication of a certain way to public travel, the other being such alteration of the surface of the earth within the bounds of the public way as may make it more suitable for travel.

The county commissioners have the power under section 6906 to combine the steps of laying out and establishing a new road with that of building it, and when such combination is made in the manner provided by that and the succeeding section the road when completed will, of course, be a county road. But the effect of action under section 6860 of the General Code is not to constitute the road as located and established, a county road, but merely a road; in fact, the character which it immediately assumes as an unimproved public way is that of a township road—for roads are now classified not by reference to the manner of the establishment or location, but by reference to the authority which has constructed them.

See section 7464 of the General Code referred to in the enclosed opinion.

All unimproved roads are, generally speaking, therefore, township roads, and the fact that the county commissioners, as the only competent authority to do so, have conducted the proceedings for the location and establishment of a new road, does not stamp it as a county road.

Section 3298-1 and succeeding sections of the General Code, to which you refer, were not specifically considered in the enclosed opinion. I call your attention, however, to the language of the first of these sections. It provides as amended in 107 O. L. 73, that:

> "The board of trustees of any township shall have power * * * * to construct, reconstruct, resurface or improve any public road or roads or part thereof under their jurisdiction * * * * *."

The absence from this context of the words "location," "establishment" and other words of similar import, especially when the section is compared with section 6906, which is the corresponding section referring to the commissioners of the county, is significant and is in accord with the conclusions which I have already stated.

Under the early law roads might be "established," "located" or "laid out" either by the commissioners or by the township trustees, and they were classified, broadly speaking, as county or township roads accordingly as whether they had been established by the one authority or the other. The Cass law of 1915 did away with this scheme of things and the White-Mulcahy law of 1917 makes no change in the general framework of the existing law in this respect.

Your question, therefore, is to be answered as follows:

The county commissioners alone have the authority to lay out a new road. Either the commissioners or the township trustees have power to construct a road where the establishment has taken place but no construction work has been done—and this without regard to the manner of its location and establishment, which must be by proceedings had before the county commissioners under section 6860. The county commissioners, however, may combine in one proceeding the laying out of a new road and the construction of a more or less improved surface thereon by virtue of section 6906 et seq. of the General Code. The township trustees may not do this; but their construction enterprises must be conducted upon roads that have already been laid out.

Your last question relative to the joint construction of the new road may be answered by saying that there is no statutory authority for the joint construction of a new road. The proceedings authorized by section 6906 are all county proceedings, although by virtue of section 6916 of the General Code a part of the cost may be borne by the township. This, however, occurs without any proceedings on the part of the township trustees except when they are called upon to agree upon the proportion to be assumed by the township under the third optional plan therein provided. Such agreement, however, does not make the improvement a joint one in any sense, and when proceedings have been had under favor of this section, the road when constructed would be a county road.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

1301.

JAIL PRISONERS—GUARDS FOR SUCH PRISONERS BEING WORKED ON ROADS APPOINTED BY SHERIFF—MAINTENANCE—COMPENSATION TO PRISONERS.

(1) *When jail prisoners are being worked on the roads under agreement between the sheriff and the county commissioners, the guards in control of such prisoners should be appointed by the sheriff and not by the county commissioners.*

(2) *When such prisoners are working on the roads they are not to be considered as being in jail within the meaning of section 2850 G. C., which section provides for the allowance of the sheriff for feeding prisoners in jail. Under section 7500 G. C. the commissioners must reimburse the sheriff for his actual cost of maintaining these prisoners, including the cost of feeding them. Whether or not the cost exceeds 75 cents per day is immaterial.*

(3) *When the sheriff and the commissioners agree upon the amount to be paid these prisoners for their labor, this amount must be credited to the prisoner and paid to him upon his discharge from jail, or sometime prior to his discharge, as the sheriff may see fit. It is not necessary, however, that the prisoners be paid anything.*

(4) *The amount paid to these prisoners for their labor, as well as the expense of transportation, maintenance and discipline, should be paid from the road fund.*

COLUMBUS, OHIO, June 24, 1918.

HON. THOMAS F. HUDSON, *Prosecuting Attorney, Springfield, Ohio.*

DEAR SIR:—I have your letter of March 6, 1918, as follows:

> "The commissioners of Clark county propose to make use of the prison labor on the roads of this county. When such prisoners have been sentenced to imprisonment in the county jail, are the guards to be furnished by the sheriff or by the county commissioners?
>
> In this county the sheriff is paid 65 cents per day for keeping and feeding the prisoners. When these prisoners are at work on the roads, it will be necessary for the sheriff to prepare and send with the prisoner his dinner meal, such food to be of better quality and of greater quantity than

when the man is constantly confined in the jail. Can the commissioners legally contract with the sheriff for more than 75 cents per day for keeping and feeding such prisoners while so employed? (Section 2850 G. C.)

Can the commissioners exceed the maximum provided in section 2845 G. C., when arranging with the sheriff for payment for the labor of these prisoners?

Should the sheriff be paid for the labor of these prisoners out of the road fund and the credits so given to said prisoners be paid in by the sheriff to the county fund?

On May 17, 1915, a bill was passed entitled, "An act to provide a system of highway laws for the state and to repeal all sections of the General Code and acts inconsistent therewith." Chapter 11 of this act was entitled, "Use of prison labor on roads." Section 261 of the act, which became section 7496 of the General Code, provided that the state highway commissioner might make a requisition upon the warden of the penitentiary or superintendent of the state penal institutions for prisoners to work upon the state highways. Section 262 of the act, now section 7497 of the General Code, provided for an agreement between the state highway commissioner and the prison officials for the amount to be paid for the use of the prisoners in addition to the entire cost of transportation, maintenance and discipline. Section 263 of the act, now section 7498 of the General Code, provided that the county commissioners might make a requisition upon the state prison authorities for prisoners desired for use upon the county highways. Section 267 of the act, now section 7502 G. C., reads:

"All persons convicted of crime and sentenced to be confined in the state reformatory, penitentiary, jail, workhouse or other penal institutions, shall be subject to labor upon the highways and streets as hereinbefore provided."

Section 265 of the act, now section 7500 G. C., provides:

"The county commissioners may make requisitions upon the authorities in charge of any workhouse located within such county for any number of prisoners confined therein, or upon any jailers for any number of prisoners sentenced thereto, desired for use upon the highways of said county, or in the manufacture of road materials and the authorities in charge of said workhouse, and the jailer in charge of said jail, may furnish such prisoners, if available, out of the number in their charge. An agreement shall first be entered into between the county commissioners, and the authorities in charge of said workhouse or jail, prescribing the amount which shall be paid for the labor of such prisoners in addition to the cost of transportation, maintenance and discipline of said prisoners. The restrictions hereinbefore provided for determining the amount to be paid for the labor of such prisoners when the same are procured from the state penal institutions, shall apply to all contracts for the use of prisoners of any workhouse or jail. Persons sentenced to imprisonment for non-payment of fines shall be liable to work upon the roads as other prisoners."

Section 277 of the act, now section 7512 G. C., provides:

"The guards, if any, in charge of said prisoners shall, so far as possible, be selected from men who are competent to supervise the work under con-

struction and, so far as practicable, said guards shall supervise such work under the directions of persons having the supervision of the construction or repair of said roads or streets, in addition to their duties as guards."

Section 7496 of the General Code, above referred to, provides:

"Said requisition shall be made through the officials having general charge of said institutions (state penal institutions) and such officials and said highway commissioners shall by agreement provide for the cost of transportation and maintenance of said prisoners, and the discipline and government thereof. The discipline of such prisoners shall be under the control of guards furnished by the prison authorities. The rules and regulations under which such prisoners shall work shall be prescribed by the prison authorities, but the work to be done and the manner of doing such work shall be under the control of the state highway commissioner or those acting under his authority in charge of such work."

It will be seen from the above quoted part of section 7496, that in the enactment of this section the legislature left no doubt as to what authority should appoint the necessary guards.

Section 7498 G. C., providing for the agreement between the county commissioners and the state prison authorities, provides:

"The county commissioners shall have full power and authority to enter into an agreement with the authorities controlling such prison, and all the provisions of law relating to the transportation, maintenance and discipline of prisoners when working upon the state highways, under requisition of the highway commissioners, shall apply to prisoners working upon county highways."

This section, by adopting the provisions of section 7496, allowed no doubt to remain as to what authority should appoint the guards in cases where state prisoners were working on county roads. However, in the case you submit, viz., where county jail prisoners are being worked on county roads by agreement between the sheriff and the county commissioners, the legislature failed to make specific provision as to how the guards should be appointed.

Section 7500 G. C., which is the section providing for the use of jail prisoners upon county roads by agreement between the county commissioners and the sheriff, and quoted above, does provide, however:

"An agreement shall first be entered into between the county commissioners and the authorities in charge of said workhouse or jail, prescribing the amount which shall be paid for the labor of such prisoners in addition to the cost of transportation, maintenance and discipline of said prisoners."

It is clear from this provision that the legislature contemplated that the county commissioners were to reimburse the sheriff not only for the cost of transportation and maintenance, but also for the cost of discipline. It would follow from this that the sheriff would be the proper party to furnish the guards, since the only way in which he could incur the cost and expense of discipline would be to employ these guards himself in the first instance. This conclusion is strengthened by the fact that these prisoners are sentenced or committed to the county jail and as jail prisoners are in the custody and control of the sheriff, and that officer is responsible

for them until the day of their discharge. The fact that the prisoners are worked upon the roads does not in any way affect his responsibility, since in such cases the jail is simply extended to include the territory where the prisoners are working, hence the responsibility of the sheriff remains, and I am of the opinion, in view of this fact and because of the provisions of the section as referred to, that in the case you submit the guards should be furnished by the sheriff and not by the county commissioners.

In your second question you ask whether the sheriff may be allowed more than seventy-five cents per day for keeping and feeding these prisoners while they are working on the roads. Section 2850 G. C. provides:

> "The sheriff shall be allowed by the county commissioners not less than forty-five nor more than seventy-five cents per day for keeping and feeding prisoners in jail, but in any county in which there is no infirmary, the county commissioners, if they think it just and necessary, may allow any sum not to exceed seventy-five cents each day for keeping and feeding any idiot or lunatic. The sheriff shall furnish at the expense of the county, to all prisoners confined in jail, except those confined for debt only, fuel, soap, disinfectants, bed, clothing, washing and nursing when required, and other necessaries as the court in its rules shall designate."

This is a general provision relating to prisoners confined in the county jails. Section 7500 G. C., above quoted, provides that when jail prisoners are being worked on county roads, an agreement shall first be entered into between the county commissioners and authorities in charge of such workhouse or jail, prescribing the amount which shall be paid for the labor of such prisoners, in addition to the cost of transportation, maintenance and discipline of such prisoners. It will be seen from this provision that the commissioners and the sheriff may, by contract, agree upon the amount which shall be paid for the labor of the prisoners "in addition to the cost of transportation, maintenance and discipline." The amount to be paid for the labor is to be determined by the commissioners and the sheriff, but the balance to be paid by the commissioners, in connection with the working of these prisoners upon the roads, is not some amount which may be agreed upon, but is to be "the cost of transportation, maintenance and discipline." The county commissioners are to pay the actual cost of transportation, maintenance and discipline of these prisoners upon the roads, and this being a special act dealing only with a certain class of prisoners who are being engaged in a certain class of work, it is my view that it is to be looked upon as an exception to section 2850 G. C. The prisoners referred to in that section are the prisoners confined in the jail, and while the prisoners working upon the roads are prisoners confined within the jail in one sense, I do not believe they are such prisoners as would fall under the provisions of section 2850 G. C. Section 7500 G. C. being a special and later act, ought to govern, and it is my opinion, in answer to your second question, that the commissioners must reimburse the sheriff for the actual cost of maintaining these prisoners, which, of course, includes the cost of feeding them. If this cost should exceed seventy-five cents per day, it is my opinion that the commissioners may, nevertheless, and should, pay the same.

Answering your third question, I beg to quote section 13717 G. C. to which you refer:

> "When a fine is the whole or a part of a sentence, the court or magistrate may order that the person sentenced remain imprisoned in jail un-

til such fine and costs are paid, or secured to be paid, or he is otherwise legally discharged, provided that the person so imprisoned shall receive credit upon such fine and costs at the rate of sixty cents per day for each day's imprisonment."

Section 7500, as amended in 106 O. L., p. 656, provides that the agreement between the sheriff and the commissioners shall prescribe the amount which shall be paid for the labor of such prisoners, in addition to the cost of transportation, maintenance and discipline of such prisoners. This section further provides:

"The restrictions hereinbefore provided for determining the amount to be paid for the labor of such prisoners when the same are procured from the state penal institutions, shall apply to all contracts for the use of prisoners of any workhouse or jail."

The question here arises whether or not the amount which the statute refers to as being paid to the prisoner for his labor on the roads means an actual payment to the prisoner of some agreed sum per day for his labor or whether it means an amount to be credited to such prisoner upon his fine or costs, or sentence of imprisonment. It is suggested that it means the latter and that the commissioners and the sheriff, in agreeing upon the amount, are limited by the provisions of section 13717, above quoted. It will be noted, however, that section 7500, above quoted, in part, provides that the amount to be paid for the labor of the prisoners shall be subject to the same restrictions as is the amount paid to prisoners in the state prisons for their labor under agreements between state prison authorities and the highway commissioner. This provision carries us by reference to section 7497 G. C. wherein the restriction upon the amount to be paid to the state prison authorities is as follows:

"The amount to be paid to said prison authorities, if anything, for the use of said prisoners, in addition to the entire cost of transportation, maintenance and discipline of said prisoners, shall be agreed upon between the officials having charge of said institutions and the said highway commissioner, but the amount so paid shall not exceed the cost of such transportation, maintenance and discipline of said prisoners plus the amount to be credited to such prisoner on account of his labor upon such highways."

That the clause in section 7497, "the amount to be credited to such prisoner on account of his labor upon such highways" refers to an actual payment of money to the prisoners for their labor and not simply to a credit upon their fine or imprisonment, is clear from the fact that no system of credits upon fines or imprisonment is in vogue at any of the state penal institutions, no provisions being made for any such system in such institutions by statute. This being so, it would seem that the authority in section 7500, for the sheriff and county commissioners to enter into an agreement, prescribing the amount which shall be paid for the labor of prisoners upon the roads, which is made subject to the same restrictions as the amount to be paid state prisoners, is an authority not to simply credit the prisoners with a certain amount upon their fines, but to determine and agree upon an amount which shall be actually paid to the prisoner for his labor.

Section 13717, referred to in your communication above quoted, provides that jail prisoners shall receive a credit of sixty cents per day for each day's impris-

onment and determine in that manner the length of their imprisonment, but this section, to my mind, has no bearing upon the amount to be paid to jail prisoners for their work upon the roads, under agreement between the county commissioners and the sheriff. It has been suggested that the authority given in these statutes to the state and county prison officials to agree with the highway commissioner and the county commissioners, respectively, upon a sum to he paid the prisoners for their labor upon county roads, is not an authority to fix any amount they may agree upon in the contract, but simply an authority to agree to pay whatever other statutes may allow to prisoners for their labor. This position is, to my mind, without foundation.

Section 7500 places the determination of the amount to be agreed upon between the county commissioners and the sheriff upon the same basis as the determination of the amount to be agreed upon by the state highway commissioner and the state prison authorities, under section 7497. There is no statute, to my knowledge, that allows prisoners in the state prisons any certain sum for their labor, nor is there any statute which lays down any general rule for the fixing of an amount to be paid them for such labor. There are several statutes, such as 1866, 2183-1, 2227-5 and 2227-6, which make provision for the payment of certain amounts to prisoners for their labor, but all of these statutes refer to special classes of prisoners engaged in special work.

It is therefore my opinion that section 7497 gives to the state prison authorities and the state highway commissioner the authority to determine in their agreement the amount which is to be paid to prisoners for their labor upon roads, and this amount so agreed upon must be credited to the prisoner and actually paid to him upon his discharge from prison, or at such other time as the prison authorities may see fit.

This view of section 7497 forces a similar conclusion with respect to section 7500 and it is therefore my opinion that when the county commissioners and the sheriff enter into such an agreement, as you refer to, for the working of jail prisoners upon the county roads, the sheriff and the commissioners may agree upon an amount to be paid these prisoners for their labor and that this amount must be credited to the prisoner and paid to him upon his discharge from jail, or some time prior to such discharge as the sheriff may see fit.

It is also suggested that sections 2238 and 2248 of the General Code might have application to the situation you present, but an examination of the history of these sections discloses that they are limited in their application to the labor of prisoners in the operation of plants in the manufacture of brick or other road building material or supplies, and has no connection whatever with prison labor upon the roads.

Answering your fourth question, beg to call your attention to section 7506 G. C. which is a part of the act above referred to, and which reads as follows:

> "The county, city and village authorities having charge of such roads and streets may lawfully expend any moneys available for the repair and maintenance of such roads or streets to meet the cost of transporting, maintaining and disciplining such prisoners while so employed upon such roads or streets."

It will be seen from this section, that while the act provided that the cost of transportation, maintenance and discipline of the prisoners should be paid out of the road fund, it did not make any specific provision as to the credits for the labor of the prisoners. Under the act it is not only necessary for the county commissioners to pay the cost of transportation, maintenance and discipline of these pris-

oners when working them upon the county roads, but also to pay an amount to be agreed upon between themselves and the sheriff, and it is my opinion that this latter amount, as well as the expense of transportation, maintenance and discipline of prisoners, should be paid from the road fund.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1302.

BONDS MAY NOT BE ISSUED FOR IMPROVEMENTS TO SCHOOL PROPERTY ORDERED BY PLUMBING INSPECTOR UNDER 7630-1—WHAT RESOLUTION BY BOARD OF EDUCATION MUST CONTAIN —DISAPPROVAL OF BOND ISSUE OF BELLEFONTAINE—$80,000.00.

Bonds may not be lawfully authorized under section 7630-1 of the General Code for the purpose of making improvements on school property rendered necessary by the orders of the state plumbing inspector.

The resolution of the board of education providing for the issuance of bonds must provide for the annual levy and collection of taxes to pay the interest on said bonds, and to cover an aliquot part of the particular indebtedness thus created. The levies on account of principal may not be made substantially different for the several years during which the bonds are to run; and if such bonds are to be issued in series, and sinking fund levies in the strict sense are not provided for, the levies on account of principal being limited to that which is payable in any year, the series must be so arranged as that substantially equal amounts of principal shall mature in each year of the life of the bonds.

COLUMBUS, OHIO, June 24, 1918.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In re: Bonds of the school district of the city of Bellefontaine; two issues, (a) in the sum of $80,000 for the purpose of improving certain various school buildings; and (b) in the sum of $25,000 for the purpose of purchasing a site and erecting thereon a school house and furnishing the same.

We return herewith the transcript of the proceedings of the board of education of the school district of the city of Bellefontaine, Ohio, relative to the issuance of both the series of bonds above referred to. The following are the reasons for which I am unable to advise that said series of bonds have been issued in accordance with the provisions of the law nor that the same constitute a good and valid legal obligation against the school district:

THE $80,000 ISSUE.

These bonds are issued under the assumed authority of section 7630-1 of the General Code, for the purpose of making improvements ordered by the state inspector of plumbing and by the division of workshops, factories and public build-

ings of the department of inspection of the industrial commission of Ohio. The preamble to the resolution providing for the submission of the question of issuing said bonds to a vote of the electors and that of the resolution providing for the issuance of said bonds both recite that $60,000 of the proceeds is to be expended for the purpose of complying with the order of the state plumbing inspector, and the remaining $20,000 is to be expended for the purpose of complying with the orders of the department of inspection of workshops, factories, etc.

There is, however, no separation of the bonds themselves as between these two classes or objects—that is, bonds of particular serial numbers are not issued for the one purpose and those of other serial numbers for the other purpose.

Section 7630-1 of the General Code cannot be resorted to for the purpose of issuing bonds in order to comply with the orders of the state plumbing inspector. The section provides that:

> "If a school house is wholly or partly destroyed by fire or other casualty, or if the use of any school house for its intended purpose is prohibited by any order of the chief inspector of workshops and factories"

and certain other conditions exist, the board of education may issue the kind of bonds therein provided for. It is probably true enough that the state plumbing inspector's order has an effect similar to that of the chief inspector of workshops and factories or its successor, the Industrial Commission of Ohio; so that in a sense it might be said that the action of the board of education of the city of Bellefontaine is within the spirit of the section. However, the section is not in terms broad enough to cover the same, and there is no such ambiguity of expression as to justify a resort to the principles of statutory interpretation. To the extent of $60,000, therefore, the $80,000 issue now under consideration is clearly without authority of law.

It may be that the action that has been taken might, so far as this point is concerned, and but for the existence of other defects in the procedure which will hereinafter be stated, form the predicate of the valid issuance of bonds in the amount of $20,000. Without citing cases, suffice it to state that there is some authority to the effect that an excessive exercise of power to issue bonds makes the issue illegal as to the excess only. But this question is not raised here because the commission has not accepted an offer of $20,000 of bonds of this issue, nor has the board of education limited the issue to $20,000. The commission has agreed to purchase $80,000 of bonds of this issue or none, and my opinion is as to the validity of the issue as a whole.

Morever, these bonds, or even as to the $20,000 which so far as the point just discussed is concerned, might be unaffected by the element of invalidity which I have mentioned (though I do not so hold) are subject to the same defects as those which I shall have occasion to describe in discussing the second issue of $25,000.

THE $25,000 ISSUE.

Notwithstanding certain irregularities in the proceeding which do not go to the validity of the bonds, I find but one element of invalidity in them, which, however, is of so serious a character that I find myself unable to approve the purchase.

I quote from the resolution providing for the issuance of these bonds enough to show the nature of the question to be considered:

> *"Be it Resolved,* by the board of education of the city school district of Bellefontaine, Ohio, That the bonds of said city school district be issued

* * * in the amount of twenty-five thousand dollars all bearing date the 1st day of May, A. D. 1918, and bearing interest from date at the rate of five per cent per annum * * * payable semi-annually * * * in denominations of five hundred dollars, each, consecutively numbered from number 141 to 184 inclusive and fifteen hundred dollars (being three bonds of $500 each) maturing May 1st, 1941, and fifteen hundred dollars (being three $500.00 bonds) maturing November 1, 1941, and being serial numbers 185 to 190, both inclusive; the residue of said bonds maturing as follows: $500.00 each year beginning May 1, 1919 to 1940 both inclusive; and $500.00 each year November 1, 1919 to 1940, both inclusive."

* * * * * * * *

"Be it further, *Resolved,* That there be annually certified to the auditor of Logan county, a tax in addition to all other taxes sufficient to pay such bonded indebtedness *as it falls due* together with the amount of interest thereon maturing."

Article XII, section 11 of the constitution of Ohio, provides:

"No bonded indebtedness of the state, or any political subdivisions thereof, shall be incurred or renewed, unless, in the legislation under which such indebtedness is incurred or renewed, provision is made for levying and collecting *annually* by taxation an amount sufficient to pay the interest on said bonds, and to provide *a sinking fund for their final redemption* at maturity."

Hon. Timothy S. Hogan, formerly attorney-general, in an opinion found at page 1224 of volume II of the Annual Reports of the Attorney-General for the year 1914, held that the fundamental and underlying idea of this section of the constitution is, that an aliquot part of the principal sum of each indebtedness incurred by the state or any political subdivision thereof should be retired or provision made for its retirement by amortization of an aliquot part thereof during each year of its life.

In arriving at this conclusion he considered the history of the proposal in the constitutional convention of 1912 and certain cases from other states having similar constitutional provisions.

I agree with his conclusion, and point out that this requirement has the effect of necessitating the separation or segregation of the separate bond issues of the given subdivision for sinking fund purposes, and particularly the levying of taxes therefor. That is to say, under this provision it is no longer lawful for the sinking fund or taxing authority of any subdivision of the state to consider its bonded indebtedness as a unit for amortization purposes and levy such amount of taxes as shall provide for the immediate or ultimate retirement of an aliquot part of the whole for each year; but each bond issue constitutes a separate unit, the amortization of which by annual tax levies must go on independently of the sinking fund requirements of other bond issues outstanding at the same time. I quote from the dictum of Donahue, J., in Link vs. Karb, 89 O. S. 326-339:

"The taxing officials of any political subdivision of the state must provide in the resolution or ordinance authorizing such issue, or in a resolution or ordinance in relation to the same subject-matter passed prior to the issuing of such bonds, for levying and collecting annually by taxation an

amount sufficient to pay the interest thereon and provide a sinking fund for their final redemption at maturity. This, of course, does not require the immediate levying of a tax certain * * * but it does mean that, at the time the issue of bonds is authorized, the taxing authorities proposing to issue such bonds shall provide that a levy shall be made each year thereafter during the term of the bonds in an amount sufficient to pay the interest thereon and retire the bonds, * * *."

It follows that a provision like that found in section 7613 of the General Code is substantially modified by this constitutional requirement. The section mentioned provides that,

"In any school district having a bonded indebtedness * * * the board of education of such district annually * * * shall set aside from its revenue a sum equal to not less than one-fortieth of such indebtedness together with a sum sufficient to pay the annual interest thereon."

Section 7614 in the same connection provides that,

"the board of education of every district shall provide a sinking fund for the extinguishment of all its bonded indebtedness."

These sections permit the combination of the entire bonded indebtedness of a district into one sinking fund; but as we have seen, the subsequently adopted constitutional amendment forbids such combination and makes each issue of bonds a separate account for the purpose of ascertaining the sinking fund or amortization requirements thereof in the levy of taxes.

As I interpret the resolution above quoted, it violates this requirement. The board of education has thereby attempted at least to provide for an annual levy to pay interest, but not for an annual levy for amortization purposes. This is made clear from the serial character of the bonds and the dates at which the bonds are to mature. The intention in this particular is made even clearer by the financial statement attached to the transcript, which discloses the reason for postponing the maturity of six bonds of the issue until 1941.

It appears from the financial statement that there are other bonds now outstanding maturing in series up to and including the year 1940, so that the additional amounts which are to mature in the year 1941 under the present issue are intended to take the place, as it were, of the issue which at that time will have been retired.

The deviation from the required uniformity is, to be sure, not great in the case of this issue, and affects but the one year 1941 in which $3,000 instead of $1,000 of the issue will mature. It is greater, however, in the case of the $80,000 above referred to, in which the bonds, though in series, do not commence to mature until 1941, and with irregularities in the amounts maturing each year, run on until 1957—the full limit allowed by the forty year provision of section 7625 et seq. of the General Code, which by reference in 7630-1 is made applicable to bonds of this character.

With all these facts before me, I cannot conclude otherwise than that the tax levying provision of each resolution is intended to require not a levy of an aliquot part of the principal with due allowance for sinking fund investments in each year of the life of the bonds, but for levies for principal only in the years in which the principal matures, and then for the amount maturing in those years.

This is not in compliance with article XII, section 11 of the Constitution, and

slight though the deviation from the requirement is in the case of the $25,000, I feel unable to approve the issue as well as the one for $80,000 where the deviation is great.

My disapproval of these bonds on this ground is predicated upon another part of the dictum of Donahue, J., in Link v. Karb, supra, in which he distinctly holds that the "provision" of which the constitutional amendment speaks, shall be made in and as a part of the local "legislation" authorizing the issuance of bonds as well as in the statutes of the state. This expression was carried into the syllabus of the case (see the second and third branches thereof), but it is none the less dictum, for that point was not before the court.

Great doubt exists in my mind as to the applicability of this holding in view of the subsequent decision of the supreme court in Cincinnati v. Harris, 91 O. S. 151. This case involved bonds about to be issued by the board of trustees of the Cincinnati Southern Railway Company. Such bonds when issued would have been general obligations of the city of Cincinnati, but the trustees, who were the issuing authority, had no power to levy taxes. The council of the city of Cincinnati had passed no ordinance providing for the annual levy and collection of taxes to meet the interest and sinking fund requirements of the bonds, and apparently relying upon what has been said in Link v. Karb, supra, the city solicitor sought to enjoin their issuance.

It appears, however, that the bonds were issued under authority of a special act commanding council of the city to levy annually a tax "sufficient to pay the interest thereon and to provide a sinking fund for their final redemption." This the court held to be sufficient "provision" and proper "legislation" within the meaning of the constitution. The syllabus is as follows:

> "1. The act of March 5, 1913 (103 O. L., 112), supplementary to the act of May 17, 1911, (102 O. L., 111) conforms to the requirement of section 11, article XII of the Constitution of Ohio.
>
> 2. This act and the act of May 17, 1911 (102 O. L., 111), is the legislation under which the indebtedness evidenced by the proposed issue of bonds is incurred within the meaning of section 11, article XII of the Constitution of Ohio."

In the opinion, referring to the special act, Donahue, J., says:

> "This is the legislation under which this indebtedness is incurred, and this legislation conforms in letter and spirit to the provisions of section 11 of article XII of the Constitution of this state. This act is equally mandatory upon the council of the city of Cincinnati, not only as now constituted, but as may be constituted at any time during the life of these bonds, as any ordinance the present city council could now pass."

This decision can be reconciled with the decision in the case of Link v. Karb on the theory that the special act involved in the Harris case required sinking fund levies to be made on the segregated basis which I have discussed; whereas the general statutes of the state applicable to municipal corporations and in force when Link v. Karb was decided, may have been regarded by the court as authorizing combined sinking fund levies. I quote from Link v. Karb the statements which otherwise explained would be inconsistent with the decision in the Harris case:

> "In view of the fact * * * that, at the time this amendment was adopted and went into effect, there was legislation by the general assembly of Ohio in harmony with its provision, it would seem that something other and further than this legislation was intended. These boards (municipal councils) are authoritzed and required by law to levy and collect annually by taxation an amount sufficient to pay the interest on bonds and to provide a fund for their final redemption, and, therefore, it would appear that this amendment to the constitution was framed and adopted for the purpose of requiring not only the legislature of the state but the taxing authority of any political subdivision of the state proposing to issue bonds to include in the law, resolution or ordinance, under which such indebtedness is incurred or renewed, the provision for levying and collecting annually by taxation an amount sufficient to pay the interest and retire the bonds, otherwise the only effect of this amendment would be to carry into the organic law of the state the existing statutory porvisions."

It is possible to reconcile the two cases on another theory, that the bonds proposed to be issued by the trustees of the Cincinnati Southern Railway Company were issued under authority of a special act relating to those bonds alone, and that when the authority therein provided for had been exercised the law became executed; whereas, the general statutes of the state referred to in Link vs. Karb did not relate to the issue of any particular bonds, but conferred general authority to issue bonds.

Now, section 5649-1 of the General Code provides that in any taxing district, the taxing authority shall levy a tax sufficient to provide for sinking fund and interest purposes for all bonds issued in a political subdivision, which tax shall be placed before and in preference to all other items, and for the full amount thereof.

This section in its former state was before the court when Link v. Karb was decided. As it then existed it provided "in any taxing district the taxing authority shall levy a tax sufficient to provide for sinking fund and interest purposes."

If the reconciliation of the two cases which I have cited is to be worked out on the first of the two grounds above suggested, then the question is raised as to whether the amendment of section 5649-1 is to be interpreted as requiring segregated levies for each issue of bonds, and, as of course, by implication, repealing numerous statutes like 7613, for example, which authorized the management of sinking funds upon the other basis. If section 5649-1 as amended, requires segregated levies, then it would seem that "provisions" in bond issuing ordinances and resolutions for the making of annual sinking fund and interest levies are no longer necessary; and that if some such "provision" is so inserted, which does not comply with the requirement of the Constitution, it is to be treated as mere surplusage on the ground that because of the mandatory provision of section 5649-1 the power as to controlling future levies has been taken away from the issuing authorities.

This reasoning would sustain the bonds now under consideration, because it would stamp as surplusage the paragraphs of the respective resolutions to which reference has been made. But there is doubt upon two points, first, as to whether section 5649-1 as amended really requires segregated sinking fund calculations of levies any more than the section in its original form as it was before the court in Link v. Karb, supra, required them; and, second, whether the Harris case is to be distinguished from Link v. Karb upon the first ground suggested or upon the second, which accounts for Cincinnati v. Harris on the theory that it involved a special act rather than the general law.

The doubt is so great that in a matter of this character, I do not feel that I ought to attempt to decide the question, but that I ought to adhere to the practice

which has been followed in this department ever since article XII, section 11 was adopted and Link v. Karb was decided, viz: to require as a condition of my approval the inclusion in the resolution or ordinance under which the bonds are to be issued, of a tax levying provision in substantial compliance with the mandatory requirement of the Constitution.

If the bonds of the $25,000 issue had been made to mature in such series as that an equal aliquot amount thereof should fall due in each year of their life, then though the language of the tax levying provision of the resolution in this case is even fundamentally different from that of the Constitution I would have been constrained to approve the proceedings in this respect on the authority of Mr. Hogan's opinion, to which I have referred.

In this opinion it was held that the Constitution did not forbid the issue of bonds in such series as that the retirement of an aliquot part thereof in each year of their life of the bonds might be provided for by taxation without the accumulation of a sinking fund in the strict sense; but slight though the deviation is, in that it affects but one year, it remains true that the maturities of the bonds of the $25,000 issue are so arranged that this principle is violated. As to the bonds of the $80,000 issue, the violation is palpable.

For these reasons then I am unable to approve of either of these issues. I may add that as I find no other material defects in the proceedings relative to the $25,000 issue, it is possible that the resolution may be so amended as to cure this defect, and the bonds when properly re-offered to the local sinking fund authorities and to the Commission, may be accepted.

The fundamental character of the other defect which I have noted with respect to the $80,000 issue, however, would seem to preclude any curative action in that regard.

Yours very truly,

JOSEPH MCGHEE,

Attorney-General.

1303.

SCHOOL FUNDS—TRANSFER.

Moneys belonging in one fund of a school district, but expended for the purposes of another fund and treated as "overdrafts" in such other fund, may not be subsequently transferred to the fund for the purposes of which the expenditures have been made, unless by nunc pro tunc order of the common pleas court under section 2296 et seq., G. C., as to which query.

Authority to transfer funds is limited to funds represented by actual cash in the treasury to the credit of the proper funds.

As to actual cash balances, however, there may be a transfer under section 2296 et seq., of General Code from a sinking fund of a school district to another fund, when the school district has no outstanding bonds.

COLUMBUS, OHIO, June 24, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, O.

GENTLEMEN—I acknowledge receipt of your letter of June 4th requesting my opinion as follows:

STATEMENT OF FACTS.

A state examiner of the division of schools and townshpis reports financial statement of a board of education as follows:

	Overdrawn	Balance
Tuition Fund	$ 706.26	
Contingent Fund	6,075.35	
Bond and Interest Fund		$6,908.39
	$6,781.61	$6,908.39
Actual Balance	126.78	
	$6,908.39	

It is very evident from this statement that the provisions of sections 5660 and 5649-3d G. C. have been greatly disregarded and violated. Our examiner informs us there is actually no bonded debt to be provided for as the last outstanding bonds of the school district matured and were paid in March of this year.

Question—In view of the fact based upon the statement submitted by our examiner that there is no bonded debt to provide for, therefore the levy which has occasioned the unrequired balance in the bond and interest fund having been incorrect can such balance of $6,908.39 in the bond and interest fund be legally transferred to the other funds of the school district by procedure in sections 2296 et seq. of the General Code."

It is, as you say, clear not only that sections 5660 and 5649-3d General Code have been violated, but that practically all the sections relative to the levying of taxes and expenditure of revenues by boards of education have been flagrantly disregarded. Without going into particulars or citing statutes, there has evidently been an entirely unauthorized levy of taxes ostensibly for sinking fund purposes. Municipal corporations may levy taxes for this general purpose, including therein the allowance of a reasonable amount to meet final judgments, save in condemnation of property cases; but boards of education have no authority to levy taxes for interest and sinking fund purposes save to meet the actual needs of the district on account of its bonded debt.

Assuming that there has been no transfer to the sinking fund from some unexpected source, the inference seems irresistible that sinking fund levies have been made in this instance without any warrant of law whatsoever. On the other hand, without denying the existence of such circumstances as under favor of section 5661 General Code might have justified the incurring of obligations by the board of education in question without money in the treasury to meet the same, it is obvious that in the face of section 5649-3d and other statutes equally applicable the so-called "overdraft" was wholly illegal. When there is no money in a school district fund there would be no authority, even in the absence of the Smith law, for the drawing or payment of a warrant on that fund. Overdrafts, save in the case of county warrants issued under favor of former laws (still unrepealed save by implication arising from the Smith law) and marked "Not paid for want of funds", from the very nature of the case are and always have been illegal.

It follows that primarily the officers of the district responsible for the present condition are liable to the distrtict for the amount of the overdrafts. They have

taken money belonging to the sinking fund and applied it to unauthorized purposes, and they and their bondsmen personally owe the sinking fund these amounts. The books may show a balance of nearly seven thousand dollars in such bond and interest fund, but as a matter of fact it is not there; it has been spent, excepting the actual balance of $126.78. This balance may, in my opinion, be legally transferred under all the circumstances by proceeding under section 2296 et seq. of the General Code. That section, which I do not quote, does not in terms prohibit a transfer from the sinking fund, as such, should there happen to be an unneeded surplus in such fund. I have already stated that there is no authority to levy taxes for a sinking fund unless there are actually bonds and interest thereon to be met. There is no reason, therefore, why, if the common pleas court to which application must be made is satisfied as to the necessity and propriety of a transfer, such a court should be denied the jurisdiction to order it made.

But as I have said, I do not believe that the ostensible balance of $6,908.39 in the bond and interest fund has any real existence save in the imagination of a bookkeeper. Your examiner says that there is in the treasury in cash $126.78. I do not see how the court could transfer from one fund to another money which had already in point of fact been paid out of the treasury, unless the power of the court under section 2296 may be exercised *nunc pro tunc* and in effect establish the transfer as of a date prior to the making of any of the expenditures in question. I am in doubt as to the authority of the court to do this, but I would not deem it proper to express an opinion upon any question that would necessarily come before a court in a proper case.

Section 2296 G. C. authorizes the transfer of "public funds * * from one fund to another". I have already expressed the view that the phrase "public funds" as used in this context means funds which really exist subject to future expenditure. As I see it and have said, money that has already been spent, though as a matter of bookkeeping the defaulting officials have debited it as an "overdraft" in another fund instead of (as it actually was) an expenditure of the sinking fund, is not subject to transfer. The real nature of things can not be altered by bookkeeping. If public officials would keep clearly in mind the legal impossibility of "overdrafts" and their own personal liability arising therefrom, evils of the sort described by you would be less frequent than they are.

If upon the exhaustion of the tuition and contingent fund application had been promptly made for the transfer of the then existent moneys in the sinking fund, and the court had allowed the transfer, the transaction would have been regular and legal; and as I have said, if the court should decide that it has jurisdiction to order a transfer *nunc pro tunc* so as to validate that which is already done, such action would be likewise effectual. I do not feel that I ought to say, however, that the common pleas court has this power nor that it should exercise it under the circumstances in this case, if it has it.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1304

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN BUTLER, ATHENS AND MAHONING COUNTIES.

COLUMBUS, OHIO, June 27, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR—I have your letter of June 25, enclosing for my approval final resolutions on the following named improvements:

Hamilton-Cleves Road—I. C. H. No. 44, sec. "C," Butler County.
Athens-Logan Road—I. C. H. No. 155, sec."(1,)" Athens County.
Oxford-Millville Road—I. C. H. No. 182, sec. "C-1," Butler County.
Akron-Youngstown Road—I. C. H. No. 18, sec. "R-2," Mahoning County.

I have carefully examined said resolutions, find the same correct in form and legal and am therefore returning them to you with my approval endorsed thereon in accordance with section 1218 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1305

AKRON ARMORY—CONTRACT FOR STEAM BOILERS—BREACH—WAIVER—EXTRAS IN CONSTRUCTION—FROM WHAT FUND PAID.

1.—*Where a contractor agreed to furnish two cast-iron, steam boilers of not less than* 13,500 *feet capacity each, for an armory, he is not released from his obligation, because of the fact that boilers of said size can not be secured on the market. The contractor would be liable for damages for a breach of his contract, in so far as the original plans and specifications are concerned.*

2.—*Where the contractor, in compliance with the original plans, specifications and estimates, submits plans for heating the armory and said plans so submitted indicate two boilers of* 10,000 *feet capacity each, and where the original plans provided that boilers manufactured by a certain firm were to be used, and the largest capacity of boilers manufactured by the firm is* 10,000 *feet, and where the state officials acquiesced and consented to the installation of two boilers of the largest type manufactured by said firm, under such conditions the state has waived its rights to an action for damages for a breach of the contract and could not recover damages against the contractor.*

3.—*Where the contractor under plans and specifications was required to install the amount of radiation as marked on the plans and he so installed the radiation, he is not liable for a breach of contract, even though the radiation as installed is not of sufficient capacity to heat the building to the desired temperature.*

4.—*The money appropriated by the legislature at its last session and credited to the state armory fund would be available to the state armory board for providing the necessary extras in the construction of said armory.*

COLUMBUS, OHIO, June 27, 1918.

HON. GEORGE H. WOOD, *Adjutant General, Columbus, Ohio.*

DEAR SIR—I am in receipt of a communication from your department signed by J. E. Gimperling, Assistant Adjutant General, and dated April 15, 1918, which reads as follows:

"I herewith submit data relative to the insufficient heating system in the state-owned armory at Akron, Ohio, now under course of construction, and respectfully request an opinion from your department as to the legal status of the state and the rights or authority of this department to order or en-

force the installation of additional pipes, radiators, boilers, etc., as are necessary and required to provide a satisfactory and efficient heating system in the building.

The architects for the building were Harpster & Bliss of Akron. The general contractor for this building is The Clemmer & Johnson Company of Akron, and the subcontractor for the heating and ventilating is The Thomas Heating Co., of Racine, Wis.

The insufficiency of the system was first discovered by actual tests made in the presence of witnesses. The discovery made by the tests has been confirmed by actual calculation and are as follows:

The total amount of direct radiation installed in the building is 4,262 square feet, and the proper amount to sufficiently heat the building should be at least 5,915, which means that at least 1,653 square feet of additional direct radiation should be installed.

The total amount of indirect radiation installed to heat the incoming air required for ventilation is 2,754 square feet, and the proper amount is 4,918 square feet, which means that at least 2,164 square feet of additional indirect radiation should be installed.

The installation of the additional direct and indirect radiation as above described would require additional and larger boiler, to generate and deliver steam to such a radiator.

The architect's plans show the amount of direct radiation to be installed in the building and the specifications state: 'The amount of radiation to be as marked on the plans.'

The architect's specifications state in reference to the indirect radiation that: 'Each of these groups of vento heaters will consist of six stacks of heaters making the group two stacks in height and three stacks deep. Each stack will have 17 loops of the regular 50 inch sections, 5¾" on centers.'

The architect's specifications provide for two sectional cast-iron boilers each with a rated capacity, in direct radiation of 13,000 (13,500).

The supervising architect, Fred W. Elliott, reports that he has thoroughly examined the system and finds that the amount of direct and indirect radiation shown by the architect's plans and specifications has been installed, but that the two boilers of capacity of 10,000 feet each have been used instead of two with a capacity of 13,000 feet each as specified. The supervising architect further reports that the boilers now installed are the largest pattern made of the size specified, and are of ample size to heat the amount of radiation shown by the archtect's plans and specifications, but that the same are not sufficient to heat the actual amount of radiation required.

The architect's specifications contain the following general clause:

'The heating and ventilating will be as hereinafter specified and the work shall in all respects comply with the code of the Department of Inspection of Workshops and Factories of the State of Ohio. The successful bidder will be required to furnish complete details of the heating system he proposes to install the same and shall give the board a written guarantee that the system will do the work as required and specified.'

With the above data before you, this department respectfully requests an opinion on the following points at issue:

First—Can the State of Ohio demand of the contractor the necessary correction of defects without paying extra for the same, or has the state waived her rights when she accepted the architect's plans?

Second—If the state has waived her rights to hold the contractor responsible, how then can funds be secured from the state treasury to pay for such extra work which will amount to $4,500.00.

Third—Can the state demand the installation of two boilers of a greater capacity than is manufactured, or should she require the equivalent capacity by using three instead of two boilers?

The Akron armory affords sufficient space for the installation of an additional boiler, but if such was not the case, would the contractor be required to remove walls and partitions in the building, in order to secure the necessary additional space?

Approved plans and specifications are on file in the state auditor's office."

Your communication refers to certain matters connected with the construction of the Akron armory. Briefly stated, the facts are as follows: The state armory board, through architects selected or approved by the board, had plans and specifications made for said armory building. Based upon these plans and specifications, which were approved by the armory board, a contract was entered into with the Clemmer & Johnson Co., of Akron, for the erection of said armory. Said company furnished a good and sufficient bond conditioned for the faithful performance of its contract.

The heating and ventilating of said armory building was sublet to The Thomas Heating Co., of Racine, Wis.

The armory proper is practically completed and in so far as the questions raised in your communication are concerned, it is entirely completed. Since the completion of the armory, it has been ascertained by careful investigation that the amount of radiation, both direct and indirect, is not sufficient to heat the building as it should be heated; that the direct radiation lacks at least 1,653 square feet of what it should be, and the indirect radiation lacks 2,164 square feet, for a proper heating of the building.

The plans and specifications, together with the plans upon which the contract was based, provided for a certain amount of radiation, both direct and indirect, and plainly indicated where the different radiators were to be located in the building. The plans and specifications also provided that two cast-iron sectional steam boilers, of not less than 13,500 feet capacity each, should be installed in said armory building in connection with the heating and ventilating of same.

There is no question raised that the contractor did not install the heating plant, in so far as radiation is concerned, exactly as the plans and specifications provide; but it is admitted, on the other hand, that instead of installing two steam boilers of a capacity of 13,500 feet each, the contractor installed two such boilers of a capacity of 10,000 feet each, thus making a total capacity of 20,000, instead of 27,000 feet.

It is further admitted that if there were a sufficient amount of radiation installed in the armory, it would require a boiler capacity of something like 36,000 feet, which is 16,000 feet more than is at present installed in the building and 9,000 feet more than called for by the plans and specifications.

It is further admitted that it was impossible at the time the contract was entered into and at any time since the date thereof, to secure on the market a boiler of the type set forth in the plans and specifications, with a capacity of 13,500 feet, and that the maximum capacity of the type of boiler such as is set out in the plans and specifications is about 10,000 feet.

It is further admitted upon the part of the state armory board that the boilers

as installed in the armory building would be of sufficient capacity for the amount of radiation now in the building.

It is further to be noted that the boiler room of the armory, which was built in accordance with the plans and specifications, is of sufficient size to accommodate another steam boiler such as those which have been installed by the contractor.

In view of these facts the question is as to what steps the state armory board ought to take under the conditions set out in your letter.

Article I of the contract provides that:

> "The contractor shall and will provide all the materials and perform all the work for the construction and completion of an armory in the city of Akron, Ohio, *as shown on the drawings and covered in the specifications* prepared by Harpster & Bliss, associated with Karl I. Best, Architects, * * *."

The bond given by the contractor, The Clemmer & Johnson Company, provides in part as follows:

> "That if the said principal shall faithfully perform said contract on its part to be performed, in accordance with the proposal *and the plans, specifications and descriptions* for the erection and completion of said armory * * then this obligation shall be void."

The specifications upon which the contract was based and which became a part of the contract itself, on p. 52 thereof, under the title "Boilers," read in part as follows:

> "Contractor shall furnish and set up in the boiler room where shown two cast-iron sectional steam boilers of not less than 13,500 feet capacity each,"

On p. 54 the following provision is made in reference to "Direct Radiation:"

> "All direct radiation in the first and second story shall be the American Radiator Company's Rococo or National Radiator Company's Novue radiation or equal to be approved by the architects using two column radiation 38 inches high unless otherwise marked in the drawing *and the amount of radiation to be as marked in the plans.*"

On p. 56 under "Motors" we find this provision:

> "The G. A. R. lodge room will be heated with warm air only and the contractor shall include in his proposition a proper size disc type of fan using the Davidson fan or equal operated with a direct motor of the three phase, 220 volt alternating current type and a sufficient amount of Vento coils for heating the air to a proper temperature, so as to heat this room to 70 degrees in the coldest winter weather."

I quote the above provisions in reference to radiation to show that the contractor did not in any way agree to furnish a certain amount of heat for any part of the building other than the G. A. R. lodge room. The contractor was simply to install a certain amount of radiation at places indicated in the plans.

On p. 52 of the plans and specifications, under the paragraph entitled "Preliminary," we find this provision:

> "The successful bidder will be required to furnish complete details of the heating system as he proposes to install same and shall give the board a written guarantee that the system will do the work as required and specified."

Apparently in compliance with this provision of the plans and specifications, on February 10, 1916, The Thomas Heating Co. submitted certain plans for a heating system, which plans clearly set forth the location of two boilers in the boiler room and indicated that these boilers had a capacity of 10,000 feet each.

In answering your questions the first thing to be considered is as to whether the contractor ought not to be relieved from his obligation to install two boilers of 13,500 feet capacity each, in view of the fact that ever since the letting of the contract it has been impossible to secure boilers of said size. Some members of the board feel that this principle might be applied. There is a general impression abroad that in all those cases in which it is impossible for a person to carry out the terms of a contract, he is relieved from the performance of the same and is not liable to damages for a breach thereof. While this is true in some instances, it is not true as a general proposition.

Elliott in his Work on Contracts, in section 1891 lays down the following:

> "Where no express or implied provision as to the event of impossibility can be found in the terms or circumstances of the agreement, it is a general rule of construction, founded on the absolute and unqualified terms of the promise, that the promissor remains responsible for damages, notwithstanding the supervening impossibility or hardship."

However, the author continues in the same section as follows:

> "It must be borne in mind, however, that it is equally well settled that when performance depends on the existence of a given person, purpose or thing, and such existence or continued existence was assumed as the basis of the agreement, the death of the person or the destruction or non-existence of the thing, without fault, puts an end to the obligation."

Is the impossibility, as we find it to exist in the matter under consideration, such as to be governed by the first or second principle laid down by Mr. Elliott? Of course if it is governed by the second principle, the contractor is relieved from the obligation to install two boilers with a capacity of 13,500 feet each.

We will first consider the second principle above laid down. In Dexter vs. Norton, et al., 47 N. Y. 62, the court says:

> "Where a contract is made for the sale and delivery of specified articles of personal property under such circumstances that the title does not vest in the vendee if the property is destroyed by an accident without the fault of the vendor, so that delivery becomes impossible, the latter is not liable to the vendee in damages for the non-delivery."

In this case the contract in question involved the sale of certain bales of cotton, each bale being designated by a particular mark. These bales of cotton were destroyed by an accidental fire. In the opinion on p. 65 the court quotes the following with approval:

"The principle seems to us to be that in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance, arising from the perishing of the person or thing, shall excuse the performance, and the reason of the rule is that because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or thing."

In Martin & Co., vs. Siegel-Cooper Co., 237 Ill., 610, the court say:

"In contracts the performance of which requires the continued existence of a particular person or a particular thing, a condition is always implied that the death of such person or the destruction of such thing shall excuse performance."

In Vogt vs. Hecker, 118 Wis., 306, the court say in the opinion at p. 309:

"Plaintiff invokes a rule well recognized—that when parties contract for the doing of some act with reference to an existing thing, to the performance of which the continued existence of the thing is essential, they impliedly agree that such continued existence shall be a condition of the contract duty * * * . This distinction is of course obvious between two contracts—one to do work upon a thing which exists, or for the creation of which another is responsible; the other, to fully create and bring into existence that for which the contract price is to be paid."

Before commenting on whether the above decisions apply to the case under consideration, I will quote from a case which upholds the first principle of Elliott above set out, viz., Harrison vs. Missouri & Co., 74 Mo., 364. On p. 371 the court say:

"Where a party by contract agrees to do a prescribed thing in a prescribed time, he is liable for non-performance of the contract, notwithstanding the fact that his non-fulfillment of the contract was occasioned by inevitable and unavoidable accident."

The court quotes then with approval as follows:

"When a party by his own contract creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract."

The court further quotes with approval:

"If the carrier has agreed to carry the goods to their destination and then deliver them within a prescribed time, he will be held to a strict performance of his contract and no temporary obstruction or even absolute impossibility will be a defense for failure to comply with the engagement * * * because he might have provided against it by his contract."

We will now consider the distinction between the two above principles laid down by Elliott. If a contractor agrees to do something with a particular thing

which is in existence at the time the contract is entered into, and if before the fulfillment of the contract this particular thing is destroyed without any fault of his own, he is relieved from his obligation and can not be held in damages for a failure to comply with the terms of his contract, for the reason that both parties must be held to have contracted on the implied condition that such particular thing would continue in existence.

On the other hand, if the contractor agrees generally to furnish a certain thing for the party with whom he contracts, he is liable for damages if he fails to furnish the article about which the contract is made, even though it is impossible for him so to do, for the reason that he might have made provision for such a contingency in his contract; that is, that he would furnish the article provided said article could be obtained on the market.

Let us apply the above distinction to the matter under consideration. The Clemmer & Johnson Co. agreed with the state armory board to install generally two steam boilers, each with a capacity of 13,500 feet. The said company did not agree to furnish two certain, specific steam boilers located at some particular place or numbered or marked in some particular manner, which were in existence at the time the contract was entered into. If the latter had been the case and these two specific boilers had been destroyed, the Clemmer & Johnson Co., would have been relieved from their obligation to furnish the specific boilers, because it would be presumed that both parties had entered into the contract with the implied understanding that said boilers would continue in existence until the fulfillment of the contract. If The Clemmer & Johnson Co. had desired to be relieved from its obligation to install two boilers of 13,500 feet capacity each, in case it would be impossible for it to obtain such boilers on the market, the company should have so stipulated in the contract.

Upon this question there is an interesting case reported in 59 Mich. 488, styled Switzer et al. vs. Pinconning Mfg. Co. In this case the defendant agreed to furnish plaintiff with two million feet of white pine lumber "to be cut from logs now in the pond and logs to be cut from section 13 during the season of 1883." It developed that there was not two million feet of lumber in the pond and on section 13.

The plaintiff brought action for damages for breach of contract, but the court held that the plaintiff was not entitled to recover, because the contract was entered into with a view to certain specific logs, viz., logs in the pond and logs to be cut from section 13, and that both parties must have impliedly understood that if there were not two million feet of lumber so located, the defendant would be relieved from carrying out its obligation and not be responsible for damages for a breach thereof. But the court clearly indicated that if the defendant had generally agreed to furnish two million feet of white pine lumber, it would have been liable for a breach of the obligation, even though it would have been impossible to have purchased on the market that number of feet of white pine lumber.

In view of all the above we can conclude that The Clemmer & Johnson Co. is not relieved from the obligations of its contract with the state armory board, merely because it was impossible for it to purchase on the market the engines for which it contracted.

Another question propounded by you is:

> "Can the State of Ohio demand of the contractor the necessary correction of defects without paying extra for the same, or has the state waived her rights when she accepted the architect's plans?"

I assume this question refers to radiation. Inasmuch as the contractor installed the radiation, both direct and indirect, exactly in conformity to the plans and speci-

fications upon which the contract was made and which became a part of the contract, the state has no right of action against the contractor for the defects in said radiation. The contractor did not agree that the radiation installed should produce a certain temperature in the rooms. He merely agreed to install "the amount of radiation to be as marked on the plans."

Your third question reads as follows:

> "Can the state demand the installation of two boilers of a greater capacity than is manufactured, or should she require the equivalent capacity by using three instead of two boilers?"

This question involves the proposition as to whether the state could compel specific performance of the contract. Without going into this very fully, I will say that the state can not compel specific performance on the part of the contractor to install two boilers of a capacity of 13,500 feet each; neither can the state compel the contractor to install three boilers having a capacity equal to that which the two boilers were to have. In other words, the state would have no right of action for specific performance of the contract, providing the contractor refuses to comply with the same. The state's action would be an action for damages, in that the contractor failed to comply with the terms of the contract for the installation of said boilers.

The question now to be considered is whether the state could maintain an action in damages, in view of all the above principles, against the contractor, for his failure to install two boilers of 13,500 feet capacity each. In reference to this matter I have received further information in the way of sworn statements and letters which pertain to the installation of these boilers.

The Thomas Heating Co. submitted plans and specifications for the heating of the building. This was done in accordance with the provisions of the original specifications and estimates. Said heating company clearly indicated in these plans that it intended to install two boilers of 10,000 feet capacity each. These latter plans and specifications were followed by the Thomas Heating Co. and the architects of the state, who stood by and saw these two boilers installed.

Further, the original plans and specifications provide that the contractor should install boilers made by the Prudential Heating Co. of Akron, O. It developed that the largest boilers the Prudential Co. manufactured were of about 10,000 feet capacity. This matter was taken up by the Thomas Heating Co. with the architect of the state, Major Best, who consented to the proposition that the Thomas Heating Co. should use boilers of the Prudential Heating Co., and inasmuch as it manufactured boilers of no larger capacity than 10,000 feet, that the Thomas Heating Co. should use boilers of said capacity in the installation of the heating system in the armory.

It was further understood there were to be but two boilers installed in connection with this heating system. It might be well here to remember also that no other company manufactured boilers, such as were to be installed in the armory, of a greater capacity than 10,000 feet.

From all the above it is my opinion that the state has by its action, through its officers, waived any rights it might have had against The Clemmer & Johnson Co. for a failure to comply with the terms of the original plans and specifications.

It is my view that the state would be estopped from setting up its rights on account of the facts above set forth and that it could not recover in an action for damages against The Clemmer & Johnson Co., and I so advise you.

There is one question remaining to be considered, viz., how can the necessary funds be secured from the state treasurer to pay for the extra work which may

have to be performed by the state in order to have said armory building properly heated? Sections 5247, 5248 and 5249 G. C. (107 O. L. 395) read as follows:

> "Sec. 5247.—The auditor of state shall credit to the 'state military fund' from the general revenues of the state, a sum equal to ten cents from each person who was a resident of the state, as shown by each last preceding federal census. Such fund shall be a continuous fund and available only for the support of the national guard and naval militia. It shall not be diverted to any other fund or used for any other purpose."
>
> "Sec. 5248.—The general assembly shall appropriate annually, and divide into two funds, the amount authorized by the preceding section. Such funds shall be respectively known as the 'state armory fund' and 'maintenance Ohio National Guard.'
>
> "Sec. 5249.—From the 'maintenance, Ohio National Guard fund' the adjutant general shall pay all expenses incident to the maintenance of the various units of the national guard and Ohio naval militia, except such as are provided for from the 'state armory fund.' From the 'state armory fund' the adjutant general shall provide grounds, armories and other buildings for military purposes by leasing, purchasing or constructing the same."

In accordance with the provisions of these sections, we find that the legislature appropriated the sum of $426,712.10, divided between the two funds as follows: Maintenance Ohio national guard, $311,712.10; state armory fund, $115,000.00.

Section 5249, supra, provides that "From the 'state armory fund' the adjutant general shall provide grounds," etc., "by leasing, purchasing or constructing the same." It is my opinion that from the moneys so appropriated by the legislature the proper officers could use a sufficient amount to provide for the extra work in connection with said armory.

I am not unmindful of the provisions of section 2 of the act, making the above appropriations, which reads as follows:

> "The following sums shall not be expended to pay liabilities or deficiencies existing prior to July 1st, 1917, * * *."
>
> 107 O. L. 188.

It is my opinion that these extras would not be furnished under an obligation entered into prior to July 1, 1917, but that there would be an obligation to furnish same under a contract entered into since said date.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1306

ROADS AND HIGHWAYS—APPROACHES AND DRIVEWAYS, DAMAGES FOR DESTRUCTION, BY WHOM PAID AND FROM WHAT FUND.

1.—*Under section 7212 G. C. (107 O. L. 120,) whatever authority constructs or improves a road, whether it be the state highway commissioner, the county commissioners or the township trustees, that same authority must pay the damages to an abutting property owner for the destruction of any approach or driveway, or in lieu thereof must reconstruct the same through the county surveyor and pay the costs incident thereto.*

2.—In those cases in which the county or township pays the damages or the costs incident to the reconstruction of a driveway or approach, the money necessary for the same must be taken from the general fund. When the state pays said damages or costs, the money necessary for same should be taken either from the inter-county highway fund due the county, or the main market road fund, depending on whether it is an inter-county highway or main market road that is being constructed or improved.

COLUMBUS, OHIO, June 29, 1918.

HON. GEORGE F. CRAWFORD, *Prosecuting Attorney, Greenville, O.*

DEAR SIR—I have your communication of June 19, 1918, which reads in part as follows:

> "The State Highway Department is constructing section 'A' of Inter-County Highway No. 62, through a part of this county. A question has arisen in the matter of the construction of approaches in this improvement. The plans and specifications for said highway do not provide for such approaches. * * *.
>
> This section (Sec. 7212 G. C.) is not clear as to whether the county or the state should repair these approaches or reimburse the abutting owner. The State Highway Department is the authority constructing this improvement and by taking that view of the section it would seem that it would be incumbent on the State Highway Department to compensate such abutting property owner. On the other hand the section provides that the county surveyor shall reconstruct the same at public expense, thus seeming to place the responsibility upon the county.
>
> Kindly give me your opinion as to the liability in the matter, as to whether it rests with the county or with the state highway department."

Briefly stated, your question is: If, in the construction of highways under the jurisdiction of the state highway commissioner, approaches leading from the highway to the abutting property are destroyed, who shall pay the property owner for the destruction of said approach or driveway, or in lieu thereof who shall authorize the county surveyor to reconstruct the same and pay for the cost of such reconstruction? The further question naturally follows as to the fund from which the damage or the cost of reconstruction shall be paid.

The questions arise under section 7212 G. C. This section was amended at the last session of the legislature and as it now stands reads as follows (107 O. L. 120:)

> "Sec. 7212.—The owners of land shall construct and keep in repair all approaches or driveways from the public roads under the direction of the county surveyor, provided, however, that if, in the construction or improvement, maintenance and repair of any road the approach or driveway of an abutting property owner is destroyed, the authorities constructing, improving, maintaining or repairing such road shall compensate such abutting property owner of said lands for the destruction of such approach or driveway, or in lieu thereof authorize the county surveyor to reconsruct the same at public expense.
>
> In the construction of a road improvement the state highway commissioner or county surveyor may in all cases where the approaches of the owners of abutting real estate are unsuitable to a projected improvement or so constructed as not to afford proper drainage after its completion, in-

clude in the plans for such improvement plans for proper approaches. The entire cost of constructing such approaches may be assessed against the lands along which they are constructed."

The section, as it stood prior to the amendment, read as follows:

"Sec. 7212.—The owners or occupants of land shall consturct and keep in repair all approaches or driveways from the public roads under the direction of the county highway superintendent, provided, however, that if, in the constuction or improvement, maintenance and repair of any road, the approach or driveway of an abutting property owner is destroyed, the county commissioners or township trustees shall compensate such abutting property owner or occupant of said lands for the destruction of such approach or driveway, or in lieu thereof, authorize the county highway superintendent to reconstruct the same."

I will call your attention to an opinion rendered by me on April 19, 1917, to Hon. S. L. Gregory, prosecuting attorney, and found in Vol. I, Opinions of the Attorney-General for 1917, p. 524, wherein I passed upon the exact question you have in mind. However, the opinion was rendered under the law as it stood prior to the amendment of this section. In the first branch of the syllabus I held as follows:

"Under the provisions of section 7212 G. C., the cost of the construction of approaches and driveways, or compensation to the abutting property owner for the destruction of approaches and driveways, is not to be included in the estimate of the cost and expense of constructing or repairing the highway and paid from the fund created for the construction or repairing of the highway, but same must be taken from the general fund of the county or township."

I think this same principle would apply under the section as amended; that is, the cost of the construction of the approaches or driveways or the damages paid to the property owner because of their destruction, would not be considered a part of the cost and expense of the improvement and hence would not be included in the plans and specifications for the improvement. This is a general obligation which rests upon the county or township and therefore the cost and expense of the same or the damages allowed would be taken from the general fund of the county or township.

In the third branch of the syllabus I held as follows:

"If the township trustees had jurisdiction and supervision of the construction or repair of the public road, then in that event they are the persons either to compensate the owner or occupant for the destruction of the approach or driveway, or to reconstruct said approach or driveway. If, on the other hand, the county commissioners or the state highway commissioner had jurisdiction and supervision over the construction or repair of the public road, then the county commissioners are the persons either to compensate the owner or occupant or to reconstruct the approach or driveway."

The principle set forth in said third branch, while related to the question you have in mind, does not exactly answer it. At this point let us remember that the

provision "the county commissioners or township trustees shall compensate," as it originally stood in section 7212 G. C., was amended to read "the authorities constructing, improving, maintaining or repairing such road shall compensate." The term "authorities" is substituted for "the county commissioners or township trustees."

I am quite sure, from the reading of the section as it now stands, that the state would be obligated to compensate the abutting property owner for the destruction of his approach or driveway, or to pay the expense of reconstructing the approach or driveway in those cases in which the state highway commissioner assumes jurisdiction over the construction of the highway. This seems to be the clear intent of the statute. That is, whatever authority—whether it be the township trustees, the county commissioners or the state highway commissioner—constructs or improves the road, that same authority must pay the damages incident to the destruction of the approach or driveway, or in lieu thereof pay the cost of the reconstruction of the same.

The question as to the fund from which the money should be paid remains to be answered. As said before, I held in the opinion quoted from above, that the damages or the cost and expense should be taken from the general fund, inasmuch as it is a general obligation against the county or the township. This leaves the only question remaining as to the fund from which the state should pay the damages or the cost and expense of reconstructing the driveway or approach. In this case I think the damages or the cost and expense of the reconstruction should be paid from the inter-county highway fund which is due the county in which the improvement is located, as provided in section 1221 G. C. (107 O. L. 131.)

While the state highway commissioner assumes jurisdiction over the building of a road, and the state pays a part of the cost and expense thereof, yet this is done only to the extent of the funds which may be due any county under said section. Therefore, the damages incident to the improvement over which the state highway commissioner assumes jurisdiction, should be paid from the same fund. Of course if it should be a main market road that is being improved under the jurisdiction of the state highway commissioner, the damages or the cost of reconstructing the approach or driveway would be paid by the state from the main market road fund, under section 1221, supra.

As I understand it, this answers your question in full.

It might be held that under the last sentence of section 7212, supra, as amended, the cost of the construction of the approaches may be assessed against the lands along which they are constructed; but I think not. This sentence evidently applies to the provisions of the latter part of the section, to the effect that the authority making the improvement may construct new approaches, provided said authority finds that the approaches as they exist at the time are not suitable to the improvement about to be projected. In other words, I do not think the provisions of this sentence apply to those cases in which approaches or driveways are destroyed and are reconstructed, or damages paid to the abutting property owner.

Very truly yours,

JOSEPH MCGHEE,

Attorney General,

1307.

OFFICES COMPATIBLE—DIRECTOR OF PUBLIC SERVICE AND HEALTH OFFICER.

The positions of director of public service and health officer are compatible if it is physically possible for one person to perform the duties of both positions.

COLUMBUS, OHIO, June 29, 1918.

The Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN—I am in receipt of your request for my written opinion as follows:

> "The health officer of the city of Circleville, Ohio, has resigned and left the city and the director of public service has been temporarily filling the duties of the health officer. We are requested by the solicitor of such city for the following information:
>
> Are the positions of director of public service and health officer of the city compatible?"

I have carefully examined the statutes pertaining to the offices of director of public service and health officer and find no statutory inhibition against one person holding both offices. It remains to be determined, then, whether or not these offices are incompatible within the meaning of the common law.

In the case of State ex rel vs. Gebhart, 12 O. C. C. (n. s.,) 274, the rule is laid down as follows:

> "Offices are considered incompatible when one is subordinate to or in any way a check upon the other, or when it is physically impossible for one person to discharge the duties of both."

I am unable to see in practice how there could be any conflict in the duties of the two positions and it is my opinion that the offices of director of public service and health officer are not incompatible and may be held by the same person if it is physically possible for one person to perform the duties of both.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1308.

INTEREST OR PREMIUM RECEIVED FROM SALE OF BONDS SHOULD BE COVERED INTO SINKING FUND.

Moneys received by way of accrued interest or premium in the sale of bonds issued under sections 1223, 6929 *and* 3298-15e *G. C. should be covered into the sinking fund, from which said bonds are to be redeemed as required by the provisions of section* 2295 *G. C. as amended,* 106 *O. L.,* 493.

COLUMBUS, OHIO, June 29, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN—I am in receipt of your favor of June 10th, 1918, in which you ask my opinion upon the following statement of facts:

"The concluding sentence of section 2295 G. C., as amended, 106 O. L. 493, provides what disposition shall be made of the premium and accrued interest on bond sales. We take it that this refers to such bonds as are issued by boards mentioned in section 2294 G. C., as amended, 106 O. L. 492. We find that sections 1223 G. C., as amended 107 O. L. 133, 6929 as amended, 107 O. L. 101 and 3298-15e, 107 O .L. 79, each contain substantially the following provision:

'The proceeds of such bonds shall be used exclusively for the payment of the cost and expense of the construction, improvement or repair of the highway for which the bonds are issued,'

but it is well to note that each of these sections cited provides that the bonds shall be sold in an amount not greater than the aggregate sum necessary to pay the respective shares, etc.

Question.—When bonds are sold under the sections above cited are the premium and accrued interest to be considered as a part of the proceeds of the sale and do these particular sections govern because of their being special provisions in place of the provisions cited in section 2295 G. C., as to the disposition of the premium and accrued interest?"

Section 2294 G. C., as amended, 106 O. L. 492 provides for the manner in which bonds issued by boards of county commissioners, boards of education, township trustees, or commissioners of free turnpikes, shall be advertised for sale.

Section 2295 G. C., as amended, 106 O. L. 492, referring to bonds issued by the authorities mentioned in section 2294, provides in part as follows:

"All moneys from the principal on the sale of such bonds shall be credited to the fund on account of which the bonds are issued and sold, and all moneys from premiums and accrued interest on the sale of such bonds shall be credited to the sinking fund from which said bonds are to be redeemed."

I do not deem it necessary to discuss at any length the provisions of sections 1223, 6929 and 3298-15e, as amended, 107 O. L. 79. It is sufficient to say that said sections authorize county commissioners and township trustees, respectively, to issue bonds for road improvement purposes, and each of said sections in terms quite identical provides that the proceeds of bonds therein set out shall be used exclusively for the payment of the cost and expense of the construction, improvement or repair of the highway for which the bonds are issued. The question made by you is with respect to the application of the above quoted provisions of section 2295 G. C. to moneys paid by way of accrued interest and premium on road improvement bonds issued under the respective sections of the General Code just noted; or more specifically, perhaps, the question is whether or not the provision in sections 1223, 6929 and 3298-15e that the proceeds of bonds issued under said respective sections shall be used exclusively for the payment of the cost and expense of the construction, improvement or repair of the highway for which the bonds are issued, has the effect of excepting moneys received by way of accrued interest and premium on such bonds from the provisions of section 2295 G. C.

The suggestion that this is the effect of this provision in said bond issuing sections of the General Code above noted, proceeds upon the assumption that said provision is incompatible with the general provisions of section 2295 G. C. with respect to the disposition to be made of accrued interest and premiums received on

bonds issued by county commissioners and township trustees, and making such assumption, is predicated upon the rule of construction that if there are two acts, of which one is special and particular and includes the matter in controversy, while the other is general and would, if standing alone, include it also, and if reading the general provisions side by side with the particular one, the inclusion of that matter in the former would produce a conflict with it, it is to be taken that the latter was designed as an exception to the general provision.

In this connection, although it is not a matter of controlling importance, it may be noted that so far as sections 1223 and 6929 G. C. are concerned, the provision therein that the proceeds of bonds issued under said respective sections shall be used exclusively for the payment of the cost and expense of the improvement for which the bonds are issued, it not to be considered as a later expression of the legislative will, than that indicated by the provision of section 2295 G. C. above quoted, and this for the reason that said provision of sections 1223 and 6929, as amended in the White-Mulcahy law of 1917, was likewise contained in said sections as enacted in the Cass law of 1915, ten days before the act amending section 2295 G. C. in its present form was enacted.

See State vs. Borham, 358-362. In re Hesse 93 O. S. 230, 235.

Sections 3298-15e G. C., as enacted in the White-Mulcahy road law of 1917, is in a measure a new section, taking the place of section 3298-8 G. C., as enacted in the Cass road law, which provided for an issue of bonds by township trustees for road purposes on a vote of the electors, and the provision in section 3298-15e that the proceeds of bonds issued thereunder shall be used exclusively to pay the cost and expense of the improvement for which they are issued is a new provision so far as this section is concerned. Inasmuch, however, as section 3298-15e G. C. is with sections 1223 and 6929 a part of what is intended to be a complete code of laws relating to the subject of road construction, improvement and repair, I do not apprehend that the particular provision here under consideration in section 3298-15e is in any event to receive a different construction or application from the same provisions in sections 1223 and 6929 G. C. However, as above indicated, no controlling importance in the consideration of this question is to be attached to the time when said respective statutory provisions were enacted, for if it be assumed that the special provision in sections 1223, 6929, and 3298-15e G. C. is in conflict with the general provisions of section 2295 G. C., above noted, the question here made is controlled by the rule of construction above noted, which, stated in another way, is that where there is a general act, and also a special act on the same subject in conflicting terms neither necessarily abrogates the other but both are permitted to stand together, and it is immaterial which is of the later date.

Commissioners vs. Board of Public Works, 39 O. S. 628, 630.

I am not persuaded, however, on a full consideration of the sections of the General Code involved in the consideration of your question, that any conflict exists between the special provision of sections 1223, 6929 and 3298-15e G. C. on one hand, and the provisions of section 2295 G. C. on the other.

It is a rule of construction as equally well established as that above noted that the provisions of a statute are to be construed in connection with all laws *in pari materia,* and especially with reference to the system of legislation of which they form a part, so that all the provisions may, if possible, have operation according to their plain import, and it is to be presumed that a code of statutes relating to one subject is governed by one spirit and policy and intended to be consistent and harmonious in its several parts.

In the case of Cincinnati vs. Conner, 55 O. S., 82, it was held that where in a code or system of laws relating to the particular subject a general policy is plainly declared, special provisions should, when possible, be given a construction which will bring such special provisions in harmony with that policy.

The above quoted provisions of section 2295 G. C. clearly declare a wise and beneficent policy with respect to the disposition of moneys received by way of accrued interest and premiums on *all* bonds sold by county commissioners and township trustees, and the provision above noted and found in section 1223 G. C., 6929 G. C. and 3298-15e G. C., should, if possible, receive a construction which will bring it in harmony with the declared policy indicated by the provisions of section 2295 G. C.

In ascertaining the legislative intent in the enactment of sections 1223, 6929 and 3298-15e G. C., we are not only permitted, but required, to read as *in pari materia* with the provisions of said sections the provisions of section 2295. Standing alone it may well be that the provision in said sections requiring the proceeds of bonds issued thereunder to be used for the cost and expense of the improvement for which they are issued, would cover moneys received by way of accrued interest and premiums as well as moneys representing the principal sum for which the bonds are issued. The word "proceeds" as used in connection with said section is one of general import, but it is likewise true that general words in a statute should be limited to the particular objects to which it is apparent the legislature intended to apply them (46 O. S. 595), and in this view, giving proper effect as I must to the provisions of section 2295 G. C., I find no difficulty in reaching the conclusion that the legislature, in providing that the proceeds of bonds issued under sections 1223, 6929 and 3298-15e G. C. shall be used exclusively for the payment of the cost and expense of improvements for which the bonds are issued, intended to provide for the application of the principal of such bonds only.

This view is likewise compelled by a consideration of other provisions of sections 1223, 6929 and 3298-15e G. C. Each of said sections contains the provision that bonds may be issued thereunder in an amount not to exceed the estimated cost and expense or portion thereof of the improvement for which such bonds are issued. In issuing bonds under said respective sections the county commissioners or township trustees, as the case may be, are not required to anticipate the amount of moneys to be received by them by way of accrued interest or premium in the sale of such bonds. This being true, such county commissioners or township trustees may issue bonds in a principal sum up to the estimate of the cost and expense or part thereof of the improvement for which the bonds are issued. The principal of bonds sold under these sections manifestly goes into the fund for the construction of the improvement for which the bonds are issued, and if in addition to this sum moneys received by way of accrued interest and premium on said bonds likewise goes into the road improvement fund, the authorities issuing such bonds will thereby realize moneys in excess of that necessary for the construction of the improvement contrary to what seems to be the intent and purpose of said sections.

For all of the above reasons I am of the opinion that moneys received by way of accrued interest for premium in the sale of bonds issued under sections 1223, 6929 and 3298-15e G. C. should be covered into the sinking fund from which said bonds are to be redeemed as required by the provisions of section 2295 G. C.

With the above request for opinion you submit to me a letter received by you from the auditor of Guernsey county in which inquiry is made as to the proper disposition of the sum of $15,976.48 received by the county commissioners by way of premium and accrued interest on road improvement bonds in the sum of $300,000.00 sold for the improvement of the National road through Guernsey county in 1914.

Without further information on the point I assume that said bonds were issued and sold by the county commissioners under section 1223 G. C., as amended in the act of April 18, 1913, for the purpose of paying the respective shares of said county, of the interested townships and of the owners of benefited property assessed for

the construction of an improvement on said highway by the state highway commissioner.

Section 1223 G. C., as enacted in the provisions of said act of 1913, provided, as now, that the proceeds of bonds issued thereunder should be used exclusively for the payment of the cost and expense of construction, improvement, maintenance or repair of the highway for which the bonds were issued, while section 2295 of the General Code then provided that all moneys from both principal and premiums on the sale of bonds issued by county commissioners should be credited to the fund on account of which the bonds are issued and sold.

This being the state of the law at the time of the sale of the bonds in question, and there being nothing in the present provisions of section 2295 G. C. indicating that they are to receive anything but a prospective operation, the conclusion is inevitable that the moneys received by the commissioners of Guernsey county by way of premium and accrued interest on the sale of the bonds mentioned in the communication of the auditor belong properly to the road improvement fund, subject to transfer to the county debt fund under the provisions of section 5654 G. C., if it be found that such money is not needed for the construction of the improvement for which the bonds were issued.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1309

GERMAN NEWSPAPER — LEGAL ADVERTISEMENT BY MUNICIPALITY.

The officers of a municipality in which the only newspaper published therein is printed in the German language are not compelled to insert the legal advertisement required by sections 4228, 4229, 4232 *and* 6255 *in such German newspaper, unless it has a bona fide paid circulation of not less than* 1,000 *copies—Such advertisement in a German newspaper does not relieve the officers of a municipality from the obligation of advertising in the manner set forth in the first paragraph of section* 4228.

COLUMBUS, OHIO, June 29, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN—I am in receipt of your request for opinion which reads as follows:

> "We respectfully request your written opinion upon the following matters:
>
> We are referring you to sections 4228, 4229, 4232 and 6255 of the General Code, and are respectfully advising that 'The Minster Post,' a newspaper printed in the German language, is the only paper published in such municipality.
>
> Question 1—Are the officers of the village of Minster forced to insert their legal advertising in such newspaper?
>
> Question 2—Must such newspaper have a circulation of 1,000 copies within such municipality?"

You call my attention to sections 4228, 4229, 4232 and 6255, which sections provide as follows:

Section 4228—"Unless otherwise specifically directed by statute, all municipal ordinances, resolutions, statements, orders, proclamations, notices and reports, required by law or ordinance to be published, shall be published as follows: In two newspapers of opposite politics printed and of general circulation in such municipality, if there be such newspapers; if two newspapers of opposite politics are not printed and of general circulation in such municipality, then in any newspaper printed and of general circulation therein; if no newspaper is printed and of general circulation in such municipality, then in any newspaper of general circulation or by posting as provided in section forty-two hundred, thirty-two of the General Code, at the option of council.

In addition to the foregoing requirements, ordinances and resolutions required by law or ordinance to be published, shall be published in a newspaper in the German language printed in such municipality and having therein a bona fide paid circulation of not less than one thousand copies; proof of the place of printing and required circulation of any newspaper used as a medium of publication hereunder shall be made by affidavit of the proprietor of either of such newspapers, and shall be filed with the clerk of council."

Section 4229—"The publication required in section forty-two hundred and twenty-eight of the General Code shall be for the following times: Ordinances, resolutions and proclamations of elections, once a week for two consecutive weeks; notices not less than two nor more than four consecutive weeks; all other matters shall be published at once."

Section 4232—"In municipal corporations in which no newspaper is printed as defined in section sixty-two hundred and fifty-five of the General Code, publication of ordinances, resolutions ,statements, orders, proclamations, notices and reports required by law or ordinance to be published, shall be published in either of the following methods, to be deterined by council, viz: By posting copies thereof in not less than five of the most public places in the municipality to be determined by council, for a period of not less than fifteen days, prior to the taking effect thereof, or, by publication thereof in any newspaper printed in Ohio and of general circulation in such municipality. Provided, however, notices to bidders for the construction of public improvements and notices of the sale of bonds shall be published in not more than two newspapers, printed in Ohio, and of general circulation in such municipality, for the time prescribed in section forty-two hundred and twenty-nine of the General Code. Where such publication is by posting, the clerk shall make a certificate of such posting and the times when and the places where done, in the manner provided in section forty-two hundred and thirty-one of the General Code, and such certificate shall be prima facie evidence that the copies were posted up as required."

Section 6255—"Whenever any legal publication is required by law to be made in a newspaper or newspapers published or printed in a municipality, county, or other political subdivision, the newspaper or newspapers used shall have at least one side thereof printed in such municipality, county, or other political subdivision; and whenever any legal publication is required by law to be made in a newspaper or newspapers of general circulation in a municipality, county, or other political subdivision, without further restriction or limitation upon a selection of the newspaper to be used, such publication shall be made in a newspaper or newspapers at least one side of which is printed in such municipality, county,

or other political subdivision, unless there be no such newspaper or newspapers so printed, in which event, only, such publication shall be made in any newspaper or newspapers of general circulation therein."

The supreme court of this state in the case of city of Cincinnati, etc., vs. Bickett et al., 26 O. S. 49, in passing upon the validity of advertising for bids for sewer construction published in one English and one German newspaper held:

"The objection that the publication of notice to bidders was made in one English and one German paper and not in two English papers, we incline to think was well taken. While there is some conflict of authorities on the question, we think it the safer and better rule to hold, as we do, that where a statute of the state requires a publication to be made in a newspaper, a paper published in the English language is to be intended, unless the contrary is expressed or indicated."

The rule laid down in the above case was sustained in the case of Schloenbach vs. The State ex rel., 53 O. S., 345; and at page 346 the court say:

"We perceive no error in the judgment of the circuit court. The duty of the commissioners in regard to publishing their report is governed wholly by section 917 of the Revised Statutes, and that section does not accord authority for either ordering such report published in a German newspaper, or paying for the same."

In 29 cyc. 1120, the rule is laid down as follows:

"While the rule supported by the weight of authority is that where the statute is silent as to the language in which either advertisement or newspaper is to be published, the advertisement must be printed in English in a newspaper printed in the same tongue, it has been held in at least one jurisdiction that publication in a German newspaper, but in the English language, is sufficient." (Citing a California case.)

See also—Turner, Auditor General vs. Hutchison, 71 N. W. (Mich.) 514; Connors vs. city of Lowell, 209 Mass., 111; Teylee vs. Hyde, 60 Fla., 389.

Under the rule as laid down in the above cases we must look to the statutes for specific authority to insert notices required by law to be published in a newspaper in the German language. Looking then to the sections referred to by you, the only authority we find for publishing municipal ordinances, resolutions, etc. in a newspaper printed in the German language is contained in the second paragraph of section 4228, which is as follows:

"* * * In addition to the foregoing requirements, ordinances and resolutions required by law or ordinance to be published, shall be published in a newspaper in the German language printed in such municipality and having therein a bona fide paid circulation of not less than one thousand copies; proof of the place of printing and required circulation of any newspaper used as a medium of publication thereunder shall be made by affidavit of the proprietor of either of such newspapers, and shall be filed with the clerk of council."

This part of the section above quoted makes it obligatory to publish municipal ordinances, resolutions, etc., in a newspaper printed in the German language under certain conditions, to-wit: that such newspaper have a bona fide paid circulation of not less than 1,000 copies. The first paragraph makes no mention of newspapers printed in the German language; therefore if these legal publications are to be made in a German newspaper at all they must be made under the conditions imposed by that part of the section just quoted. You will note that the advertising required by the latter part of said section is *in addition to* that required in the first part of the section, showing that the legislature undoubtedly required advertising other than that printed in a German newspaper.

It is my opinion that if there is no newspaper printed in the village of Minster in the English language and of general circulation therein, then such municipal ordinances, resolutions, etc., must be published in some newspaper printed in the English language and of general circulation therein, or by posting as provided by section 4232 G. C., and that the officers of the village of Minster cannot be compelled to insert their legal advertising in the "Minster Post" simply by reason of its being the only newspaper printed in the municipality. In other words that part of section 4228 which provides

> "if two newspapers of opposite politics are not printed and of general circulation in such municipality, then in *any* newspaper printed and of general circulation therein"

does not contemplate a German newspaper, but must be construed in the light of the decisions of our supreme court and other decisions to mean a newspaper printed in the English language. However, if the "Minster Post" qualifies under the latter part of said section, then the officers are compelled, in addition to the other publication required by the first part of the section, to insert such advertising in the "Minster Post."

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1310.

APPROVAL OF BOND ISSUE OF LOGAN COUNTY—$33,900.00.

In re bonds of Logan county, Ohio, in the sum of $33,900.00, *to pay the respective shares of said county, of Harrison township and of the owners of benefited property assessed, of the cost and expense of constructing I. C. H. No.* 130, *section A-2, road improvement located in said county and township.*

COLUMBUS, OHIO, June 29, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN—I have carefully examined the corrected transcript of the proceedings of the board of county commissioners of Logan county, Ohio, relating to the above issue of bonds and find said proceedings to be in conformity to the provisions of the General Code of Ohio relating to bond issues of this kind.

I am therefore of the opinion that properly prepared bonds covering said issue will, when the same are properly executed and delivered,constitute valid and binding obligations of said county to be paid in accordance with the terms thereof.

The bond form submitted with and as a part of said transcript is not entirely satisfactory to me and I am therefore holding the transcript of the proceedings relating to said bond issue until a proper bond form is submitted and approved.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1311.

APPROVAL OF BOND ISSUE OF LOGAN COUNTY—$56,300.00.

COLUMBUS, OHIO, June 29, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

In re bonds of Logan county, Ohio, in the sum of $56,300.00, for the purpose of paying the respective shares of said county, of Harrison and McArthur townships and of the owners of benefited property assessed, of the cost and expense of constructing I. C. H. No. 130, section B, road improvement, located in said county and townships.

GENTLEMEN—I have carefully examined the corrected transcript of the proceedings of the board of county commissioners of Logan county, Ohio, relating to the above issue of bonds and find said proceedings to be in conformity to the provisions of the General Code of Ohio relating to bond issues of this kind.

I am therefore of the opinion that properly prepared bonds covering said issue will, when the same are properly executed and delivered, constitute valid and binding obligations of said county to be paid in accordance with the terms thereof.

The bond form submitted with and as a part of said transcript is not entirely satisfactory to me and I am therefore holding the transcript of the proceedings relating to said bond issue until a proper bond form is submitted and approved.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1312.

LABORERS ON COUNTY EXPERIMENT FARMS NOT ENTITLED TO COMPENSATION IF EMPLOYED CONTRARY TO RULES AND REGULATIONS ADOPTED BY BOARD OF CONTROL OF THE OHIO AGRICULTURAL EXPERIMENT STATION.

1.—*Inasmuch as the statutes pertaining to county experiment farms provide that all employes thereon are to be governed by the general rules and regulations of the board of control of the Ohio Agricultural Experiment Station, a person employed to perform labor upon a county experiment farm is not entitled to compensation for labor so performed, if he were employed contrary to the rules and regulations adopted by the board of control.*

2.—*A contracting party is bound to know the provisions of law having to do with his employment, when he deals with an officer or agent of the state or any political subdivision thereof.*

COLUMBUS, OHIO, June 29, 1918.

Ohio Agricultural Experiment Station, Wooster, Ohio.

GENTLEMEN—I have a communication from the prosecuting attorney of Hamilton county, Ohio, in which he encloses a letter received by him from Cary W. Montgomery, chief of the department of farm management, and upon which he has requested that I render an opinion. Said letter enclosed reads in part as follows:

> "The department of farm management, Ohio Agricultural Experiment Station, has the general supervision of the county experiment farms. (See general orders Nos. 1 and 3, attached.)
>
> The local superintendent of each farm is required to make an estimate of the probable expenditures for each month and forward to the department for approval. (See order No. 10, attached.)
>
> For two years previous to July 1, 1917, D. R. Van Atta was local superintendent of the Hamilton county experimental farm located four miles north of Mt. Healthy. Some time during the month of May or June, 1917, Mr. Van Atta had the farm residence painted outside. A request to do said work had not been sent in on an estimate and allowed.
>
> Is the Hamilton County Experiment farm liable for the bill? Is the director of the Ohio Agricultural Experiment Station liable for the bill?"

We will consider a few of the sections of the General Code pertaining to the establishment of county experiment farms.

Section 1174 G. C. provides as follows:

> "In order to demonstrate the practical application under local conditions of the results of the investigations of the Ohio Agricultural Experiment Station, and for the purpose of increasing the effectiveness of the agriculture of the various counties of the state, the commissioners of any county in the state are hereby authorized and empowered to establish an experiment farm within such county as hereinafter provided for."

Section 1176 G. C. provides that the county commissioners must submit the question of establishing a county experiment farm to the voters upon five per cent. of the electors signing a petition requesting such submission. Provision is then made for securing the necessary funds with which to establish the experiment farm.

Section 1177-4 G. C. reads in part as follows:

> "The equipment of an experiment farm shall consist of such buildings, drains, fences, implements, live stock, stock feed and teams as shall be deemed necessary by the board of control for the successful work of such farm, and the initial equipment shall be provided by the county in which the farm is established, together with a sufficient fund to pay the wages of the laborers required to conduct the work of such farm during the first season. * * *."

That is, the board of county commissioners must provide for the initial equipment as well as funds to pay the wages of laborers for the first season.

Section 1177-5 G. C., covering the management of the county experiment farm after the same has been established, reads as follows:

> "Sec. 1177-5.—The management of all county experiment farms estab-

lished under authority of this act shall be vested in the director of the Ohio Agricultural Experiment station, who shall appoint all employes and plan and execute the work to be carried on, in such manner as in his judgment will most effectively serve the agricultural interests of the county in which such farm may be located, the director and all employes being governed by the general rules and regulations of the board of control."

In order to intelligently answer the question submitted, it will be well for us to note the sources from which a county experiment station obtains the funds with which to manage the farm.

The latter part of section 1177-4 G. C. provides as follows:

"Sec. 1177-4— * * * The county commissioners shall appropriate for the payment of the wages of laborers employed in the management of such farms as may be established under this act, and for the purpose of supplies and materials necessary to the proper conduct of such farms such sums not exceeding two thousand dollars annually for any farm, as may be agreed upon between such county commissioners and the board of control."

Section 1177-8 G. C. reads as follows:

"Sec. 1177-8.—The produce of each county experiment farm as may be established under this act, over and above that required for the support of the teams and live stock kept on the farm, shall be sold and the proceeds applied to the payment of the labor and to the purchase of the supplies and materials required for the proper management of the farm as contemplated by this act, and for the maintenance of its equipment. Any surplus beyond these requirements shall be covered into the county treasury and placed to the credit of the general fund of the county, except in the case of the use of farms already belonging to the county, in which case the proceeds shall be placed to the credit of such fund as the county commissioners may designate."

From these two sections we note there are two sources of income:

(1) The county commissioners must appropriate annually a sum of money not to exceed two thousand dollars for the farm.

(2) The income derived from the farm, which must first be used for expenses that arise in conducting the operations of the farm.

We will now consider some of the rules and orders which have been adopted by the board of control of the Ohio Agricultural Experiment Station, in reference to these county experiment farms.

While section 1177-5 G. C. provides that the management of all county experiment farms shall be vested in the director of the Ohio Agricultural Experiment Station, yet such rules have been adopted and such orders made that the management of these county experiment farms is placed under a department known as the department of farm management.

In General Order No. 3 adopted by the board of control, through the director, Charles E. Thorne, we find the following in subdivision "(A)" thereof:

"(A) The department of farm management is organized for the general management of the county experiment farms. All plans for the work of these farms, and all business transactions concerning them, must be submitted to the department of farm management before being put into operation."

In order that there may be a local representative upon the grounds, provision is made in subdivision "(C)" of said General Code No. 3 as follows:

> "(C) The superintendent of the county experiment farm is the local representative of the department of farm management, and all employees and all work on the farm are under his supervision."

From these provisions it is seen that the director of the Ohio Agricultural Experiment Station appoints what is called a superintendent of the farm and this superintendent by virtue of his position becomes the local representative of the department of farm management and has the local supervision of all matters pertaining to the farm. In other words, the local superintendent becomes the agent of the department of farm management, through whom said department carries on the operations of the experiment farm.

In an order designated General Order No. 10, the department of farm management has adopted the following rule in subdivision "(B)" thereof:

> "In the latter part of each month an itemized statement of the probable receipts and expenses of the experiment farm for the coming month should be made out and forwarded to this office. No expenditure will be allowed except emergency unless it has first been authorized by this office."

In the amendment to General Order No. 10, under subdivision "(D)" we find the following provision:

> "On these estimates should be indicated in detail:
> 1. All items on account of which liability is to be incurred during the coming month. * * *."

With the provisions of the statutes and general orders, above quoted, in mind, let us now turn to the facts submitted by you. D. R. Van Atta was appointed local superintendent of the Hamilton county experiment farm, which position he held in the year 1917. As such local superintendent he employed a certain person to paint the farm residence. The department of farm management complains that Mr. Van Atta failed to obey the rules and orders of the department, in that he did not include in his report of expenses, likely to be incurred the following month, an estimate of the money needed to paint said farm residence.

The question now arising in your mind is whether this is sufficient in law to warrant a refusal of payment to the person who painted the house under his employment by the local superintendent of the experiment farm. The requirement for the superintendent to submit estimates of expenses to be incurred during the succeeding month arises under an order of the department of farm management, hereinbefore quoted. But it must be remembered that this is not a mere order of the department of farm management, but arises under the statutory provisions above quoted. Section 1177-5, supra, provides among other things that:

> " * * * the director and all employes being governed by the general rules and regulations of the board of control."

Of course there can be no question that Mr. Van Atta, the local superintendent, was merely an employe of the board of control of the Ohio Agricultural Experiment Station, acting through the department of farm management.

The principle is well settled that a person dealing or contracting with an offi-

cer or agent of the state is bound to know the law and take the same into consideration when he deals or contracts with the officer or agent.

When the party who painted the farm residence came to deal with the local superintendent of the county experiment farm located in Hamilton county, he must be held to have known that this employe was governed entirely by the general rules and regulations of the board of control and hence it would be up to him to investigate as to what rules and regulations had been issued by the board of control to regulate the local superintendent in the performance of his duties pertaining to the experiment farm.

As said before, one of the orders issued by the department of farm management was to the effect that:

> "No expenditure will be allowed except emergency unless it has first been authorized by this office."

When the painter contracted with Mr. Van Atta, he must be held to have known of this regulation or order and hence to have known that Mr. Van Atta had not complied with said rule and regulation under which he was acting as local superintendent.

From the above principles I think it is clear that the Ohio Agricultural Experiment station, acting through its proper officials, is under no obligation in law to allow the claim presented by the one who painted the farm residence, and that no officer or agent of the state is under obligation to pay the same for and on behalf of the State of Ohio or the county of Hamilton.

As to whether Mr. Van Atta is liable upon the claim, due to the fact that he exceeded his authority in so employing the person who painted the farm residence, I am not considering, for this is a private matter and not one pertaining to the interests of the state or any political subdivision thereof. However, if the services were rendered in good faith by the one who painted the farm residence, and the same was in need of being painted, and the state and county have gotten value received from the labor performed upon said farm residence, you would, in my opinion, be justified in allowing the claim and permitting the same to be paid, but as stated above, you are under no obligation to do this as a matter of law. It simply rests with the proper officials, exercising a sound discretion as to whether they will allow the bill, notwithstanding the fact that Mr. Van Atta exceeded his authority in so employing the one who painted the farm residence.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1313.

DISAPPROVAL OF BOND ISSUE OF RICHWOOD, UNION COUNTY—$21,000.00.

COLUMBUS, OHIO, June 29, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

> In re bonds of the village of Richwood, Union county, Ohio, in the sum of $21,000.00, for the purpose of extending the time of payment of certain indebtedness, which from its limits of taxation the said village is unable to pay at maturity.

GENTLEMEN—I have carefully examined the transcript of the proceedings of the council and other officers of the village of Richwood relating to the above issue

of bonds and find said proceedings to be fatally defective in that the ordinance providing for the issue of said bonds does not make any provision for an annual tax levy for interest and sinking fund purposes as required by section 11 of Article XII of the State Constitution, which reads as follows:

> "No bonded indebtedness of the state, or any political subdivisions thereof, shall be incurred or renewed, unless in the legislation under which such indebtedness is incurred or renewed, provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds, and to provide a sinking fund for their final redemption at maturity."

The foregoing constitutional provisions are obviously mandatory and I have no discretion to do otherwise than to disapprove said bond issue by reason of the failure of council to comply with said provisions in the enactment of the ordinance providing for the issue of said bonds.

There are a number of other minor defects in the proceedings on the transcript as it now reads, most of which perhaps can be obviated by further information. Inasmuch, however, as the defect in the proceedings above noted compels me to disapprove the said issue, it will serve no useful purpose so far as you are concerned for me to discuss the other defects in the transcript.

I am of the opinion that said bond issue is invalid and that you should not purchase the same.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1314.

FRANCHISE TAX—HOW REDEEMED PREFERRED STOCK CONSIDERED IN COMPUTING.

The redemption of preferred stock under favor of section 8669 General Code, as amended 107 Ohio Laws, 411, extinguishes such preferred stock, so that the amount redeemed is not to be taken into consideration as "subscribed or issued and outstanding capital stock" in computing the basis of the franchise tax.

COLUMBUS, OHIO, June 29, 1918.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN—I acknowledge receipt of your letter of June 19th requesting my opinion as follows:

> "In its report as a domestic corporation for profit for 1917 the Cincinnati Realty Company gave $1,550,000 as the amount of its subscribed and issued and outstanding capital stock. In 1918 $1,525,000 is given as the amount of such stock. In its report the company states a reduction of $25,000 of its preferred stock was made August 31, 1917.
>
> "We presume that this reduction was made by redeeming that amount of the issued and outstanding preferred stock. The company has not filed a certificate in the office of the Secretary of State reducing its authorized

capital stock. Is this redeemed stock subject to the franchise fee of three-twentieths of one per cent? A number of corporations have made reductions in a similar manner.

"We make this inquiry in order that we may have your interpretation of section 8669 (O. L. 107, page 411) as affecting the amount of the subscribed or issued and outstanding stock determined by the commission as a basis of the franchise tax."

The section to which you refer reads as follows:

"Sec. 8669.—A corporation issuing both common and preferred stock may create designations, preferences, and voting powers, or restrictions or qualifications thereof, in the certificate of incorporation, and if desired, preferred stock may be made subject to redemption at not less than par, at a fixed time and price, to be expressed in the stock certificates thereof.

Preferred stock may also be redeemed in whole or part by purchase thereof by the corporation or by exchanging the same for common stock, or be converted into common stock, upon such terms as from time to time may be proposed by the board of directors and accepted by the holders thereof. Preferred stock redeemed may be cancelled by the board of directors, and if so cancelled shall not be reissued. A certificate of such cancellation shall be filed with the secretary of state, as a certificate of reduction. Thereupon the authorized capital stock of such corporation shall be reduced by the amount stated in said certificate."

The new matter inserted in this section by the amendment is the second paragraph thereof. From its original enactment in 1902 the section, then a part of section 3235a of the Revised Statutes, has always contained the language now found in its first paragraph.

Your question is asked, I take it, in view of section 5498 of the General Code, which imposes a tax or "fee" upon the corporate franchise of a domestic corporation for profit measured by "its subscribed or issued and outstanding capital stock." The real problem, then, is to determine whether preferred stock which has been "redeemed" as provided in section 8669 G. C. otherwise than by conversion into common stock at par or exchanged for common stock at par, but which has not been "canceled" as therein provided, is to be considered as "subscribed capital stock" or as "issued and outstanding capital stock" within the meaning of section 5498 G. C.

The status of common stock which, whether legally or illegally, has after issuance been purchased or otherwise acquired by the corporation and constitutes so-called "treasury stock" has been considered in several opinions of this department; and it has been uniformly held that such stock, though belonging to the corporation, retains its character of "issued and outstanding capital stock" within the meaning of section 5498 General Code and its predecessor, the original Willis law of 1902. (See annual report of Attorney-General 1907, page 84, per Wade H. Ellis, attorney-general; Opinions of Attorney-General 1916, Volume I, page 288, Volume II, page 1322, per Edward C. Turner, Attorney-General.) There was, to be sure, some difference in the reasoning of these opinions, in that Attorney-General Ellis seemed to regard such "treasury stock" as "issued and outstanding," while Attorney-General Turner seemed to be of the opinion that it would come more appropriately under the designation of "subscribed" capital stock.

Whichever of these views be correct, I am content at the present time to follow the general conclusion that common stock of this character is to be in-

cluded in the amount upon which the franchise tax is to be computed, upon the ground that the question may be regarded as authoritatively settled by long continued administrative ruling, if upon no other ground.

But it must be admitted that it does not necessarily follow from this conclusion that preferred stock which has been redeemed in pursuance of specific statutory authority is to be likewise treated. It could not be treated as "subscribed stock" if the statute with reference to its redemption had been complied with, because the contract of subscription for it would have been fully discharged. It would seem, therefore, that the only question which could arise with reference to preferred stock which had been redeemed but not canceled would be with respect to its character as "issued and outstanding capital stock."

At this point a brief analysis of section 8669 with regard to the possibilities thereunder may be helpful. The section provides for the "redemption" of preferred stock in four ways, viz:

(1) At a fixed time and price, to be expressed in the certificates.
(2) By purchase by the corporation at any time.
(3) By exchange for common stock.
(4) By conversion into common stock.

Whether the purchase and exchange may be made upon such terms as may be proposed by the board of directors and accepted by the holders, or whether this freedom of contract as to terms is extended only with respect to conversion into common stock, is a question which I do not find it necessary to decide in considering the present question. I will, however, discuss the question upon the hypothesis that the purchase and the exchange for common stock may be made upon such terms as may be proposed by the board of directors and accepted by the holders.

It is further provided in the section that preferred stock which has been redeemed *may* be canceled and *if* so canceled shall not be re-issued, but that a certificate of cancellation shall be filed with the secretary of state as a certificate of reduction and shall have the effect of reducing the authorized capital stock.

Let me now point out that if preferred stock is redeemed by conversion into common stock at par its "cancellation" needs must be automatic, and that in such case a certificate of cancellation need not be filed with the secretary of state. It seems to be only when the effect of the cancellation of the shares is to reduce the authorized capital stock of the company that such a certificate need be filed. Suppose, for example, a corporation has an authorized capital stock of $1,000,000 divided into $700,000 common and $300,000 preferred, and that the $300,000 preferred is converted into common stock at par; the corporation will then have $1,000,000 common and no preferred, and it will not have authority to issue or "re-issue" any preferred because its total authorized capital stock is $1,000,000. In such case the "cancellation" of the redeemed preferred capital stock would not reduce the authorized capital stock of the corporation at all, and in such event, therefore, the filing of a certificate of reduction would seem to be unnecessary. In such a case, moreover, the amount upon which the franchise tax would have to be computed would remain the same, because it could not possibly be argued that the"redeemed" preferred stock had any existence for any purpose when it had been "converted" into common. Indeed, another way of looking at this process is to regard the "conversion" not as a real "redemption" at all, but as a mere change in the character of issued and outstanding stock. It is clear that such conversion can be made only as to issued and outstanding stock and not as to unissued stock because it is to be made upon terms proposed by the board of directors and accepted by the "holders" thereof, necessarily implying that it must be outstanding.

This process of conversion seems to offer no other possibilities, for, considered as a mere change in the character of existing stock, it could not be effected in such a way as to require the issuance of stock of additional par value nor to change the par value of the existing shares. That is to say, despite the ability of the directors and the holders of the outstanding preferred stock to agree upon "terms" of conversion, I do not believe it would be legal for outstanding preferred stock of the par value of $100.00 a share to be converted into common of the par value of $200.00 a share, nor into common of the par value of $50.00 a share. Nor could the par value of outstanding stock be in any way affected by such a conversion; the "terms" must relate to the actual cash capital to be contributed by the holders of the preferred for the privilege of having stock converted into common or by the corporation for the privilege of making the conversion. Inasmuch, however, as all questions relating to the franchise tax depend for their solution upon the par value of the shares, what these terms may be would be immaterial so long as the par value remained constant.

But, assuming the ability of the directors and the holders of the preferred stock to agree upon "terms" of *exchange* the same reasoning would not necessarily apply. It does not appear from the section that preferred stock is to be exchanged for common stock at par. Conceivably it may be exchanged upon other terms. Suppose—to put a question about other features of which there will not be doubt—the corporation which has been used for purposes of illustration had issued of its authorized common stock of $700,000 but $400,000, and that an exchange of $150,000 of its outstanding preferred stock for common stock on the basis of two shares of common for one of preferred had been agreed upon, the corporation would emerge from this process with an increase in its issued and outstanding capital stock of $150,000 and with all its authorized common stock issued, but with $150,000 of its authorized preferred stock redeemed and apparently subject to reissue.

Your question requires me to consider upon such facts whether or not this $150,000 should be regarded as "issued and outstanding capital stock," although taken in by the corporation in return for common stock which had already actually increased the basis of its franchise tax—whether, putting it in another way, the corporation should now pay on $300,000 more of issued and outstanding stock than formerly, or only on $150,000 more, without filing a certificate of cancellation.

Of course, I have assumed in stating this question that the right to exchange can only be exercised when the originally authorized common stock has not been fully issued, and then only by the use of unissued common stock. This I believe to be the law.

But suppose the redemption of the preferred stock is made in one of the first two ways, i. e., either according to the terms of the preferred stock certificates or upon other terms of purchase not involving the issuance of common stock in exchange or the conversion of the preferred shares into common; the facts here would always be much simpler, and the question would be as to the status of the preferred which had been redeemed but not canceled. There would seem to be no difference, for the purposes of your question, between redemption in accordance with the terms of the stock certificates and redemption otherwise.

The word "redeemed" or the substantive "redemption," whichever may be employed, seem to embody the idea of repurchase.

See Westerfield, Bonte Co. vs. Burnett, (Ky.) 195 S. W. 477; Booth vs. Union Fibre Co. (Minn.) 162 N. W., 677.

See also Words and Phrases Judicially Construed, and cases cited.

The question now is as to whether these terms carry with them also the idea of extinguishment of the stock itself as a necessary incident to its redemption. It

is very clear from the section that in cases wherein the process of redemption is worked out in one of the first three methods above described it does not deprive the corporation of the power to "re-issue" such stock, unless it has been also "canceled." In other words, it is clear that the word "redeem" does not mean that the effect of the process shall be to reduce the authorized capital stock unless the last step therein has been taken. Even when the "redemption" is made by converting the preferred into common stock the authorized capital stock is not reduced, but the proportions of preferred and common respectively, representing such authorized capital stock, are automatically changed.

We have it, then, that the redeemed stock, save where it has been converted into common stock, may be "re-issued." Does this mean that the same stock is to be issued over again, or does it mean that the authority to issue stock may again be exercised though the stock to be issued is not the same stock which was redeemed? In my opinion, the answer to this question is the same regardless of which of the first three methods of redemption has been employed. It is true that if redemption is made according to the first method the original certificate would never be used again because according to its own terms it would be a nullity; but this same remark would apply to all preferred stock having a definite redemption date, whether redeemed at that date or prior thereto.

In my opinion, the word "re-issue" which is used in this context does not mean the mere sale of stock as an asset; it means at least the issuance of a new certificate; it must mean this in the case of stock redeemed in accordance with the first method, and I think it also means it in the other two cases now under consideration.

If this is true, then the stock which has been purchased or acquired by exchange on the part of the corporation has no real existence as stock after the process is complete, for though the certificate is not the stock but merely evidence of it, it at least defines the contractual relation which is the basis of the reciprocal rights of the parties in the case of preferred stock. When ordinary common stock is in the treasury of the corporation after purchase by it, it is not "re-issued" when the corporation comes to dispose of it; it is *sold,* and in the meantime it has been an asset in the corporate treasury and in a very real sense the corporation has been one of its own stockholders. Not so with preferred stock which has been redeemed. When it leaves the corporation again it must be re-issued; a new contract must be entered into creating a new and distinct relation between the corporation and the person to whom the stock is issued. This is clearly true in the first case, for the old contract embodied in the first issue of stock is discharged and there will be nothing which the corporation as the holder of a contract with itself could assign to a third party. Inasmuch as the statute, as I have already said, treats the effect of all three processes alike this fact becomes determinative.

If these things are true then it must follow that the redemption of preferred stock in any of the first three methods extinguishes the stock so that it has no existence for the purpose of the franchise tax.

The word "cancellation" in the context under consideration would seem to suggest a contrary result; inasmuch as this term is most appropriately used to describe a process which puts an end to existing contract rights. I conclude, however, that what is meant by "cancellation" is the renunciation of the corporation's privilege of re-issuing the stock. It will be observed that the corporation apparently has the option whether to renounce this privilege or not, as the filing of a certificate of cancellation is not compulsory. It will be observed also that the effect of the filing of such a certificate is to reduce the authorized capital stock, i. e., deprive the corporation of the privilege of re-issuing so much stock. On the whole, then, I find no difficulty in assigning to the word "cancellation" in this context

such a meaning as will harmonize it with the necessary effect of redemption of preferred stock in the first of the above described methods.

For the reason, then, that when preferred stock is "redeemed" at the "fixed time and place * * * expressed in the stock certificates thereof" such redemption *ipso facto* puts an end to that stock, as such, though not necessarily to the authority of the corporation to "re-issue" it upon new terms, and for the reason that there is no discrimination in the section as between this method of redemption and the other two which would leave authority in the corporation to "re-issue such stock," I arrive at the conclusion that stock which has been redeemed in any of the first three methods above referred to, but as to which no certificate of cancellation has been filed with the secretary of state, is neither "subscribed" nor "issued and outstanding capital stock" within the meaning of section 5498 of the General Code.

In the specific case put by you the result is that the amount of franchise taxes to be paid by the corporation referred to by you will be smaller for 1918 than for the previous year, if it be assumed that the reduction in the amount of issued and outstanding capital stock was made in compliance with the statutes.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1315

REBUILDING COURT HOUSE DESTROYED BY FIRE—PROCEDURE—BUILDING COMMISSION—JAIL PRISONERS MAY NOT BE USED TO REMOVE DEBRIS FROM BUILDING DESTROYED.

1.—*Where a court house is destroyed by fire, the county commissioners are not compelled to submit the question of the policy of rebuilding the same to a vote of the people of the county. This by virtue of the provisions of section* 2436 *G. C.*

2.—*In the reconstruction of a court house which has been destroyed by fire, a building commission must be appointed as provided in section* 2333 *G. C. and the provisions of this section as well as the provisions of the sections following must be carried out by the county commissioners.*

3.—*In removing the debris from a court house which has been destroyed by fire, the county commissioners can not use the labor of persons confined in the county jail in the doing of said work.*

COLUMBUS, OHIO, July 1, 1918.

HON. THOMAS F. HUDSON, *Prosecuting Attorney, Springfield, Ohio.*

DEAR SIR—I have your communication of June 13, 1918, which reads as follows:

> "Clark county's court house was gutted by fire several months ago. The walls remain uninjured according to state officials. The commissioners have received $54,000.00 insurance on said building. Plans have been submitted to rebuild the court house at a cost of $48,000.00. Have the commissioners authority to expend an amount not to exceed $50,000.00 in rebuilding the court house without first submitting the question to the voters of Clark county or having a building commission appointed by the court? If the commissioners have such authority, may they make use of the labor of prisoners, confined in the county jail and subject to labor on the county roads, in removing the debris from the building?"

Your communication naturally divides itself into three different questions, especially must it be so divided when it comes to giving an answer to the matters set out therein.

The three questions are as follows:

(1)—Have your commissioners the authority to expend an amount not to exceed $50,000 in rebuilding the court house, which was destroyed by fire, without first submitting the question to the voters of Clark county?

(2)—Have your commissioners authority to proceed to reconstruct the court house without the necessity of having a building commission appointed by the court of common pleas?

(3)—Have the commissioners authority to use the labor of prisoners confined in the county jail in removing the debris from the building?

In reference to the question of submission, it will be well for us to keep in mind that there are two different provisions of the statutes in reference to submission for the construction of a building such as you have in mind.

Section 2333 G. C., provides that the county commissioners shall submit the question of issuing bonds of the county to a vote of the electors thereof when the erection of a court house costs more than $25,000.

Section 5638 G. C. provides that the county commissioners shall not levy a tax, appropriate money or issue bonds for the purpose of building county buildings, the expense of which will exceed $15,000, without first submitting to the voters of the county the question as to the policy of making such expenditure.

Your question now is as to whether the county commissioners may proceed to reconstruct a court house costing not to exceed $50,000 without submitting the question to the voters of Clark county. Of course, under the circumstances you will not need to issue bonds for the purpose of reconstructing the court house, as you have sufficient money on hands to reconstruct the same without issuing bonds. But the provisions of section 5638 G. C. are still to be considered.

Section 2436 G. C. provides as follows:

"For the purpose of rebuilding an infirmary or court house, destroyed by fire or other casualty, the commissioners of a county may appropriate money, levy tax, issue and sell the bonds of such county in anticipation thereof, in an amount not to exceed fifty thousand dollars, without first submitting to the voters of said county, the question of rebuilding such infirmary or court house, appropriating such money, levying such tax and issuing and selling such bonds."

The part of this section which is to be particularly noted is that if the court house does not exceed $50,000, the county commissioners may proceed with the construction of the same "without first submitting to the voters of said county;" then follow two different propositions,—(1) "the question of rebuilding such infirmary or court house," and (2) "appropriating such money, levying such tax and issuing and selling such bonds." From these provisions it is quite clear that if the court house can be reconstructed at a cost not to exceed $50,000, both the provisions of sections 2333 and 5638 do not obtain.

Hence, answering your first question specifically, it is my opinion that under the facts set out in your communication, your county commissioners can proceed with the reconstruction of the court house without submitting the question as to the policy of making such expenditure to a vote of the people of your county.

The next question to be considered is: Can the county commissioners also proceed without the necessity of appointing a building commission as provided for in section 2333 G. C.?

In reference to this question, I desire to call your attention to an opinion rendered by my predecessor, Hon. Timothy S. Hogan, found in Annual Reports of Attorney-General, 1911-12, Volume II, page 1142. In this opinion Mr. Hogan was passing upon the question as to whether a county infirmary which had been destroyed by fire could be rebuilt without the intervention of a building commission as provided for in section 2333 G. C. In this opinion he was considering the provisions of section 2436 G. C., the same one that is involved in this case. In the second branch of the syllabus he held:

> "Under section 2436 General Code, when an infirmary has been destroyed by fire, the commissioners are empowered to appropriate money, levy tax, and issue and sell bonds in anticipation of said tax in an amount not to exceed $50,000 without submission to the vote of the electors."

In the third branch of the syllabus he held:

> "While this section" (that is, section 2436 G. C.) "presents an exception to that part of sections 2333-2343, General Code, providing for a submission to the electors the question of issuing bonds for county buildings in excess of $25,000, it in no way excepts any of the other restrictions of these sections, providing for a building commission, etc."

In the opinion on page 1144 he held as follows:

> "I take it that all of said sections are mandatory and are to be strictly followed by the commissioners; and if there were no exception to the provisions of the above mentioned sections, then the procedure therein contained would be the exclusive method by which such county buildings would be constructed and erected. But there is an exception, at least in respect to the building of an infirmary building when the same has been destroyed by fire, as provided in section 2436, General Code, which reads as follows:"

Mr. Hogan then quotes the section, which at that time did not include the rebuilding of a court house, but it has been since amended so as to include a court house, as shown in the section, as hereinbefore quoted.

Mr. Hogan then concluded:

> "So that it follows, whenever by reason of fire or other casualty, an infirmary is destroyed, the commissioners may resort to the power given them by the legislature in said section 2436, which is an exception to the provisions of sections 2333 to 2342, General Code, inclusive, and that the commissioners may proceed under said section 2436 to rebuild such county infirmary without first submitting the proposition to a vote of the people of the county."

Mr. Hogan rendered another opinion found in Annual Reports of the Attorney-General, 1914, Volume I. page 251, having to do with this same matter. In this opinion he seemed to weaken somewhat in reference to the holding in the opinion above cited and quoted. He did this on account of an opinion rendered by the supreme court in McKenzie vs. State, 76 O. S., 369. But he still maintained that his original conclusion was correct, using the following language:

"I still am inclined to the view that it would be at least the safer policy to follow the building commission act in constructing a county building, the cost of which exceeds $25,000."

I think Mr. Hogan was right in his holding in both of said opinions. I am of the opinion that the first conclusion reached by him is correct, and that it is not only the safer policy to follow the building provision in reference to a building commission as set out in section 2333 G .C., but that this is an absolutely essential provision in reference to the building of a county building which costs to exceed $25,000.

I want to call your attention in reference to this matter to an opinion rendered by me and found in Volume I, page 585 of the 1917 opinions.

While I did not have your specific question under consideration in rendering that opinion, yet I arrived at conclusions therein which will possibly be of some assistance to you in the matter which you have under consideration. In that opinion I found that not only did the provisions of sections 2333 to 2342 G .C. inclusive, apply to the matter of erecting a county building to cost over $25,000, but that also the provisions of section 2343 to 2361 G. C. inclusive, apply as well; that is, that while original sections 2333 to 2342 formed one act, and section 2342 to 2361 formed another act, yet, when these matters were codified by the legislature in 1910, section 2338 G. C. was so amended as to combine and unite these two acts into one, and that the provisions of sections 2333 to 2361 must be followed in the matter of erecting a county building to cost in excess of $25,000.

Hence, answering your question specifically, it is my opinion that it would be necessary for you to proceed in the matter of the reconstruction of the court house by having the common pleas court appoint a building commission in conformity with the provisions of section 2333 G. C.

Your third question is as to whether the county commissioners can use persons confined in the county jail in the matter of removing the debris from the interior of the walls of the court house as they now stand.

In your communication you connect this question up with the question as to whether they can proceed without the building commission, but as I view it, the question as to whether a building commission is necessary or not, has nothing to do with the removal of the debris from the building as it now stands.

I am of the opinion that it is the duty of the county commissioners to remove the debris from the building, and that after this is done, the building commission in connection with the county commissioners would proceed under the provisions of section 2333 et seq.

This question was pretty carefully considered in the case of State ex rel. vs. Green, et al. 18 O. N .P. n. s. 97. In that case a taxpayer raised the question that the matter of removing the debris of a court house which had been destroyed by fire, and the matter of building the new court house should not be taken together and let as one contract. In this case the court held that the two matters could be taken together; but it is to be noted in the opinion on page 117 that the court laid considerable stress, in arriving at its conclusion, upon the fact that much of the material which was found in the debris of the old building was to be used in the construction of the new one. That is, in this case, the walls and everything were destroyed, while in the case under consideration, the walls are left standing, and undoubtedly no material part of the debris, which is now within the walls, could be used in the erection of the new building, and for this reason it would seem to me to be safer to follow the course above outlined by me.

Of course, in reference to this matter you are more familiar with the facts in the case, and you will be better able to judge whether you ought to follow the

course outlined by me, or whether you ought to follow the course as passed upon by the court in State ex rel. vs. Green, supra.

With this in mind, let us proceed to the answering of your third question.

In 98 Ohio Laws, 177, there is an act which has to do with the employment of convict labor. This act was given sectional numbering 2228 G. C. etc. Section 2228 G. C. reads as follows:

> "The board of managers of the Ohio penitentiary, the board of managers of the Ohio State reformatory, or other authority, shall make no contract by which the labor or time of a prisoner in the penitentiary or reformatory, or the product or profit of his work, shall be let, farmed out, given or sold to any person, firm, association or corporation. Convicts in such institutions may work for, and the products of their labor may be disposed of, to the state or a political division thereof, or for or to a public institution owned or managed and under the control of the state or a political division thereof, for the purposes and according to the provisions of this chapter."

It is to be noted in this section that convicts may work for the state or a political division thereof for the purposes "and according to the provisions of this chapter." This language makes it necessary for us to turn to the other provisions of the chapter to ascertain when convicts may labor for a state or for a political division thereof.

Section 2230 G. C. provides as follows:

> "Such labor shall be (1) for the purpose of the manufacture and production of supplies of such institutions, the state or political divisions thereof; (2) for a public institution owned, managed and controlled by the state or a political division thereof; (3) for the preparation and manufacture of building material for the construction or repair of a state institution, or in the work of such construction or repair; (4) for the purpose of industrial training and instruction, or partly for one and partly for the other of such purposes; (5) in the manufacture and production of crushed stone, brick, tile, and culvert pipe, suitable for draining wagon roads of the state, or in the preparation of road building and ballasting material."

Section 2238 G. C. provides in part:

> "In such counties, the board of commissioners, whenever practicable, shall cause to be worked as provided in this chapter all convicts so sentenced to imprisonment at hard labor," etc.

The provision of this section, I think, can be held to refer back to the provisions of section 2230 G .C. So that the provisions that are made in section 2230 would apply not only to the state, but also to a county.

The question now is as to whether there is any provision in section 2230 G. C. which would warrant the county commissioners in using the labor of persons sentenced to the county jail for the purpose of removing the debris from the court house walls as it now stands. The only provision in section 2230 G. C. which could be made to apply to your matter would be the one above designated as No. 2, namely, "for a public institution, owned, managed and controlled by the state or a political division thereof;" or No. 3, "for the preparation and manufacture of building material for the construction or repair of a state institution, or in the work of such construction or repair."

Is a court house an institution, either state or county? I do not think it is an institution in any sense, and especially in the sense in which the legislature evidently used the term "institution" in said section. The legislature evidently had in mind such activities of the state or county as the Ohio penitentiary or the activities which have to do with the blind or the deaf or the incorrigible youth of the state, such as the Boys' Industrial Farm or the Girls' Industrial School.

In view of all the above, it is my opinion that your county commissioners could not use the labor of those persons confined in the county jail to remove the debris in question.

In arriving at this conclusion I am not unmindful of the provisions of section 2227-4 G. C. which reads as follows:

> "No other articles than those specified in section 2 of this act shall be manufactured, but nothing herein shall prevent the employment of any person so confined, elsewhere than within the jail or workhouse where he has been committed by any political subdivision, nor impair or affect any contract heretofore made."

It is to be noted that this section provides, "but nothing herein shall prevent the employment of any person so confined, elsewhere than within the jail or workhouse where he has been committed." This might be construed as giving authority to employ persons confined in jails or workhouses for the work you have under consideration; but this section should not, in my opinion, be given such a construction. It simply provides that there is nothing in this act which shall prevent the employment of any person outside of the jail or workhouse, but in order to get the authority so to employ, we must look elsewhere in the statutes, and as said before, the authority elsewhere given does not seem to be broad enough to include your matter.

Neither am I unmindful of an opinion rendered by my predecessor, Hon. Timothy S. Hogan, found in Annual Reports of the Attorney General, 1913, Volume I, page 502. In this opinion he assumed, without raising any question, that a state arsenal is a state institution or building. There is not much question but that a state arsenal is a state building, but not all state buildings are state institutions.

While I do not pass upon the question as to whether a state arsenal is a state institution or not so as to come within the provisions of section 2230 G. C., yet I am of the opinion that a court house is not a county institution, and therefore could not be brought within the provisions of said section. It is to be noted that said section does not include the term "building," but merely the term "institution."

In coming to the above conclusion I have considered that what your county commissioners are about to do is to erect a court house and not merely repair or alter an old one. It is to be noted that the provisions of section 2333 G. C. apply only in those cases in which the county commissioners are about to erect a court house or other county building.

If what your county commissioners are about to do is merely to repair or alter the court house of the county, then the provisions of section 2333 G. C. would not apply, but the provisions of section 2343 would make it possible for the county commissioners to do this without the necessity of there being a building commission.

There is a line, of course, somewhere that divides those enterprises which have to do on the one hand with the erection of county buildings, and which have to do on the other hand with the mere repair or alteration of the same. Without having all the facts before me, it is impossible for me to say whether the matter about which your county commissioners are about to enter is one that falls upon one side

of the line or the other; but if there is any doubt in your mind as to this question, I would resolve it in favor of proceeding under section 2333 G. C. rather than resolve it in favor of the other course, as there would be less liability of your getting into trouble and difficulty by following that course than there would be by following the other.

In reference to this matter I might call your attention to a case found in 5 O. N. P. 260, styled State ex rel. vs. Board of Commissioners of Ottawa county. In this case the court went into the matter to a considerable length based upon facts which are very similar to those with which you have to deal, and found along the line that the provisions of section 2333 et seq. should be followed.

I also call your attention to a case found in 24 O. S. 492, styled Commissioners vs. Croweg et al. This case is not so nearly in point as the one before cited, but the principles therein set out may assist you somewhat in deciding as to the point in question.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

1316.

OFFICES COMPATIBLE— SECRETARY OF THE BOARD OF CEMETERY TRUSTEES OF A UNION CEMETERY AND VILLAGE CLERK.

The positions of secretary of the board of cemetery trustees of a union cemetery and the clerk of the village, which with the township constitutes the joint cemetery, are compatible.

COLUMBUS, OHIO, July 1, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN.—I am in receipt of your request for my opinion upon the following:

> *"Statement of Facts*
>
> In a joint cemetery of village and township, operated by the cemetery trustees in accordance with law, the secretary of the cemetery trustees, receiving compensation for his services, is the clerk of the village, which with the township constitute the joint cemetery.
>
> *Questions*—Are the positions of village clerk and secretary of cemetery trustees compatible, and can the one person draw the two compensations?"

I have carefully examined the statutes and find no statutory restriction against the secretary of the board of trustees of a union cemetery holding the position of clerk of the village which with the township constitutes the joint cemetery. It will be necessary, then, to ascertain whether or not there is any incompatibility in these two positions under the common law.

The rule is laid down in the case of State ex rel. vs. Frank Gebert, 12 O. C .C. (n. s.) 274-275, as follows:

> "Offices are considered incompatible when one is subordinate to, or in any way a check upon, the other; or when it is physically impossible for one person to discharge the duties of both."

The following sections of the General Code are pertinent to your inquiry:

Section 4283.—"In the following provisions of this chapter, the word 'city' shall include 'village,' and the word 'auditor' shall include 'clerk.'"

Section 4284.—"At the end of each fiscal year, or oftener if required by council, the auditor shall examine and audit the accounts of all officers and departments. He shall prescribe the form of accounts and reports to be rendered to his department, and the form and method of keeping accounts by all other departments, and, subject to the powers and duties of the state bureau of inspection and supervision of public offices, shall have the inspection and revision thereof. Upon the death, resignation, removal or expiration of the term of any officer, the auditor shall audit the accounts of such officer, and if such officer be found indebted to the city, he shall immediately give notice thereof to council and to the solicitor, and the latter shall proceed forthwith to collect the indebtedness."

Under the last above quoted section of the General Code it is the duty of the clerk of the village to audit the accounts of all officers and departments of said village. Therefore, it becomes necessary, in answering your question, to determine whether or not these cemetery trustees of the union cemetery are officers of the village which is united with a township for cemetery purposes within the meaning of this section. This consideration is necessary because of the fact that if it should be that they are such officers and it is therefore necessary for the clerk to examine and audit their accounts, which accounts would of course be made up by their secretary, then under the rule as laid down in the case of State ex rel. vs. Gebert, supra, the two positions of which you inquire would be incompatible.

In the determination of this question we must, then, ascertain how the trustees of a joint cemetery are appointed. Section 4193-1 G. C. provides in part as follows:

"At any such joint meeting or at the joint meeting provided for by section 4192 of the General Code, by a majority vote of all present counting council members and trustees, such meeting may elect a board of cemetery trustees consisting of three members, of which one or more must be a member of each of the separate boards of township trustees and municipal councils comprised in the union cemetery association represented by such joint meeting. * * * *."

You will note that this section, after providing for a board of trustees, says:

"Of which one or more must be a member of *each* of the *separate* boards of township trustees and municipal councils comprised in the union cemetery association represented by such joint meeting."

This provision is somewhat ambiguous, and at first sight it appears that the legislature in saying "of which (speaking of the board of trustees) one or more, etc.," intended simply that one member of the board chosen must be a member of either the village council or township trustees, but the following part of the section wherein it says "must be a member of *each* of the *separate* boards" leads me to the conclusion that the legislature intended that each separate board represented at the joint meeting must have representation on the board of cemetery trustees, or, in other words, in a case where a village united with a township for cemetery purposes, at least one member of the board of cemetery trustees must be a member

of council and one a member of the township trustees represented at each meeting, but both the council and township trustees must have representation on such board.

I have gone into this discussion for the purpose of showing that the board of cemetery trustees is made up of one municipal officer and one township officer, and therefore it could not be said that the members of said board of cemetery trustees are municipal officers or that such board is a municipal department. This board, as above pointed out, is selected jointly by municipal and township officers, and neither the township nor the municipality separately has control over such board. It is a joint board, and entirely separate and distinct from each branch of local government represented, and is neither a township nor a municipal board.

This is borne out by the fact that the funds derived from the sale of lots, etc., in the cemetery are not turned into the village treasury nor into the township treasury, but are under the control and charge of the cemetery trustees. (Sections 4193 and 4167 G. C.) Therefore, the clerk of the village, under section 4284 G. C. would not be compelled, nor would he have any authority, to examine and audit the accounts of the board of cemetery trustees, and therefore would not be a check upon the board of cemetery trustees or the secretary of such board.

I know of no way in which the positions of secretary of the board of cemetery trustees of a union cemetery and the clerk of the village, which with the township constitutes the joint cemetery, are incompatible, and, therefore, advise you that said positions may be held by one person if it is physically possible for one person to perform the duties of both offices.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1317.

APPROVAL OF BOND ISSUE OF ANTRIM TOWNSHIP RURAL SCHOOL DISTRICT OF WYANDOT COUNTY—$20,000.00.

COLUMBUS, OHIO, July 1, 1918.

The Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN—

> In re bonds of Antrim township rural school district of Wyandot county, Ohio, in the sum of $20,000.00 for the purpose of completing the construction of a partially built school house in said school district.

I have made a careful examination of the transcript of the proceedings of the board of education and other officers of Antrim Township Rural School District, relating to the above issue of bonds. Said issue of bonds is one approved by the electors of said school district at a special election held in accordance with the provisions of section 7625, et seq., General Code, and I find the proceedings relating thereto to be in conformity with the provisions of the General Code of Ohio relating to bond issues of this kind.

I am therefore of the opinion that properly prepared bonds covering said issue will, when same are properly executed and delivered, constitute valid and binding obligations of said school district to be paid in accordance with the terms thereof.

No bond form of the bonds to be printed covering said issue has been submitted to me and I am therefore holding the transcript of the proceedings relating to this issue until such bond form is submitted and approved.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1318.

APPROVAL OF CONTRACT BETWEEN THE BOARD OF AGRICULTURE AND FRANK R. LANDER.

COLUMBUS, OHIO, July 1, 1918.

Board of Agriculture of Ohio, Columbus, Ohio.

GENTLEMEN:—You have submitted to me contract entered into on the 20th day of June, 1918, between the board of agriculture and Frank R. Lander, of Cleveland, Ohio, for services as engineer in and about the building and construction of two ponds at Chagrin Falls, Ohio, said ponds to be used as fish hatcheries, the contract calling for $300.00 for services to be rendered thereunder.

I have carefully examined said contract and finding the same correct in form have approved the same, and having received from the Auditor of State a certificate that there is money available for the purpose of the said contract, have this day filed said contract in the office of the Auditor of State and am herewith returning to you the duplicate copies thereof.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1319.

CHIROPRACTOR NOT AUTHORIZED TO SIGN DEATH CERTIFICATE UNDER SECTION 210 G. C.

A chiropractor is not authorized to sign a death certificate under section 210 G. C., and he is not a "physician" as that term is used in said section.

COLUMBUS, OHIO, July 1, 1918.

Bureau of Vital Statistics, Columbus, Ohio.

GENTLEMEN:—You have asked for an opinion as to the right of a chiropractor to sign a death certificate when one of his patients dies without a regular physician having been called.

Section 204 G. C. provides for the necessity of a burial or removal permit and that—

> " * * *. No such burial or removal permit shall be issued by any registrar until a complete and satisfactory certificate of death has been filed with him, as hereinafter provided."

Section 209 G. C. provides for the contents of the certificate of death, while section 210, providing by whom such certificate shall be signed, contains the following:

> " * * * The medical certificate shall be made and signed by the physician, if any, last in attendance on deceased, who shall state the time in attendance, the time he last saw the deceased alive, and the hour of the day at which death occurred. He shall further state the cause of death, so as to show the course of disease or sequence of causes resulting in death, giving the primary cause, the contributory causes, if any, and the duration of each."

Section 212 G. C. makes provision for certificate in case of death without medical attendance.

So it is seen that the statute requires the medical certificate of death to be signed by "the physician," if any, who is last in attendance on the deceased.

Your sole question is whether or not a chiropractor under the Ohio law is embraced within the term "physician" as used in this section.

Section 1274 G. C. provides for the issuance of a certificate to practice medicine or surgery after an examination as prescribed by law and among other things contains this language:

> " * * *. Such certificate when deposited with the probate judge as required by law, shall be conclusive evidence that the person to whom it is issued is entitled to practice medicine or surgery in this state. * * *."

The word "physician" is defined by Cyc. as—

> "a person who has received the degree of doctor of medicine from an incorporated institution; one lawfully engaged in the practice of medicine."

This is the common meaning of the term "physician" and the word, when used by the legislature in the passage of the section providing for the signing of the certificate of death by the attending physician, did not contemplate nor include a chiropractor. The right of a chiropractor to practice his vocation is given in the supplementary sections to section 1274 G. C., found in 106 O. L. 202. Section 1274-1 provides that the state medical board shall examine and register persons desiring to practice any limited branch or branches of medicine and surgery and that it shall establish rules and regulations governing such limited practice. This section further provides among other things that:

> "Sec. 1274-1. * * * . Such limited branches of medicine or surgery shall include chiropractic, * * *."

Section 1274-3 G. C. provides that if the applicant passes the examination and pays the required fee, the state medical board shall issue its certificate to that effect and further:

> "* * * Such certificate shall authorize the holder thereof to practice such limited branch or branches of medicine or surgery as may be specified therein, but shall not permit him to practice any other branch or branches of medicine or surgery nor shall it permit him to treat infectious, contagious or venereal diseases, nor to prescribe or administer drugs, or to perform major surgery."

The above sections are found in the act in 106 O. L. 202, referred to, the title of which reads as follows:

> "To supplement section 1274 of the General Code by the enactment of sections 1274-1 to 1274-7, both inclusive, for the purpose of regulating further the practice of medicine and surgery in this state by authorizing the examination and registration of practitioners of limited branches thereof."

Section 1274-7 G. C. provides that nothing in sections 1274-1 to 1274-6, inc., shall be so construed as to in any way amend sections 1286, 1287 and 12694 G. C., or as in any manner limiting the application of said sections or any other provisions of the laws of the state to practitioners of such limited branches of medicine or surgery, save as thereinbefore specifically provided.

Section 1286 G. C. provides what constitutes the practice of medicine, surgery or midwifery, while section 1287 provides certain exceptions to the provisions of the chapter, but not including practitioners of chiropractic.

Section 12694 G. C. provides a penalty for practice of medicine or surgery without having obtained a certificate therefor, or for practising after an obtained certificate has been revoked.

In an opinion to the Ohio Board of Administration under date of October 24, 1917, found in Volume III, Opinions of the Attorney-General for 1917, p. 1994, I held that an osteopath could not be regarded as practicing medicine or surgery, pointing out the different educational qualifications required and the totally different examinations provided with reference to the two professions; and further that an osteopath could not be considered as a physician within the meaning of sections 1954 and 1956 G. C., providing for the signing of a certificate of insanity by a medical witness who was required to be a "reputable physician."

I think the legislature, by the use of the words "physician * * * last in attendance," had in mind a practitioner who had obtained a certificate to practice medicine and surgery generally, and that said term can not include a limited practitioner such as a chiropractor.

Holding these views, it is my opinion that a chiropractor is not authorized to sign up a death certificate, under the vital statistics law, for one of his patients who dies without a regular physician being in attendance.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1320

COLLATERAL INHERITANCE TAX—BEQUEST TO BOARD OF EDUCATION FOR ERECTION, ETC., OF PUBLIC LIBRARY AND Y. M. C. A. EXEMPT.

A bequest to a board of education for the purchase of a site and the erection and maintenance of a building for a combined public library and Young Men's Christian Association building is exempt from collateral inheritance tax.

COLUMBUS, OHIO, July 1, 1918.

HON. J. H. MUSSER, *Prosecuting Attorney, Wapakoneta, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of June 20th requesting my opinion, as follows:

"In July, 1912, one of the citizens of our county died testate, leaving a will containing among other provisions, the following:

'*Seventh.*—Provided there are sufficient funds left out of my estate after the payment of the bequests, legacies and devises made in this will, I next give and bequeath to the Board of Education of the School District of Wapakoneta, Ohio, the sum of fifty thousand dollars ($50,000.00), or such other less sum as may be left for that purpose, for the purchase of the necessary land, erection of a building and maintenance of same, for a combined public library and Young Men's Christian Association building, to be called the "Blume Library and Y. M. C. A.," for the use and benefit of all the people and citizens of Wapakoneta and vicinity, the same to be in charge of and under the control of said Board of Education.'

This money was not to be paid over to the Board of Education under this provision of the will until after the death of his wife, she being constituted a trustee for the purpose of holding same until said time.

All of the parties interested in the will now desire to make a complete settlement of the estate and terminate the trust, and the question has arisen as to whether or not the collateral inheritance tax should be paid upon the bequest of $50,000.00 in the item above referred to."

I assume that the estate in the wife is a mere dry trust, she having no beneficial interest therein. Of course, any interest she might have would not be within the terms of the collateral inheritance tax law. Assuming the capacity of the board of education to take this bequest, it would be clearly exempt under section 5332 G. C., which is now in force and was a part of the law in force in 1912, as a "bequest * * * to a * * * political subdivision (of the state) * * * for exclusively public purposes."

From your letter I gather that no question has been or will be raised by the next of kin of the testator respecting the validity of the bequest.

Under all the circumstances, therefore, I advise that the bequest is exempt from the collateral inheritance tax under the law in force in July, 1912, which is the law determining the question, though said law so far as the exemptions now involved are concerned has not been changed since that time.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1321.

OFFICES COMPATIBLE—MAYOR OF VILLAGE AND MEMBER OF BOARD OF EDUCATION.

The mayor of a village may also hold the office of member of the board of education for a district which includes the village of which he is mayor.

COLUMBUS, OHIO, July 2, 1918.

HON. R. A. KERR, *Prosecuting Atorney, Troy, Ohio.*

DEAR SIR:—I am in receipt of your request of June 21, 1918, as follows:

"A few days since I had inquiry from a township school superintendent asking if the mayor of a village could also be a member of a board of

education for a district, which included the village of which he is mayor. My reply to him was that there was no provision of statute that would prohibit such holding of the two offices, and he has requested me to ask your opinion on the point.

The only sections I find covering the question of qualifications of the mayor are 2830, 2910 and 4762, forbidding the mayor to act as deputy sheriff or as prosecuting attorney, but I find no section forbidding the mayor to act as member of a school board or a member of school board to act as mayor.

The question is submitted to you at his request and not because of doubt in my mind as to it. For the purpose of clearing the matter up, however, I would appreciate it if you could give me your ruling on the same."

I have carefully examined the statutes pertaining to the offices of mayor of a village and member of the board of education and find no statutory inhibition against one person holding both offices. It remains to be determined, then, whether or not these offices are incompatible within the meaning of the common law.

In the case of State ex rel. vs. Gebhart, 12 O. C. C. (n. s.) 274, the rule is laid down as follows:

"Offices are considered incompatible when one is subordinate to or in any way a check upon the other, or when it is physically impossible for one person to discharge the duties of both."

I am unable to see in practice how there could be any conflict in the duties of the two positions and it is my opinion that the offices of mayor of a village and member of the board of education are not incompatible and may be held by the same person if it is physically possible for one person to perform the duties of both.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1322.

EXECUTION FOR COSTS—STATUTES OF LIMITATION DO NOT RUN AGAINST RIGHT OF CLERK OF COURTS TO ISSUE.

The statutes of limitation do not run against the right of a clerk of courts to issue execution for costs under section 3028 *G. C.*

COLUMBUS, OHIO, July 2, 1918.

HON. A. C. MCDOUGAL, *Prosecuting Attorney, Woodsfield, Ohio.*

DEAR SIR:—I am in receipt of your request for my opinion, which reads as follows:

"Does the statute of limitations run against the right of the clerk of courts to issue execution for costs for his own benefit in cases either in the

Court of Common Pleas or in the Court of Appeals? This question is based upon the provisions of section 3028 G. C."

Section 3028 G. C. provides:

"When the party recovering neglects to sue out execution immediately, or after such execution has been returned without satisfaction of costs, the clerk, for his own benefit, may, or at the instance of a person entitled to fees in the bill of costs, taxed against either party, shall issue against the party indebted to such clerk or other person, for such fees, whether plaintiff or defendant, an execution to compel the party to pay his own costs, in the following form, towit:

(Form of execution to compel either party to pay his own costs.)

The State of Ohio,_____county, ss:

To the Sheriff of _____county, Greeting:

WHEREAS, in a certain civil action lately prosecuted in the _____ court of_____county, wherein _____ was plaintiff and_____ _____ was defendant, the costs of said _____ were taxed at _____ dollars _____ cents: You are therefore conmmanded, that of the goods and chattels or for the want of goods and chattels, of the lands and tenements of the said_____in your county; you cause to be made the costs aforesaid, with interest thereon from the _____day of _____ A. D., _____ (the date of the judgment) until paid, and costs that may accrue: And if you shall levy and make said costs and interest, do you have the same before the _____ court of _____ county, within sixty days from the date hereof, to render unto the persons entitled to the same; and have you then and there this writ.

WITNESS my hand and the seal of the _____ court, this _____ day of _____ A. D._____.

A B. Clerk.

The statutes of limitation of this state limit the time within which a person or persons may bring an *action* to enforce a right. An action has been defined by the Supreme Court of this state in the case of In Re Oliver, reported in Volume 77 Ohio State Reports, page 474, as follows:

"Action is the formal demand of one's right from or upon another made in a court of justice."

Section 11279 of the General Code provides what shall constitute the commencement of an action. This section reads:

"A civil action must be commenced by filing in the office of the clerk of the proper court a petition, and causing a summons to be issued thereon."

Under section 3028 G. C., above quoted, it is not necessary for the clerk of courts to institute an action for the recovery of costs. He does not file a petition and cause a summons to issue thereon. Under that section he is authorized to issue an execution against the successful party when such party neglects to issue out execution immediately or after such execution has been returned without satisfaction of costs, without any preliminary proceedings in the matter.

As above pointed out the proceeding instituted by a clerk under section 3028 G. C. is not an action. Therefore, the statutes of limitation would not apply to such a proceeding. I am not unmindful, however, of section 11663, which provides:

> "If execution on a judgment rendered in a court of record in this state, or a transcript of which has been filed as hereinbefore provided, be not sued out within five years from the date of the judgment, or if five years intervene between the date of the last execution issued thereon and the time of suing out another execution, such judgment shall be dormant, and cease to operate as a lien on the estate of the judgment debtor."

This section, however, does not apply to your question, as the execution issued by the clerk is not predicated upon any judgment or order of court.

See Eckstein vs. Strauss, 1 Ohio Dec. 292.

Answering your question specifically, therefore, I advise you that the statutes of limitation do not run against the right of a clerk of courts to issue execution for costs under the provisions of section 3028 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1323.

BOARD OF EDUCATION—ASSIGNMENT OF PUPILS TO SCHOOLS OUTSIDE OF DISTRICT—CONSENT OF PARENTS.

1.—*A board of education has no authority to assign pupils to schools outside of the district over which such board has jurisdiction.*

2.—*A board of education may contract under the provisions of section 7734 G. C. with another board of education for the admission of pupils into the schools of such other district and such contract is in effect an assignment of the pupils to such other district school.*

3.—*The consent of parents is not required to make an effective assignment of the school youth of the school district to the various schools therein.*

COLUMBUS, OHIO, July 2, 1918.

HON. CLARE CALDWELL, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR.—You request my opinion on the following statement of facts:

> "Throughout our county, on the school district line roads, the school vans of the adjoining districts must both travel the same road in order to to collect the children on one side of the road belonging to the particular district.
>
> It has been suggested that if it were legal, the road could be divided by the board of the adjoining district so that but one van would travel the particular road. However, this would necessitate taking the children on the side of the road from the adjoining district, to the school from which the van was sent and thereby take the children out of the district in which they live.
>
> I desire an opinion as to whether or not the school board, in its own

discretion, may, without the consent of the parents of the child, assign a pupil to the adjoining district under the circumstances above set forth. However, section 7684 provides for the assignment of pupils and it seems to confine them to the school within the district. Section 7734 confers upon the board of education the right to contract with another board for the admission of pupils outside of the district of the first board. However, the question in my mind is this:

Does not section 7681 confer upon the parent the right to have his child attend school in his own school district, and would not the consent of the parent be required before the board could assign the child to an adjacent district?"

Several sections of the General Code must be considered in determining your question, and they are as follows:

Sec. 7684.—"Boards of education may make such an assignment of the youth of their respective districts to the schools established by them as in their opinion best will promote the interest of education in their districts."

Sec. 7681.—"The schools of each district shall be free to all youth between six and twenty-one years of age, who are children, wards or apprentices of actual residents of the district, but the time in the school year at which beginners may enter upon the first year's work of the elementary schools shall be subject to the rules and regulations of the local boards of education. * * * But all youth of school age living apart from their parents or guardians and who work to support themselves by their own labor, shall be entitled to attend school free in the district in which they are employed."

Sec. 7734.—"The board of any district may contract with the board of another district for the admission of pupils into any school in such other district, on terms agreed upon by such boards. The expense so incurred shall be paid out of the school funds of the district sending such pupils."

That is to say, the school youth of a district have the right and privilege of attending the schools of such district and the board of education of a district, that is, a village or rural district can only assign the pupils to the various schools within the district and under no circumstances has a local board control over the schools of any other district than its own, and its pupils can only be admitted to such other district by proper contract with the board of education of such other district. If your boards of education cannot agree that a division of the district line road mentioned by you be made, then the county board of education might settle the matter by transferring certain territory from one district to the other so that the transportation could be carried out along the line suggested in your inquiry. This transfer would be made under the provisions of sections 4692 or 4736 G. C. There is nothing in the statute which provides that the consent of the parents must be secured to make such transfer or such assignment of the school youth, but under section 4692, above mentioned, the electors of the territory to be transferred, and under 4736 the electors of the territory affected, have a right to remonstrate against the proposed transfer under the first section and against the arrangement proposed under the second section.

It might also be suggested that under section 7734 G. C. the board of any district may contract with the board of another district for the admission of pupils into any school of such other district. Your several boards might enter into such arrangement in relation to the pupils along said highway and the contract so entered

into in relation to such pupils would be an assignment of the pupils to the school of such other district.

Answering your question, then, I advise you that (1) a board of education has no right to assign pupils to schools outside of the district over which the board has jurisdiction, and (2) the consent of parents is not required to make an assignment of the school youth of a district to the various schools therein.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1324.

APPROVAL OF FINAL RESOLUTION FOR ROAD IMPROVEMENT IN COLUMBIANA COUNTY.

COLUMBUS, OHIO, July 3, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR.—I have your letter of June 29, 1918 enclosing, for my approval, final resolution for the following named improvement:

Cleveland- East Liverpool road—I. C. H. No. 12, section "Q," Columbiana county.

I have carefully examined said resolution, find the same correct in form and legal and am therefore returning it to you with my approval endorsed thereon in accordance with section 1218 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1325.

APPROVAL OF BOND ISSUE OF BELLE CENTER VILLAGE SCHOOL DISTRICT—$16,000.00.

COLUMBUS, OHIO, July 5, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In re bonds of Belle Center village school district, in the sum of $16,000.00, for the purpose of repairing and furnishing the school building now in said school district.

I have carefully examined the corrected transcript of the proceedings of the board of education and other officers of Belle Center village school district relating to the above issue of bonds. Said bonds are issued on a vote of the electors of the school district for the above stated purpose, and I find said proceedings to be in conformity to the provisions of sections 7625 to 7628, inclusive, of the General Code governing the issue of bonds of this kind.

I am therefore of the opinion that properly prepared bonds covering said issue will, when the same are properly executed and delivered, constitute valid and subsisting obligations of said school district, to be paid in accordance with the terms thereof.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1326

APPROVAL OF BOND ISSUE OF BELLE CENTER VILLAGE SCHOOL DISTRICT—$55,000.00.

COLUMBUS, OHIO, July 5, 1918.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

In re bonds of Belle Center village school district, in the sum of $55,000.00, for the purpose of purchasing a site for and erecting and equipping a high school building in said school district.

I have carefully examined the corrected transcript of the proceedings of the board of education and other officers of Belle Center village school district relating to the above issue of bonds. Said bonds are issued on a vote of the electors of the school district for the above stated purpose, and I find said proceedings to be in conformity to the provisions of sections 7625 to 7628, inclusive, of the General Code governing the issue of bonds of this kind.

I am therefore of the opinion that properly prepared bonds covering said issue will, when the same are properly executed and delivered, constitute valid and subsisting obligations of said school district, to be paid in accordance with the terms thereof.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1327.

APPROVAL OF BOND ISSUE OF CHAGRIN FALLS, CUYAHOGA COUNTY—$2,600.00.

COLUMBUS, OHIO, July 5, 1918.

The Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

IN RE: Bonds of the village of Chagrin Falls, Cuyahoga county, in the sum of $2,600, for the purpose of making needed and necessary repairs to the sewage disposal plant of the sanitary sewer system of said village.

I have made a careful examination of the transcript of the proceedings of the

council of the village of Chagrin Falls relating to the above issue of bonds, and find said proceedings to be in conformity to the provisions of the General Code of Ohio relating to bond issues of this kind.

I am therefore of the opinion that properly prepared bonds covering said issue will, when the same are properly executed and delivered, constitute valid and binding obligations of said village, to be paid in accordance with the terms thereof.

The bond form submitted with and as a part of the transcript is not entirely satisfactory to me, and I am therefore holding said transcript until a proper bond form of the bonds to be printed covering said issue is submitted for approval.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

1328.

APPROVAL OF BOND ISSUE OF EAST PALESTINE—$25,000.00.

COLUMBUS, OHIO, July 5, 1918.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

IN RE: Bonds of the village of East Palestine, Ohio, in the sum of $25,000.00, for the purpose of making certain extensions and improvements to the combined waterworks and electric light plant of said village.

I have carefully examined the transcript of the proceedings of the council of the village of East Palestine, Ohio, relating to the above issue of bonds, and find said proceedings to be in conformity to the provisions of the General Code of Ohio relating to bond issues of this kind.

I am therefore of the opinion that properly prepared bonds covering said issue will, when the same are properly executed and delivered, constitute valid and subsisting obligations of said village, to be paid in accordance with the terms thereof.

The bond form submitted is not entirely satisfactory and I am therefore retaining the transcript until proper bond form covering said issue is submitted and approved.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1329.

WHEN COMMON PLEAS COURT REVERSES A CONVICTION BY MAYOR'S COURT FOR VIOLATION OF SPEED LAW (12604 G. C.) COST OF BILL OF EXCEPTIONS CANNOT BE CHARGED AGAINST THE COUNTY.

In a prosecution for the violation of section 12604 *G. C. prohibiting the operation of a motor vehicle at a greater rate of speed than fifteen miles an hour in other*

portions of the municipality than the business and closely built up portions thereof, where the defendant's conviction in the mayor's court is reversed by the court of common pleas, the cost of the bill of exceptions may not be charged against the county.

COLUMBUS, OHIO, July 6, 1918.

HON. BENTON G. HAY, *Prosecuting Attorney, Wooster, Ohio.*

DEAR SIR:—I have your letter of May 30th asking the following question:

> "In the mayor's court the defendant in a criminal case in which the state of Ohio was plaintiff was found guilty, he prepared a bill of exceptions and secured a reversal in the court of common pleas. Can the cost of the bill of exceptions be charged against the county and the defendant be reimbursed for his cost in preparing the bill of exceptions. The case was a misdemeanor? Is section 12279, 105-106 O. L., 134, applicable to criminal cases? See section 1552 G. C., 22 Ohio Dec. 360."

Also your letter of June 7th, adding the following information:

> "The prosecution was under section 12604 for violating that provision of the section prohibiting the operation of a motor vehicle at a greater rate of speed than fifteen miles an hour in other portions of the municipality than the business and closely built up portions thereof."

Section 12604 G. C. reads:

> "Whoever operates a motorcycle or motor vehicle at a greater speed than eight miles an hour in the business and closely built-up portions of a municipality or more than fifteen miles an hour in other portions thereof or more than twenty miles an hour outside of a municipality, shall be fined not more than twenty-five dollars, and, for a second offense shall be fined not less than twenty-five dollars nor more than fifty dollars."

I have noted, as you suggest, section 12279 G. C., as amended 105-106 O. L., 134, which reads:

> "When a judgment or final order is reversed, the prevailing party shall recover all court costs incurred to secure such reversal, including the cost of bills of exceptions, and when reversed in part, and affirmed in part, the court may apportion said costs between the parties in such manner as it deems equitable."

This section, I think, is applicable only to civil cases. Section 1552 G. C., which is cited, reads:

> "The compensation of stenographers for making such transcripts shall be not more than eight cents per folio of one hundred words, to be fixed by the common pleas judges of the subdivision. Such compensation shall be paid forthwith by the party for whose benefit a transcript is made. The compensation for transcripts made in criminal cases, by request of the prosecuting attorney or the defendants, and transcripts ordered by the court in either civil or criminal cases, shall be paid from the county treas-

ury, and taxed and collected as other costs. The clerk of the proper court shall certify the amount of such transcripts, which certificate shall be a sufficient voucher to the auditor of the county, who shall forthwith draw his warrants upon the county treasurer in favor of such stenographers."

In the case of Cincinnati Equipment Co. vs. Kauffman, 22 O. D., p. 360, which you cite, it was held:

"The expense of making a stenographic transcript of trial proceedings constituting a bill of exceptions, in the absence of a statute authorizing it in error proceedings, cannot be taxed as costs."

Section 1552 G. C., to which you refer, and which is cited above, has no application to the mayor or justice courts and nowhere in the statutes is there found any provision for an official stenographer in those courts or for any stenographic record of the proceedings in those courts. Costs are only allowed in criminal cases when the statute permits them to be so taxed. There being no authority in the statute to tax the expense of the bill of exceptions as costs in the case, such expense may not be paid as "costs" by the county. Even if this were not true, the costs in this case of the bill of exceptions could not be paid by the county for the reason there is no authority for the payment by the county of any costs in the case. In a great many misdemeanor cases the statute provides that the costs, if the defendant be acquitted or discharged from custody, shall be certified under oath by the trial magistrate to the county auditor and then paid out of the county treasury upon the auditor's warrant. This is true regarding all those cases enumerated in section 13423 G. C. It has quite frequently been held that the provision in regard to such payment of costs in section 13429 G. C. applies to all the fifteen classes of misdemeanors set out in section 13423 G. C. Special provision is also made in section 1404 concerning all fish and game cases, and numerous other special provisions concerning certain misdemeanors may be found in the statutes. However, I know of no provision of law relating to payment of costs in misdemeanors brought under section 12604 G. C.

In an opinion of this department, rendered February 19, 1918, to the bureau of inspection and supervision of public offices, it was held in the third branch of the syllabus:

"In prosecutions for charging unlawful rate of interest on money loaned, there being no special provision for the payment of costs, the only authority for payment of costs is section 3019."

In that opinion it was said:

"The third case to which attention is called in the inquiry is one in which the defendant was charging an unlawful rate of interest on money loaned. This is a misdemeanor for which no special provision as to payment of cost has been made and it is subject, therefore, to the general rule relating to misdemeanors.

Section 3019 of the General Code provides:

'In felonies wherein the state fails, and in misdemeanors wherein the defendant proves insolvent, the county commissioners, at any regular session, may make an allowance to any such officers in place of fees, but in

any year the aggregate allowances to such officer shall not exceed the fees legally taxed to him in such causes, nor in any year shall the aggregate amount allowed an officer exceed one hundred dollars.'

It has frequently been held by this department that in misdemeanor cases, before officers may be allowed fees under section 3019, there must be, first, a conviction and, second, the defendant must prove insolvent. This is the view recently taken by the common pleas court of Carroll county, in an opinion rendered December 3, 1917, in the case of State ex rel. vs. Marshall, Auditor.

Referring, then, to the case mentioned in the inquiry, concerning the violations of the loan shark law, beg to advise that, assuming for the purposes of this opinion that the justice court had jurisdiction to try this case, the costs may be paid as follows: If the higher court sustains the conviction and the defendant proves insolvent, fees may be allowed under section 3019 of the General Code, as above provided. If the higher court reverses the conviction, I know of no way to collect."

The case you present, as far as the question of costs is concerned, is exactly the same as the one to which reference is made in the opinion quoted, and I am of the opinion that in this case neither the cost of the bill of exceptions or any other costs may be taxed against the county.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1330.

COUNTY COMMISSIONER—APPOINTED TO FILL VACANCY—FEE—COMMISSION—VALIDITY OF ACTS PERFORMED WHEN HE DOES NOT SECURE COMMISSION—SALARY.

1. *A county commissioner appointed by the probate judge, county auditor and county recorder, to fill a vacancy, must, before entering upon his duties, pay the fee of five dollars to said officers and secure a commission from the governor of the state.*

2. *If a county commissioner enters upon the duties of his office in good faith, by virtue of his appointment, without securing the commission, he is an officer de facto, and so far as the rights of third persons and the public are concerned, his acts pertaining to the duties of said office are legal.*

3. *If a county commissioner is paid the salary pertaining to his office, while a de facto officer, and he has performed the duties of his office in good faith, the public having benefited by the same, in justice, and possibly in law, no finding should be made against him for the recovery of the money paid him as salary.*

COLUMBUS, OHIO, July 6, 1918.

HON. JAMES F. FLYNN, JR., *Prosecuting Attorney, Sandusky, Ohio.*

DEAR SIR:—I have your communication of June 21, 1918, which reads as follows:

"On January 14, 1918, you rendered an opinion to me in reference to the question as to whom the resignation of a county commissioner should

be sent and in which you advised me that the appointing board, to wit, the probate judge, auditor and recorder of the county should receive the resignation and make the appointment. The question has arisen with reference to the appointee qualifying for that office. There is nothing in the statute with reference to the appointing board certifying the appointment to the governor or secretary of state.

* * * From the foregoing (section 138 G. C. quoted) it seems apparent that the county commissioner who was appointed to fill the vacancy must present a legal certificate of his appointment to some one, and before he can enter upon his duties he must have a commission from the governor to fill the said office as county commissioner.

Is it your opinion that this county commissioner must have the certificate of the appointing board, and if so, to whom will he present the certificate, how will he receive his commission from the governor and will he be required to pay the fee for said commission the same as an elective official?

This county commissioner has been drawing his salary since the so-called filling of the vacancy by the appointing board last January. What do you say as to the duties he has performed as such commissioner and his right to receive his salary as commissioner?"

Your questions are based on section 138 G. C., quoted in your request. Said section reads as follows:

"Sec. 138. A judge of a court of record, state officer, county officer, militia officer and justice of the peace, shall be ineligible to perform any duty pertaining to his office, until he presents to the proper officer or authority a legal certificate of his election or appointment, and receives from the governor a commission to fill such office."

Your communication is naturally divided into three parts as follows:

1. Matters having to do with the issuing of the certificate and the payment of the fee for the commission.
2. Whether the acts of said county commissioner since his appointment are legal.
3. Whether the salary paid to said county commissioner since his appointment was legally paid.

It is my opinion that section 140 G. C. would control, at least by analogy, in reference to the certificate and commission. Said section reads as follows:

"Sec. 140. When the result of the election of any such officer is officially known to the deputy state supervisors of elections of the proper county, and upon payment to them of the fee prescribed in the preceding section, they shall immediately forward by mail to the secretary of state a certificate of election of such officer together with the fee so paid. Upon receipt of such certificate and fee by the secretary of state, the governor shall issue and forward the proper commission to the clerk of the court of common pleas, who shall deliver the same to the officer entitled thereto. The fees so received by the secretary of state shall be paid into the state treasury to the credit of the general revenue fund."

The appointing board, consisting of the probate judge, auditor and recorder

of the county, would in this case be in the place of the deputy state supervisors of elections. The appointing board, upon receiving the fee of five dollars from the county commissioner appointed by it, would forward a certificate to the secretary of state, accompanied by the five dollar fee. Upon receipt of this certificate and fee by the secretary of state, the proper commission would be issued by the governor of the state and forwarded to the clerk of the court of common pleas, who would deliver the same to the commissioner so appointed.

The question might arise as to whether the commission should be dated back to the time at which the county commissioner was appointed, with a view to making his acts in all respects legal from the time he entered upon the performance of the duties of county commissioner; in other words, whether it would not be well for the governor to make a *nunc pro tunc* commission, dating it back to the time when it should have been issued under the statutes. I do not think this should be followed. The commission cannot be dated back of the day upon which it is issued. The only case in which a court or any officer can make a *nunc pro tunc* order or entry is where they actually did, as of a former date, make an order, but failed to enter the same upon the records. In such case the order or entry can be dated as of the date upon which the same was actually made; but no officer has authority to date an order, commission or entry as of an earlier date, if in fact he did not at said earlier date make an order or finding of some kind. Therefore it is my opinion that the commission should be dated as of the date when it is actually issued by the governor.

A question is asked in reference to the fee to be paid by the county commissioner. It is my view that under section 138 G. C. the commissioner would be required to pay the fee of five dollars, provided in section 139 G. C., to the board which appointed him to fill the vacancy, and it in turn would forward this fee with the certificate to the secretary of state. Section 138 applies to appointments as well as elections, and therefore to my mind covers the case under consideration.

We come now to the legality of the acts of this county commissioner. In my opinion, so far as the rights of third persons and the public are concerned, the acts of said commissioner are legal. There was a vacancy upon the board of commissioners. The proper authorities appointed this person to fill the vacancy, in accordance with the provisions of law. He entered into the possession of the office and actively engaged in the performance of the duties which devolved upon him by virtue of his position. Third persons and the public dealt with him on the theory that he was the duly appointed and qualified commissioner of the county. In view of all these things, it seems to me said commissioner has been an officer *de facto* from the time he entered upon the performance of the duties of the office.

I will not quote from any decisions, but the principle is well established that as between himself and the public the official acts of an officer *de facto* have the same force and virtue in law as do the acts of an officer *de jure,* and are as valid as to strangers, the public and third persons as are the acts of an officer *de jure.*

We come now to a consideration of a question more difficult to answer, as to whether this county commissioner is entitled to retain the salary paid him by the county from time to time since his appointment. There are several questions pertaining to this matter which are well settled. One of them is that even though, as between himself and the public, the acts of a *de facto* officer are as valid as those of a *de jure* officer, yet when it comes to the assertion of his individual rights, based upon his official character, he is required to show that he is an officer *de jure.* The acts of a *de facto* officer are valid only so far as the rights of the public or third persons having an interest therein are involved. Said officer can claim nothing for himself by virtue of those acts. He cannot claim the benefit of his acts. He is never allowed to build up rights or shield himself from responsibility on the mere fact that he has entered into an office and performed the duties of the same.

From the above principle the proposition also naturally follows that a *de facto* officer cannot maintain an action against the proper authorities, based merely upon the fact that he is a *de facto* officer. He must show in such a proceeding that he is not merely a *de facto* officer, but that he is a *de jure* officer. In other words, the salary or emoluments annexed to a public office are incident to the right to the office and not to the mere exercise of its duties or its occupancy.

The facts submitted by you do not come within the above principles of law. The officer has been paid by the county, from time to time, the sums of money due him as county commissioner. This being the case, I do not believe that a finding should be made against him. He entered into the office by virtue of an appointment. He performed the duties of the office in good faith. The public has received the benefits of the services rendered by him. Further, the public will not run the risk, as in many cases, of being compelled to pay this salary a second time, inasmuch as there is no other person in this case who is the officer *de jure*.

In view of all the above it is my opinion that in justice, and possibly in law, no finding should be made against this county commissioner.

There is some authority for the above conclusion. Constantineau on the De Facto Doctrine, section 240, has the following suggestions to make in reference to recovering money paid to a de facto officer:

> "It is a settled rule of the common law, that money paid by one with full knowledge of the circumstances, or the means of such knowledge in his hands, cannot be recovered back on account of such payment having been made under an ignorance of the law. Whether such rule applies to governments and public bodies as well as to individuals, is a much debated question. But whatever may be the result of the decisions on this point, we think it can safely be asserted that, in the absence of statutory provisions declaring a different rule, money paid as fees or salary by the state or a public corporation to a *de facto* officer, cannot in general be recovered back as money paid under a mistake of law."

In Badeau vs. United States, 130 U. S. 439, the court passed upon a question very similar to the one under consideration. In the head notes to said case we find the following principle laid down:

> "Where an officer of the army was paid, as such, for time during the intervals of his employment in a diplomatic or consular capacity, being an officer *de facto* if not *de jure,* the moneys so paid to him cannot be recovered back by the United States."

Mr. Chief Justice Fuller in the opinion uses the following language:

> "But inasmuch as the claimant, if not an officer *de jure,* acted as an officer *de facto,* we are not inclined to hold that he has received money which, *ex aequo et bono,* he ought to return."

It is to be noted that in this opinion Mr. Justice Fuller held that in justice and good dealing, if not in law, an officer *de facto* cannot be compelled to return money which he has received by virtue of his assuming an office and performing the duties pertaining thereto.

In view of all the above, I am of the opinion that the conclusion heretofore reached is correct, and ought to be followed by yourself and the bureau of inspection and supervision of public offices.

Yours very truly,

JOSEPH MCGHEE,

Attorney-General.

1331.

APPROVAL OF SYNOPSIS OF PROPOSED AMENDMENT TO CONSTITUTION RELATIVE TO THE CLASSIFICATION OF PROPERTY FOR PURPOSES OF TAXATION.

COLUMBUS, OHIO, July 10, 1918.

The Ohio Taxpayers' League, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your communication containing a proposed amendment to the constitution, proposed by initiative petition, to be submitted directly to the electors, together with what purports to be a fair and impartial synopsis of such proposed amendment, the same reading as follows:

"AMENDMENT TO THE CONSTITUTION PROPOSED BY INITIATIVE PETITION TO BE SUBMITTED DIRECTLY TO THE ELECTORS.

To amend section 2 of article 12 of the constitution, to provide classification of property for purposes of taxation.

Be it Resolved, By the people of the state of Ohio:

That section 2 of article 12 of the constitution of the state of Ohio be amended to read as follows:

The general assembly shall provide for the raising of revenue for all state and local purposes in such manner as it shall deem proper. The subjects of taxation for state and local purposes shall be classified by the general assembly, and the rate of taxation shall be uniform on all subjects of the same class, and shall be just to the subject taxed; excepting all bonds outstanding on the first day of January, 1913, of the state of Ohio or of any city, village, hamlet, county or township in this state or which have been issued in behalf of the public schools in Ohio and the means of instruction in connection therewith, which bonds outstanding on the first day of January, 1913, shall be exempt from taxation; but burying grounds, public school houses, houses used exclusively for public worship, institutions of purely public charity, public property used exclusively for any public purpose, and personal property, to an amount not exceeding in value five hundred dollars, for each individual, may, by general laws, be exempted from taxation; but all such laws shall be subject to alteration or repeal; and the value of all property so exempted, shall, from time to time, be ascertained and published as may be directed by law."

"SYNOPSIS OF THE PROPOSAL TO WRITE INTO THE CONSTITUTION A PROVISION FOR CLASSIFICATION OF PROPERTY.

The proposal to amend section 2 of article 12 of the constitution of the state of Ohio provides:

That the general assembly shall classify property for taxation purposes.

The proposed amendment does not change any of the provisions of section 2, article 12, of the constitution having to do with the exemption of state, municipal and school bonds, school houses, charitable institutions, etc."

I hereby certify the foregoing synopsis of an amendment to the constitution,

proposed by initiative petition, being a proposal to amend section 2 of article XII of the Ohio constitution, has been submitted to and examined by me, and I find that such synopsis is a truthful statement of the contents and purposes of the said proposed amendment.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1332.

ADJUTANT GENERAL HAS NO AUTHORITY TO LEASE STATE RIFLE RANGE AND MILITARY CAMP GROUND.

The adjutant general has no authority in law to lease to the federal government, or to anyone else, the state rifle range and military camp ground, commonly known as Camp Perry.

COLUMBUS, OHIO, July 10, 1918.

HON. J. E. GIMPERLING, *Adjutant General, Columbus, Ohio.*

DEAR SIR:—I have your communication of July 1, 1918, which reads as follows:

> "Please note enclosed letter from the adjutant general, central department, relative to lease of the Camp Perry rifle range by government.
>
> General Wood was acting under authority of section 5246, page 395, Laws of Ohio, 1917.
>
> Will you please give me your legal opinion as to proper procedure in this case?"

This question arises by virtue of the fact that the adjutant general of the state leased to the federal government the state rifle range and military camp ground, commonly known as Camp Perry, to be used by the federal government in matters pertaining to the United States army. The federal government now hesitates to pay the rental provided for in the lease because of the fact that it feels there is no authority upon the part of the adjutant general to lease said lands to the federal government. Hence, your communication raises two questions; first, as to whether the adjutant general would have authority to lease said lands, and, secondly, if he has no authority so to lease said lands, then what would be the proper course to pursue in reference to the matter.

It will assist us somewhat in understanding the matter in question if we look to the statutes as they originally stood, which made provision for this rifle range. This was provided in section 5283 G. C. as it stood prior to the enactment of the law in 1917, which is now in force and effect. This section read as follows:

> "The adjutant general shall be the custodian of the state rifle range and military camp ground, which is hereby dedicated and set apart forever as a state park for military purposes to be known and designated as 'Camp Perry' in honor of Commodore Oliver Hazzard Perry and the naval victory won by him September 10, 1813, near this park."

Supplemental sections were added to this section providing for the purchase of additional lands to be made a part of said state rifle range and military camp grounds.

You state in your communication that the adjutant general leased said lands to the federal government under and by virtue of the provisions of section 5246 G. C., 107 O. L. 395. This section reads as follows:

> "In case any armory erected or purchased by the state of Ohio under the provisions of this chapter shall become vacant by reason of the disbandment of the organization or organizations quartered therein, the adjutant general with the consent and approval of the governor, is authorized to sell or lease said armory, the proceeds of rent therefrom being turned into the state treasury to the credit of the 'state armory fund.'"

It is my opinion that this section does not give any authority to the adjutant general to lease the lands which go to make up the state rifle range and military camp. It is to be noted that this section is placed under the general title of "armories," and when we study it in reference to its context we can scarcely arrive at the conclusion that it gives any authority to lease the lands now in question. This section together with the connected sections has to do with the purchase and building of armories for the use of the different military organizations of the state. These sections provide the amount that may be expended for each armory and the use to which they are put and provides a board of control for their management. I do not think that said section 5246 gives authority to lease anything other than an armory, using that term in its strict sense; that is, a building that has either been purchased or built for the use of the local organizations of the Ohio national guard. It is to be noted that in this section the term "to sell" is used co-ordinately with the term "to lease." It would hardly be held that the adjutant general would have authority to sell the lands commonly known as Camp Perry, yet if he has authority to lease them under and by virtue of the same provisions he would have authority to sell them. Further, I do not find any provisions of the General Code which would authorize the adjutant general to lease said lands.

Section 5220 G. C., 107 O. L., 391, provides as follows:

> "The adjutant general shall be the custodian of the state rifle range and military camp ground."

This seems to be about the extent of his authority. It could not be held that a mere custodian of said property would have authority to lease it.

Section 5221 G. C. provides that the adjutant general may make changes and improvements in reference to said property and may make rules and police regulations for the range and ground subject to statutory provisions. Section 5221 has this provision:

> "All revenue and receipts therefrom, or from any other military property in the state of Ohio, not made a portion of the company, troop, battery or other organization funds by regulations, shall be credited to the fund hereinbefore specified as 'Maintenance, Ohio national guard.'"

This provision makes it clear that the adjutant general may realize some revenue from these grounds, but these terms are not broad enough to warrant the conclusion that he has authority to lease said premises.

In connection with this question I desire to call attention to the provisions of section 8523 G. C., which reads in part as follows:

> "All conveyances of real estate, or any interest therein, sold on behalf

of the state, in pursuance of law, shall be drafted by the auditor of state, executed in the name of the state, signed by the governor, countersigned by the secretary of state, and sealed with the great seal of the state."

I quote this provision simply to the point that even the governor of the state is not permitted to convey real estate, or any interest in the same, excepting in pursuance of some statutory provision. It is my opinion that before any state officer can convey real estate or any interest in the same, the right to do so must clearly be set forth in some provision of law. Hence, it is my opinion that the adjutant general had no authority in law to lease the state rifle range and military camp ground and that the federal government is justified in hesitating to pay the rentals provided for in said lease.

The next question to be considered is this: What course shall the state pursue in reference to this matter?

In the letter directed to the adjutant general of Ohio and signed by H. O. S. Heistand, adjutant general, department adjutant, he suggests the following course:

"It is suggested that the United States government be permitted to occupy the range until the next session of the legislature, at which time proper authority can be secured, and the terms and conditions of the lease now in existence can be put into force, and execution and disbursement thereon made."

In reference to this suggestion I might say that there is one thing certain and that is that no state official has any authority to lease said grounds until authority is given to some state official by enactment of the legislature. Further, under the circumstances it would not be wise or advisable for the state to refuse the use of this ground to the federal government even though at the present time no strictly legal arrangements can be made by which the lands can be leased to the federal government by the state; but inasmuch as the lease has been made under the assumed authority given by statute and the federal government has entered into the possession of said lands under the lease, it is my opinion that the matters pertaining thereto should be worked out along the line suggested in the above quotation; that is, the federal government could use the lands with the tacit consent and understanding that when the legislature meets the coming winter it could enact some provision whereby this land could be leased to the federal government for and during the period of the war.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1333.

SHERIFF—SECTION 2846 MAKING ALLOWANCE TO SHERIFF ONLY APPLIES TO COSTS IN COURT OF COMMON PLEAS.

Magistrates may issue their warrants to the sheriff, but when a warrant is issued by an officer of a municipal corporation, such as the mayor, it must be issued to the marshal or police officer thereof.

Section 2846 G. C. providing that the county commissioners may make an allowance to the sheriff for fees in certain criminal cases has application only to the court of common pleas, and does not apply to magistrates or mayors' courts.

COLUMBUS, OHIO, July 10, 1918.

The Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—You have called my attention to our opinion No. 1002, rendered February 11, 1918, to J. W. Watts, prosecuting attorney, Hillsboro, Ohio, in which it was held:

> "The sheriff must pay into his fee fund fees received by him for serving warrants issued to him by a magistrate in state criminal cases."

You have informed me that some doubt has arisen as to whether or not this opinion held by inference that the mayor might issue his warrant to a sheriff. In holding, however, this opinion warrants no such conclusion.

Section 13500, which was considered in the opinion, reads:

> "The warrant shall be directed to the sheriff or any constable of the county, or, when it is issued by an officer of a municipal corporation, to the marshal or other police officer thereof and, by a copy of the affidavit inserted therein or annexed and referred to, shall show or recite the substance of the accusation and command such officer forthwith to take the accused and bring him before the magistrate or court issuing such warrant, or other magistrate of the county having cognizance of the case, to be dealt with according to law."

It will be noted from this section that magistrates may issue their warrants to sheriffs, but when the warrant is issued by an officer of a municipal corporation, such as the mayor, it must be issued to the marshal or police officer thereof. The statute draws a sharp distinction between the issuing of such warrants by the magistrate and by the mayor. This fact was noted by former Attorney-General Hogan in opinion No. 1158, found in Report of the Attorney-General for 1914, Vol. 2, page 1246. At page 1247 he says:

> "Section 13500 makes special and, therefore, exceptional provision for an officer of the municipal corporation by directing a warrant issued by such to be directed to the marshal or other police officer of such municipal corporation. This provision is in keeping with the general plan of the statutes, to confine as far as possible, the administration of such corporation. I am therefore of the opinion that a mayor is without authority to issue a warrant, in a state case, to the sheriff."

In our opinion of February 11, 1918, to which you redirect my attention, the following statement was also made:

> "It will be noted that section 2846 G. C. provides that the sheriff in criminal cases, where the state fails to convict, and in misdemeanors upon conviction, where the defendant proves insolvent, may be allowed his fees upon the certificate of the clerk and the allowance by the county commissioners. The fact that these fees must be allowed upon the certificate

of the clerk would indicate that the section refers only to cases in the court of common pleas and not to cases in the mayor's court, police court and courts of justices of the peace. This being so, this section would offer no assistance in the situation you refer to."

You call my attention to the fact that former Attorney-General Edward C. Turner rendered an opinion found in Opinions of the Attorney-General for 1915, Vol. 1, page 114, in which he held:

"The certificate comprehended by section 2846 G. C. as to such fees as are earned by the sheriff in the probate court and the court of justice of the peace, shall be made by such probate judge and justice of the peace, respectively."

In that opinion Mr. Turner said:

"I hold that the term 'clerk' as used in the statute, shall be construed as referring to the officer of each of the various courts, wherein the sheriff is required to render such service, having custody of the records and memoranda of such court and being charged with the clerical or ministerial functions thereof, rather than that such word 'clerk' should be construed as referring exclusively to the particular officer of the county technically named 'clerk of the court.'"

In support of this holding Mr. Turner says:

"By the provisions of the statute a justice of the peace performs all the ministerial and clerical functions incidental to his court, as well as the judicial functions thereof."

After consideration of this opinion I advise you that I still hold to the view expressed in my opinion of February 11, 1918, to the effect that section 2846 refers only to cases in the court of common pleas and not to cases in the mayor's court or justice court.

This view is strengthened by the fact that the statutes, when providing for the certification of costs in magistrate's courts, invariably refer to a certification "by the magistrate;" also by a review of the history of section 2846 G. C., which discloses the fact that as originally enacted the section provided:

"Courts of common pleas in each county shall make an allowance of not more than three hundred per annum for the sheriff, for services where the state fails to convict or the defendant proves insolvent."

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1334.

WORKHOUSE—WHEN PRISONERS MAY BE SENTENCED TO WORKHOUSE IN ANOTHER COUNTY.

Where a county has no workhouse, and is not joined with other counties in the

maintenance of a joint workhouse, prisoners from such county may not be sentenced by the courts to the workhouse of another county except under an agreement as provided in section 12384 G. C.

COLUMBUS, OHIO, July 11, 1918.

HON. P. A. SAYLOR, *Prosecuting Attorney, Eaton, Ohio.*

DEAR SIR.—I have your letter of June 27, 1918, as follows:

"Preble county, Ohio, of which Eaton is the county seat, has no workhouse, nor has any village or city within the confines of said county a workhouse.

We understand from the county auditor that the county commissioners of Preble county, Ohio, have a contract with the authorities of the Dayton workhouse, at Dayton, Ohio; and the auditor is also sure that the commissioners have no contract with any other workhouse directors.

In the fall of 1917, a man by the name of James Penny was taken up at the village of Camden, Ohio, which is south of Eaton, and has good railroad connections with Cincinnati, but very poor railroad connections with Dayton, Ohio, for assault and battery. He waived the right of trial by jury, in writing, and Mr. Shuey, mayor of the village of Camden, Ohio, found him guilty and sentenced him to the workhouse at Cincinnati, Ohio. Penny was taken up on a state warrant and sentenced under the laws of the state, and not by virtue of any ordinance of the village of Camden. Penny served part of his time and then he went insane and was released and taken back to Mobile, Alabama, by his relatives.

The city workhouse of the city of Cincinnati, Ohio, has presented a bill to the county commissioners of Preble county, Ohio, in the amount of thirty-three dollars and eighty cents ($33.80,) for housing, boarding, etc., Penny from October 28th to December 19th, 1917—fifty-two (52) days, at sixty-five cents (65c) per day—and the question arises, in the minds of the board of county commissioners whether they should pay this bill, because of the fact that they have not made a contract with the workhouse authorities of the city of Cincinnati.

I should like your opinion with reference thereto, calling attention to sections 4141, 4151 and 4152 of the General Code of Ohio.

We think the bill is reasonable and should be paid."

Sections 4141, 4151 and 4152 G. C. provide:

Sec. 4141.—"Any city or district having within its limits, a workhouse, may receive as inmates thereof persons sentenced thereto, as provided by law, from counties other than the one in which such workhouse is situated, upon such terms and during such length of time as is agreed upon by the commissioners of such counties, or by the council of such municipality, and the council of the city, or the board of the district workhouse, or other authority having the management and control of such workhouse. Convicts so received shall in all respects be and remain under control of such director or board of workhouse directors, and subject to the rules, regulations and discipline of such workhouse, the same as other convicts therein detained."

Sec. 4151.—"When a person has been convicted of a misdemeanor by a court or magistrate in a district in which there is a workhouse, such court or magistrate may sentence such person to such workhouse for a

period not exceeding the maximum period of confinement in the jail of the county provided by statute for such offenses. In all such cases the court or magistrate may further order that such person stand committed to such workhouse until the costs of prosecution are paid, or he be discharged as herein provided. In all cases where a fine may be imposed in punishment in whole or in part for an offense and the court or magistrate could order that such person stand committed to the jail of the county until such fine and the costs of prosecution are paid, the court or magistrate may order that such person stand committed to the workhouse until such fine and costs are paid, or until he be discharged at the rate of sixty cents per day for each day of confinement, or be otherwise legally discharged."

Sec. 4152.—"When a person is sentenced to such workhouse by the court of common pleas, the clerk shall make and deliver to the sheriff a certified copy of the docket and journal entries showing the crime charged and the sentence of the court, which shall be delivered by the sheriff to the proper officer in charge of the workhouse, and shall be his warrant for detaining such person in custody therein. In cases of such convictions by any other court or magistrate such court or magistrate shall make a certified transcript of the docket in the case, which shall in like manner be delivered to the marshal or constable, or sheriff by the court or magistrate, which shall be delivered by the officer to the proper officer in charge of the workhouse, and shall be his warrant for detaining the person in custody therein. In all cases of sentence to such workhouse, the person so sentenced may be confined in the jail of the county for such period as may be reasonably necessary for the officer to procure the papers and make arrangements to transport him to the workhouse."

It will be noted that section 4141 provides that any city or district having a workhouse may receive as inmates persons sentenced thereto from counties other than the one in which the workhouse is located, upon such terms and during such length of time as agreed upon by the commissioners of such county or by the council of such municipality, and the council of the city or the board of the district workhouse, or other authority having the management and control of such workhouse. This section simply makes provision for the commitment to the workhouse in another county after a proper contract has been entered into. No such contract was entered into in the case you submit and therefore this section can afford us no assistance.

Section 4151 G. C. provides:

"When a person has been convicted of a misdemeanor by a court or magistrate in a district in which there is a workhouse, such court or magistrate may sentence such person to such workhouse for a period not exceeding the maximum period of confinement in the jail of the county provided by statute for such offenses."

This section refers to the commitment by a court or magistrate when such court or magistrate is located in a district composed of counties which have united in the erection, management or maintenance of a workhouse for the joint use of such counties, as provided in section 4142 G. C. The commissioners of Preble county not having joined with any other counties for the erection, management and maintenance of a workhouse, this section is without application. The same may be said of section 4152 G. C., above quoted.

Sections 12384 and 12386 of the General Code read:

Sec. 12384.—"The commissioners of a county, or the council of a municipality, wherein there is no workhouse, may agree with the city council, or other authority having control of the workhouse of a city in any other county, or with the board of district workhouses having a workhouse, upon what terms and conditions persons convicted of misdemeanors, or of the violation of an ordinance of such municipality having no workhouse, may be received into such workhouse under sentence thereto. The county commissioners, or the council of a municipality, are authorized to pay the expenses incurred under such agreement out of the general fund of the county or municipality, upon the certificate of the proper officer of such workhouse."

Sec. 12386.—"When a person has been convicted of a misdemeanor, or of the violation of an ordinance of a municipality, by the court or magistrate in a county or municipality having no workhouse, and the commissioners of such county or council of such municipality, have made provision as allowed by law for receiving persons so convicted into the workhouse of a city in any other county or district in the state, such court or magistrate, where imprisonment in the county or municipal jail may lawfully be imposed in punishment of such offense, may sentence such person to such workhouse for a period not exceeding the maximum period of confinement in the county or municipal jail allowed by statute or ordinance for the offense. In such cases, the court or magistrate may further order that such person stand committed to such workhouse until the costs of prosecution are paid, or he is discharged as herein provided."

When there is no workhouse in the county or the county has not become a part of a district in which a joint workhouse is maintained, section 12384 G. C. allows the commissioners of the county or the council of a municipality to agree with the city council or other authority having control of a workhouse in another city or county, upon what terms and conditions persons convicted of misdemeanors for the violation of a municipal ordinance may be received into such workhouse. The county commissioners or the council of a municipality are authorized to pay whatever expenses are incurred under such agreement.

Section 12386 G. C. makes it lawful for courts or magistrates in the county having no workhouse, to sentence or commit prisoners to the workhouse in another county under the agreement entered into. This is the only provision I know of for sentencing and committing prisoners under such circumstances to counties other than the one in which the offense is committed. I do not believe that where a county has no workhouse and is not joined with other counties in the maintenance of a joint workhouse it can send its prisoners into the workhouse of any other county except by agreement as provided for in section 12384. When this agreement has been entered into, the expenses of commitment in that workhouse are made payable under the authority of that section and the confinement of a prisoner in the workhouse of the other county is made lawful by virtue of the provisions of section 12386, above quoted. Under no other circumstances, in such case, would the imprisonment be lawful or the payment of expenses incurred legal.

This being true, I must advise you that inasmuch as there is no workhouse in your county, and your county board has not joined with any other county in maintaining a joint county workhouse, it may only sentence its prisoners to a workhouse outside of your county after contracting with the authorities having control of

the workhouse in another county, under section 12384, as your commissioners have done in entering into a contract with the city of Dayton. I am of the opinion that the sentencing of a prisoner by the mayor of Camden, Ohio, to the Cincinnati workhouse, was without authority in law and that the expense of the prisoner's commitment to that institution, in the absence of a contract with that workhouse, under section 12384, may not lawfully be paid.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1335.

APPROVAL OF CONTRACT BETWEEN EDWIN F. SHAFFER AND ADJUTANT GENERAL.

COLUMBUS, OHIO, July 11, 1918.

HON. J. E. GIMPERLING, *Acting Adjutant General, Columbus, Ohio.*

DEAR SIR.—You have submitted to me a contract entered into on the 3rd day of July, 1918, between Edwin F. Shaffer, doing business under the name of The Shaffer Roofing Company, Columbus, Ohio, and yourself for the re-roofing of the state capitol, in the sum of $6,000.00, together with bond securing same.

I have examined the contract and find the same to be in compliance with law and having received from the auditor of state a certificate to the effect that there is money available for such purpose. I have this day approved said contract and filed the same in the office of the auditor of state.

I am herewith returning you the balance of the papers in regard to the matter left with us.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1336.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN BUTLER, CLERMONT, CLINTON, GEAUGA, HOCKING, JACKSON, MAHONING, MERCER, MONTGOMERY, PORTAGE, SHELBY, VAN WERT AND WYANDOT COUNTIES.

COLUMBUS, OHIO, July 11, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR.—I am in receipt of your letter of July 8, enclosing for my approval final resolutions for the following named improvements:

Cincinnati-Hamilton Road—I. C. H. No. 39, section F, Butler county.

Cincinnati-Chillicothe Road—I. C. H. No. 8, section K-1, Clermont county.

Wilmington-Hillsboro Road—I. C. H. No. 254, section A, Clinton county (amount $480.00).

Wilmington-Hillsboro Road—I. C. H. No. 254, section A, Clinton county (amount $1,390.00).

Cleveland-Meadville Road—I. C. H. No. 15, section K-1, Geauga county.

Logan-McArthur Road—I. C. H. No. 397, section A-1, Hocking county.
Chillicothe-Jackson Road—I. C. H. No. 364, section F, Jackson county.
Youngstown-Lisbon Road—I. C. H. No. 82, section D, Mahoning county.
Celina-Wabash Road—I. C. H. No. 264, section D-1, Mercer county.
Akron-Youngstown Road—I. C. H. No. 18, section V, Portage county.
Dayton-Covington Road—I. C. H. No. 63, section K, Montgomery county.
Sidney-Wapakoneta Road—I. C. H. No. 164, section E, Shelby county, types A and B (in duplicate).
Van Wert-Ft. Wayne Road—I. C. H. No. 419, section C, Van Wert county.
Bucyrus-Nevada-Upper Sandusky Road—I. C. H. No. 490, section B-b, Wyandot county, types A and B.
Forest-Upper Sandusky Road—I. C. H. No. 233, section A-2, Wyandot county, types A, B, and C.
Tiffin-Upper Sandusky Road—I. C. H. No. 266, section B, Wyandot county, types A, B, and C (in duplicate).

I have carefully examined said resolutions, find them correct in form and legal, and am therefore returning the same to you with my approval endorsed thereon in accordance with section 1218 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1337.

WOMAN IS ELIGIBLE FOR APPOINTMENT AS SUPERINTENDENT OF COUNTY INFIRMARY.

The superintendent of a county infirmary is not a public officer and therefore a woman is eligible for appointment to said position.

COLUMBUS, OHIO, July 11, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN.—I have your letter of July 3, 1918, in which you submit the following question for my opinion:

"Can a woman be legally appointed superintendent of a county infirmary?"

The question which you ask is based upon two sections of our state constitution.

Section 4 of Art. XV of the constitution reads in part as follows:

"No person shall be elected or appointed to any office in this state unless possessed of the qualifications of an elector; * * *."

When we turn to section 1 of Art. V of the constitution we find set forth the qualifications of an elector in the following terms:

"Every white male citizen of the United States, of the age of twenty-

one years, who shall have been a resident of the state one year next preceding the election, and of the county, township, or ward, in which he resides, such time as may be provided by law, shall have the qualifications of an elector, and be entitled to vote at all elections."

From the provisions of these two sections it is readily apparent that if the position of superintendent of a county infirmary is an office, a woman can not be appointed to said position; but if we can arrive at the conclusion that it is not an office, a woman could be appointed thereto by the county commissioners.

In your communication you referred to an opinion rendered by me to Hon. J. H. Fultz, prosecuting attorney, at Lancaster, under date of March 22, 1917 (Vol. I, Opinions of the Attorney-General for 1917, p. 329), wherein I held that the superintendent of a county infirmary is not a public officer. The syllabus reads as follows:

"The superintendent of a county infirmary is not a public officer and therefore not required to have the qualifications of an elector."

This opinion was based entirely upon the authority of Palmer vs. Zeigler, 76 O. S. 210, and without any further examination whatever. Notwithstanding said opinion and the decision of our supreme court in the case above referred to, you raise the question whether this position ought not to be considered as an office, inasmuch as since the rendering of said decision in the supreme court our statutes have been modified to some extent and further and added duties placed upon the superintendent of a county infirmary. Because of this suggestion I have carefully examined the statutes pertaining to the duties of superintendent of a county infirmary as they stood at the time the supreme court passed upon the case of Palmer vs. Zeigler, supra, and as they now exist.

Sections 961 to 985 inclusive R. S. dealt with the superintendent of an infirmary under the law as it stood at the time the above decision was rendered; while sections 2422 to 2557 inclusive G. C. cover the same matter under the existing law. When the office of infirmary director was abolished and the duties of infirmary directors were placed upon the county commissioners, there were some added duties given to the superintendent of an infirmary; that is, some of the duties which were originally performed by the infirmary directors now devolve upon the superintendent of a county infirmary, and not upon the county commissioners. The act abolishing the office of infirmary director and placing their duties upon the county commissioners and the superintendent of a county infirmary is found in 102 O. L. 433.

We will briefly note the nature of the added duties placed upon the superintendent of a county infirmary, to determine whether they are such as would make the position of superintendent an office, rather than a mere employment, as held by our supreme court in Palmer vs. Zeigler, supra, under the law as it then existed.

In section 962 R. S. provision was made that the infirmary directors should sell all products of the infirmary not necessary for the use of the same, and all moneys arising therefrom should be paid into the county treasury, to be placed to the credit of the proper fund; while in section 2526 G. C. it is provided that this same duty shall be performed by the superintendent of the infirmary.

In section 967 R. S. provision was made that the infirmary directors on the first Monday of March and September of each year should report to the county commissioners all matters pertaining to the county infirmary; while section 2533 G. C. places this same duty upon the superintendent of the infirmary.

Section 967 R. S. also provided that the infirmary directors should give all

statistical information in reference to the inmates of the county infirmary in the report they made on the first Monday in September; while section 2535 G. C. provides that the superintendent of the infirmary shall give this same information to the county commissioners.

In section 969 R. S. provision was made whereby the infirmary directors were given authority to remove any person from the infirmary who had no legal settlement in the state, to the county and state in which he had a legal settlement; while under section 2540 G. C. the superintendent performs this duty.

In section 974 R. S. authority was given to the infirmary directors to admit persons into the infirmary when they were of the opinion that the person complained of was entitled to admission to the infirmary; while under section 2544 G. C. this duty and discretion devolve upon the superintendent of the county infirmary.

Under section 974 R. S. the infirmary directors were compelled to make a report to the state board of charities as to all outside relief which had been furnished by the infirmary directors during any particular year; while under section 2545 G. C. this is done by the superintendent of the infirmary.

The above I think covers the main duties which were placed upon the superintendent of the county infirmary at the time the infirmary directors were abolished. It will be noted that the added duties are mainly the making of reports. It is true there are some additional duties which call for the exercise of considerable judgment and discretion upon the part of the superintendent, in that he has the authority to sell the products of the farm, to remove any person not legally entitled to admission to the infirmary, and to admit persons into the infirmary if in his opinion they are entitled to such admission. However, I do not feel that these additional duties are sufficient in law to transform this position of county superintendent from that of a mere employment to an office.

In Palmer vs. Zeigler, supra, the court, in deciding whether the position of superintendent of a county infirmary is an office or a mere employment, laid stress upon the question as to whether he exercised any of the sovereign functions of the government; that is, whether some portion of the sovereignty of the county, either legislative, executive or judicial, attached to him for the time being, to be exercised by him for the public benefit. The court reached the conclusion that the superintendent did not exercise any of the sovereignty of the state or nation and therefore could not be considered as a public officer. I believe this reasoning and conclusion would still stand, notwithstanding the fact that the duties above set out have been added to the duties which were originally performed by the superintendent.

There is one striking provision which remains the same under the new law as it was under the old. In section 962 R. S. the following language is found:

> "The directors shall appoint a superintendent who shall reside in some apartment of the infirmary or other building contiguous thereto, and shall receive such compensation for his services as they determine. *He shall perform such duties as they may impose upon him, and be governed in all respects by their rules and regulations.*"

Section 2523 G. C. provides as follows:

> "The county commissioners shall appoint a superintendent who shall reside in some apartment of the infirmary or other building contiguous thereto, and shall receive such compensation for his services as they deter-

mine. The superintendent shall perform such duties as the commissioners impose upon him, and be governed in all respects by their rules and regulations. * * *."

From both of these provisions it would seem that the law contemplates that the superintendent of a county infirmary originally was a mere employe of the infirmary directors, while at the present time he is an employe of the county commissioners.

Therefore, in view of all the above, I do not feel that I would be justified in ruling otherwise than I have heretofore held in reference to the superintendent of a county infirmary; nor do I believe that the facts are so different that the position now could be distinguished from what it was at the time the court rendered the decision in Palmer vs. Zeigler, supra.

This conclusion having been reached, your question is readily answered to the effect that a woman is eligible to an appointment to the position of superintendent of a county infirmary, provided the commissioners of the county find her to be otherwise qualified for said position.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1338.

DIRECTOR OF PUBLIC SERVICE—CONTRACTS FOR IMPROVEMENT IN EXCESS OF ESTIMATE OF CITY ENGINEER.

A contract for an improvement to be paid for in part by special assessments may be let by the director of public service under the provisions of the Municipal Code, if the lowest and best bid therefor exceeds the amount of the estimate of the city engineer on file at the time of the passage of the resolution of necessity and approved therein, without impairing the validity of the assessment in whole or in part.

COLUMBUS, OHIO, July 11, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN.—I am in receipt of a letter from the city solicitor of Cincinnati requesting my opinion upon a question which I may phrase as follows:

"May a contract for an improvement to be paid for in part by special assessments be let by the director of public service under the provisions of the Municipal Code, if the lowest and best bid therefor exceeds the amount of the estimate of the city engineer on file at the time of the passage of the resolution of necessity and approved therein?"

It appears that conflicting opinions on this point have been expressed by various city solicitors and assistant city solicitors of the city of Cincinnati, and that in view of the present condition of the market for labor and materials in the construction of street improvements it has been found impossible to proceed in the city of Cincinnati with needed improvements until this question is settled.

I shall discuss the provisions of the Municipal Code. I understand that the city of Cincinnati is operating under a charter, but no reference is made in the

communications which have been addressed to me to any special provisions of this charter, and I assume therefore that the charter adopts the essential provisions of the general law with respect to the procedure for making assessments and that for letting contracts in excess of five hundred dollars in the department of public service or its equivalent.

I quote the following provisions of the Municipal Code which must be considered in answering this question:

Section 3814.—"When it is deemed necessary * * * to make a public improvement to be paid for * * * by special assessments, council shall declare the necessity thereof by resolution, * * *."

Section 3818.—"A notice of the passage of such resolution shall be served * * * upon the owner of each piece of property to be assessed, * * *."

Section 3815.—(107 Ohio Laws, 151)—"Such resolution shall * * * approve the plans, specifications, *estimates* and profiles for the proposed improvement. In such resolution council shall also determine the method of the assessment, the mode of payment, and whether or not bonds shall be issued in anticipation of the collection thereof. * * *."

Section 3816.—"At the time of the passage of such resolution, council shall have on file * * * plans, specifications, *estimates* and profiles of the proposed improvement, * * * which plans, specifications, *estimates* and profiles shall be open to the inspection of all persons interested."

Section 3819.—"The council shall limit all assessments to the special benefits conferred upon the property assessed, * * *."

Section 3820.—"The corporation shall pay such part of the cost and expense of improvements for which special assessments are levied as council deems just, which part shall be not less than one-fiftieth of all such cost and expense, and * * * the cost of intersections."

Section 3823.—"An owner of a lot, * * * abutting upon a proposed improvement, claiming that he will sustain damages by reason of the improvement, within two weeks after the service of the notice * * * shall file a claim in writing with the clerk of the council, setting forth the amount of the damages claimed, * * *. An owner who fails to do so shall be deemed to have waived such damages * * *."

Section 3824.—"At the expiration of the time limited for so filing claims for damages, the council shall determine whether it will proceed with the proposed improvement or not, * * *."

Section 3825.—"If the council decides to proceed with the improvement, an ordinance for the purpose shall be passed. Such ordinance shall set forth specifically the lots and lands to be assessed for the improvement, shall contain a statement of the general nature of the improvement, the character of the materials which may be bid upon therefor, the mode of payment therefor, a reference to the resolution theretofore passed for such improvement with date of its passage, and a statement of the intention of council to proceed therewith in accordance with such resolution and in accordance with the plans, specifications, *estimates* and profiles provided for such improvement."

Section 3833.—"The contract for any such improvement shall be let by the director of public service, in the same manner as other contracts, * * *."

Section 3812.—"* * * . The council of any municipal corpora-

tion may assess upon the abutting * * * lots or lands in the corporation, any part of the entire cost of an expense connected with the improvement of any street, * * * by any of the following methods:

First. By a percentage of the tax value of the property assessed.

Second. In proportion to the benefits which may result from the improvement, or

Third. By the foot front of the property bounding and abutting upon the improvement."

Section 3896.—"The cost of any improvement contemplated in this chapter shall include the purchase money of real estate * * * the costs and expenses of the proceeding, the damages assessed in favor of any owner of adjoining lands * * *, the costs and expenses of the assessment, the expense of the preliminary and other surveys, and of printing, publishing the notices and ordinances required, * * * and serving notices on property owners, the cost of construction, interest on bonds, * * * and any other necessary expediture."

Section 3901.—"If in any such action (for the recovery of a special assessment) it appears that by reason of any technical irregularity or defect, whether in the proceedings of the council, or of any other officer of the corporation, or in the plans or *estimates,* the assessment has not been properly made against any defendant * * * the court may nevertheless * * * render judgment for the amount properly chargeable against such defendant * * *."

Section 3909.—"If an assessment proves insufficient to pay for the improvement and expenses incident thereto, the council may, under the limitation prescribed for such assessment, make an additional pro rata assessment to supply the deficiency. * * *."

Section 3911.—"Proceedings with respect to improvements shall be liberally construed by the councils and courts, to secure a speedy completion of the work, at reasonable cost, and the speedy collection of the assessment after the time has elapsed for its payment, and merely formal objections shall be disregarded, but the proceedings shall be strictly construed in favor of the owner of the property assessed or injured, as to the limitations on assessment of private property, and compensation for damages sustained."

Section 4328.—"The director of public service may make any contract * * * for any work under the supervision of that department * * *. When an expenditure within the department, * * * exceeds five hundred dollars, such expenditure shall first be authorized and directed by ordinance of council. When so authorized and directed, the director of public service shall make a written contract with the lowest and best bidder after advertisement * * *."

Section 4329.—"The bids shall be opened * * * by the director of public service and publicly read by him. Each bid shall contain the full names of every person * * * interested in it, and shall be accompanied by a sufficient bond * * * that if the bid is accepted a contract will be entered into and the performance of it properly secured. If the work bid for embraces both labor and material, they shall be separately stated with the price thereof. The director may reject any and all bids. * * *."

Section 4330.—"The contract shall be between the corporation and the bidder, and the corporation shall pay the contract price in cash. *Where a bonus is offered for completion of contract prior to a specified date, the department may exact a pro rated penalty in like sum for every day of delay beyond a specified date.*"

Section 4331.—"When it becomes necessary in the opinion of the director of public service, in the prosecution of any work or improvement under contract, to make alterations or modifications in such contract, such alterations or modifications shall only be made upon the order of such director, but such order shall be of no effect until the price to be paid for the work and material, * * * under the altered or modified contract, has been agreed upon in writing * * *."

I do not believe that it will be necessary to consider any sections other than those which I have quoted except for the purpose of contract. Thus, there are provisions in the general laws of the state expressly prohibiting the letting of contracts at a greater sum than the estimated cost thereof (See section 6946 General Code, county road improvement; section 2323 G. C., state buildings; section 2358 G. C., county buildings and bridges; section 1207 G. C., state highway improvements.) The quotations which I have made from the Municipal Code, setting forth as they do all the provisions thereof with respect to this matter, show that there is no similar provision governing municipal officers in the letting of contracts now under consideration. I have not quoted section 4403, which requires contracts in the department of public service in excess of five hundred dollars to be approved by the board of control, but may say that it adds nothing to the sections which I have quoted in this particular.

I think it is clear from what has been said that unless there is something in the nature of the estimate required to be made and approved by the council as a part of the initial step looking toward the levying of special assessments which gives rise to some rights on the part of the owners of property to be assessed, there is nothing to prohibit the proper municipal authorities from letting a contract for a street improvement at a price in excess of that fixed in the estimate. In other words, there is no *public* right which could be enforced by general taxpayers or the city solicitor which would be violated by such action on the part of the proper authorities.

Nor am I able to see that there is any private right arising in favor of the owner of property which is to be assessed that would be violated by so letting the contract. True, he has notice that the estimated cost of the construction work of the improvement is to be a certain figure; but in the absence of a statute limiting the actual construction cost to that estimated, I do not see how it could be argued that he would have a right to expect that the actual cost of construction would be so limited. Unless there is something in the very nature of the estimate which makes it, without the express language contained in the other sections to which I have referred, a limitation on the amount of the contract or on the amount thereof which is to enter into the assessment, the property owner's knowledge of the amount of the estimate would carry with it as a necessary implication the correlative knowledge that it was but an estimate—a guess, and that there is nothing in the law which would prevent its being exceeded by the actual cost of the construction work.

Of course, the statutes make it perfectly clear that at the very most the estimate is not a limit on the amount which can be assessed, because in the first place many other items of the cost of the improvement are included in the total cost which is to be assessed; because in the second place the council need not assess the entire cost of the improvement nor even the maximum proportion thereof which by law it is permitted to assess, and there is nothing in the statutes requiring council to decide at the time it passes the resolution of necessity or even at the time it passes the ordinance determining to proceed with the improvement that it will assess any definite proportion of the total cost; and because in the third place it is

perfectly clear that so long as the essential character of the improvement is not changed supplemental contracts may lawfully be entered into, the effect of which may conceivably be to change the total cost of the construction work. Indeed this power to modify the original contract shows that not only may the estimate be exceeded by its exercise, but the plans and specifications themselves may be changed thereby so long as what is substantially a different improvement does not result therefrom.

All these things the owner of property to be assessed who has been served with notice of the passage of the resolution of necessity must be deemed to know in the legal sense. To be sure, it might be argued that he would have a right to expect, for example, that whatever the total cost of the improvement so much of it as is attributable to construction work should not exceed the estimate; that whatever proportion of the total cost and expense may be assumed by the city, so much thereof as is attributable to construction work shall not be based upon an amount greater than that set forth in the estimate; and that if the estimate is exceeded by modifications of the contract it will be exceeded only in this way and not by letting a contract in excess of the estimate. So that after all the question narrows down to the purpose of the estimate from the viewpoint of the owner of property to be assessed, and may be expressed in the formula:

> Has such owner a legal right to insist that he shall not be assessed beyond the amount set forth in the estimate?

Of course, he could not assert that to exceed the estimate in the letting of the contract would make the whole assessment invalid in the teeth of the curative provisions of the statutes which have been quoted.

I can not see that the property owner would have such a right. As previously stated, an estimate is in the absence of a provision expressly making its amount a limitation upon the amount for which a contract may be awarded nothing more than a guess—an approximation. There is no idea of limitation inherent in the word itself.

Conceding, then, that the purpose of having an estimate on file and approving it in the resolution of necessity, coupled with the giving of notice of such action to the property owner who is to be assessed, is to enable the property owner to predicate objections to the improvement upon the amount which it is going to cost as disclosed thereby—a question which is not free from doubt.

> See—Vincent vs. South Bend, (Wash.) 145 Pac. 452; Property Co. vs. Seattle, 69 Wash. 508; State vs. Town, 38 N. J. L., 419.

It does not follow that he would be entitled to infer therefrom anything more than the meaning of the word would necessarily imply. He does have a right to believe that the amount fixed in the estimate has been fixed in good faith, and that it represents an honest effort on the part of the officers of the municipality to advise the owners of property to be assessed of the probable cost of the improvement; but in the state of the statute law applicable to municipal assessments it can not be regarded as an assurance to him that the work will not cost more than that amount.

In one of the opinions of a city solicitor of Cincinnati to which I have referred it is reasoned that the letting of a contract in excess of the original estimate would be a change of the estimate and would be equivalent to letting a contract originally upon different plans and specifications from those approved by council. If this were so, it would follow that a contract could not be let in excess of the

estimate, but that council would have to commence its legislation over again in order to enable the director of public service to let the contract at the figure required, just as it would have to reinitiate the improvement if the contract were to be originally let upon different plans and specifications from those originally approved.

But I can not follow this reasoning. To my mind the assumption that the letting of a contract in excess of the estimate is a change in the estimate begs the whole question. It brings us back again to the question as to what the estimate is for. It is true that in the ordinance determining to proceed, which is the ordinance constituting the authority of the director of public service to enter into the contract involving an expenditure of more than five hundred dollars required by the section governing the activities of that official, the council is required to declare its intention to proceed in accordance with the plans, specifications, estimates and profiles which have been theretofore adopted. Such an ordinance determining to proceed is a command and an authority to the director of public service to let a contract only in accordance with the plans, specifications, estimates and profiles. This is to be conceded; but if he lets a contract to the lowest and best bidder at a figure in excess of the estimate does it therefore follow that he has not proceeded "in accordance with the estimate?" I do not think so. It is to be admitted that some slight inference in this direction is afforded by the fact that whatever effect is to be given to the estimate is carried over, so to speak, and given force as regards the action of the director of public service; but it may be given plenty of force in this regard without having the effect which would have to be ascribed to it if it were to control the amount that he might agree to expend in letting a contract for the work.

Heretofore I have used the word "estimate" in the singular number as if it were an entirety. This I have done because it has not been claimed by any of the learned gentlemen who have expressed opinions thereon that anything other than the gross or total amount of the estimate would be binding upon the director of public service. As a matter of fact, however, the statutes use the word in the plural, from which I assume that the intent of the statute was that the council should have on file and approve not merely an estimate of the total construction cost, but also detailed estimates of the cost of labor and cost of material of various kinds. If anything would be controlling upon the director of public service it would seem to me that each item estimated would be so controlling. However, it will be observed that the director of public service has the right to reject any and all bids, and it is, of course, his duty and that of the board of control to scrutinize bids carefully for the purpose of determining which is the best one as well as which is lowest. The bids are required to be itemized as to labor and material, and the estimates may well be used by the director of public service and the board of control for the purpose of determining whether or not a contractor's bid is free from mistakes and errors of calculation such as might give rise to misunderstandings and difficulties. There are other purposes for which the estimates may be regarded as binding on the director of public service; but in the absence of a statute making the total amount thereof a limit upon the total contract price which he may agree to for the corporation, I can not say that such is its effect.

Being of the opinion, then, that the mere fact that the director of public service is to proceed under authority of council "in accordance with the estimates" does not make the total amount thereof binding upon him in the sense under discussion, I return to the question as to whether the letting of the contract at a price in excess of the estimate would be a change in the estimate. I do not see upon what grounds, other than those previously discussed, such an assumption could be predicated. Council certainly does not change the estimate when it orders the director of public

service to proceed with the improvement in accordance therewith: the director of public service does not change the estimate when he lets a contract in excess of it; if he does anything he violates the estimate, but we have already seen that this is not so because the estimate does not bind him in this respect.

Without prolonging the discussion, I advise that it is my opinion that neither in assessment cases nor in other cases in which the director of public service of a municipal corporation governed by the Municipal Code is proceeding to let public contracts is the estimate of the engineering department of the city a limitation, in gross or otherwise, upon the amount of the contract which he may let. This conclusion is further sustained, in my judgment, by such provisions as that authorizing a supplemental assessment in case the first assessment is not sufficient to pay the total cost of the improvement, which, it seems to me, could hardly be based upon anything except an assumption that the original estimates may not have been adequate.

I have also considered the cases of *Scovill* vs. *City of Cleveland,* 1 O. S. 126, and *Wewell* vs. *City of Cincinnati,* 45 O. S. 407, which, in my judgment, support the conclusion at which I have arrived. *Joyce* vs. *Barron,* 67 O. S. 264, would be authority for the conclusion that the failure to make and file any estimate at all would be fatal to the assessment. This conclusion, of course, is based upon an entirely different principle from that which I have discussed. The case of *Doddsworth* vs. *City of Cincinnati,* 10 C. C. Dec. 179, contains a dictum to the contrary, the actual holding being that no greater effect could be claimed for the making of an assessment for construction work in excess of the estimate than that the assessment is voidable as to the excess—a proposition which I have already advanced in this opinion. On the main issue the remark of the court is clearly a dictum, and I do not regard the decision in this respect as binding.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1339.

COUNTY COMMISSIONERS HAVE NO AUTHORITY TO PAY FOR PRINTING OF PAMPHLETS CONTAINING MATTERS PERTAINING TO OFFICE OF COUNTY TREASURER.

The county commissioners have no authority in law to pay for the printing of a pamphlet giving certain information and making certain recommendations in reference to matters pertaining to the office of county treasurer.

COLUMBUS, OHIO, July 11, 1918.

HON. SAMUEL DOERFLER, *Prosecuting Attorney, Cleveland, Ohio.*

DEAR SIR.—I have a communication as of date July 1, 1918, and signed by G. A. Howells, assistant prosecuting attorney, asking for my opinion in reference to a certain matter therein set out. The communication reads as follows:

> "The treasurer of this county is desirous of publishing a pamphlet which I am enclosing herewith. The question has arisen whether or not this could be considered as supplies or stationery for the office.

Will you kindly look this pamphlet over and give your opinion as soon as possible as to whether or not the expense of the publication could be paid for by the county?"

To this communication is attached a certain printed pamphlet prepared by Hon. John J. Boyle, county treasurer.

The question is as to whether the cost of printing this pamphlet, which was prepared undoubtedly for circulation among the taxpayers of the county of Cuyahoga, might be paid by the county commissioners of Cuyahoga county on the theory that it might be classed as office supplies or stationery.

The pamphlet contains twenty pages of printed matter, and contains quite a bit of information which would be valuable to the taxpayers of Cuyahoga county, and also contains much matter, which shows a commendable zeal in the present county treasurer in the way of looking after the interests of the people of his county. Briefly, it contains articles along the following lines:

Showing the administration and the workings of the office of county treasurer, and setting forth a number of improved methods adopted by the present county treasurer; setting forth the fact that the delinquent tax collector has been abolished, and thus much money saved to the taxpayers of the county; setting forth what is done with the overpaid taxes, due to the fact that taxes upon certain property are frequently paid twice; stating that the real estate tax bills are mailed to the different taxpayers of the county; giving the information that the legislature has so modified the law in reference to delinquent tax sales that the same are now practically abolished; making recommendations that a constitutional amendment should be adopted in order that cities may be given certain relief in the way of having better representation in the legislature of the state; recommending that laws should be passed which would give relief to the cities in the matter of tax limitation; recommending that provision be made whereby a discount could be granted taxpayers in the event that they should see fit to pay the entire year's tax at the time the first installment thereof is due; recommending that different dates should be provided by law for the payment of taxes. The above, in brief, sets out the contents of this pamphlet.

While the same contains valuable information to the voters of the county, yet it can hardly be said that the pamphlet in any way goes to the matter of enabling the county treasurer to perform the duties of his office, and, therefore, it is my opinion that the printing of this pamphlet could not legally be paid by the county commissioners. At best, it seems under the provisions of our statutes as they now stand, there is no direct authority vested in the county commissioners which warrants them in purchasing supplies of any kind for county officers, but it has always been held that they have the implied power to furnish the different county officers with supplies necessary to enable them to perform the duties of their offices. However, I do not believe that this implied power should be extended beyond that which is absolutely necessary to enable the county commissioners to purchase those things which may be directly connected with the administration of the different county offices.

The section upon which the county commissioners rely for the power to purchase supplies is 2419 G. C. This section reads as follows:

"A court house, jail, public comfort station, offices for county officers, and an infirmary, shall be provided by the commissioners when, in their judgment, they, or any of them, are needed. Such buildings and offices shall be of such style, dimensions, and expense, as the commissioners de-

termine. They shall provide all rooms, fire and burglar proof vaults and safes, and other means of security in the office of the county treasury, necessary for the protection of public moneys and property therein."

It will be noted that the matter rests in the judgment of the county commissioners as to whether they will furnish offices for the different county officers or not; that is, they are to furnish them with offices when they are needed, and the matter rests in their sound discretion as to when they are needed.

Under this section courts and attorneys-general of the state have held that county commissioners have the implied power to furnish not only a bare office, but also to furnish the supplies and stationery which may be needed to enable the different officers to perform the duties pertaining to their offices.

In an opinion rendered by me to Hon. David A. Webster, prosecuting attorney, as of date June 2, 1917, I held as follows:

"Section 2419 G. C. is the only section relative to providing offices for county officers and said section makes it discretionary with the commissioners in regard thereto."

In the body of the opinion I used the following language:

"Under various rulings of former attorneys-general it has been determined that the discretion resting with the commissioners would go so far as to permit also the furnishing of the office as well as the providing of the bare office rooms."

But, inasmuch as the pamphlet enclosed does not in any way partake of the nature of supplies for the office, or furnishings or stationery, it is my opinion that the county commissioners would have no warrant in law in paying for the printing of the same.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

1340.

APPROVAL OF BOND ISSUE OF AUGLAIZE RURAL SCHOOL DISTRICT. $20,000.00.

COLUMBUS, OHIO, July 11, 1918.

The Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN.—

In re:—Bonds of Auglaize rural school district, Allen county, Ohio, in the sum of $20,000.00 for the purpose of completing a partially built school house in said district.

I have carefully examined the corrected transcript of the proceedings of the board of education and other officers of said Auglaize rural school district, relating to the above issue of bonds. Said issue is on a vote of the school district for the

purpose above indicated and the proceedings relating to this issue of bonds are in conformity to the provisions of the General Code of Ohio relating to bond issues of this kind.

I am therefore of the opinion that bonds of said school district covering said issue will, when the same are properly executed, in accordance with the resolution authorizing their issue, and when the same are delivered, constitute valid and binding obligations of said school district to be paid in accordance with the terms thereof.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1341.

APPROVAL OF BOND ISSUE OF RUSHVILLE UNION SCHOOL DISTRICT—$46,000.00.

COLUMBUS, OHIO, July 13, 1918.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN.—

In re:—Bonds of Rushville union school district, in the sum of $46,000 for the purpose of purchasing a site for and erecting and furnishing a school building in said school district.

The above issue of bonds is on a vote of the electors of Rushville Union school district for the purpose above noted. I have made a careful examination of the corrected transcript of the proceedings relating to said bond issue, and find the same to be in accordance with the provisions of the General Code of Ohio relating to bond issues of this kind.

I am therefore of the opinion that bonds covering said issue will, when the same are properly executed and delivered, constitute valid and subsisting obligations of the school district, to be paid in accordance with the terms thereof.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1342.

APPROVAL OF BOND ISSUE OF MONTGOMERY COUNTY—$25,000.00.

COLUMBUS, OHIO, July 13, 1918.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN.—

In re:—Bonds of Montgomery county, Ohio, in the sum of $25,000.00 for the purpose of providing funds for the payment of said county's fur-

ther apportioned share of the first cost of the district tuberculosis hospital of said county and of Preble county and the cost of certain betterments and additions thereto.

The above issue of bonds is one by the board of county commissioners of Montgomery county, Ohio, pursuant to the authority of sections 3148, 3149 and 3152 of the General Code for the purpose of meeting the further share of Montgomery county of the expense of constructing a district hospital, which share of such expense has been apportioned to Montgomery county by the joint board of county commissioners of said county and of Preble county, Ohio, organized as such joint board for the purposes of said district hospital in the manner provided by law.

I have carefully examined the transcript of the proceedings of the board of county commissioners of Montgomery county relating to said bond issue, as well as the records of the joint board and of the board of trustees of said hospital in all matters pertaining to the construction of said district hospital, and find said proceedings to be in substantial compliance with the provisions of the General Code of Ohio governing the duties of said respective boards, and further find the proceedings of the board of county commissioners of Montgomery county relating to this bond issue to be likewise in substantial compliance with the provisions of the General Code authorizing the board of county commissioners of a county to issue bonds for this purpose.

I am therefore of the opinion that said bond issue is in all respects a valid issue and that bonds covering said issue will, when the same are properly executed and delivered, constitute valid and subsisting obligations of said county, to be paid in accordance with the terms thereof.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1343.

APPROVAL OF BOND ISSUE OF MONTGOMERY COUNTY — $18,000.00.

COLUMBUS, OHIO, July 13, 1918.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN.—

In re:—Bonds of Montgomery county, Ohio, in the sum of $18,000.00, for the purpose of restoring and repairing a number of small but necessary bridges in said county.

I have carefully examined the transcript of the proceedings of the board of county commissioners of Montgomery county, Ohio, relating to the above bond issue, and find the same to be in accordance with the provisions of the Genreal Code of Ohio relating to bond issues of this kind.

I am therefore of the opinion that bonds properly prepared according to the bond form submitted will, when the same are signed by the proper officers and delivered, constitute valid and subsisting obligations of said county, to be paid in accordance with the terms thereof.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1344.

REGISTRATION FEES FOR DOGS NOT TO BE TAKEN INTO CONSIDERATION IN MAKING ALLOWANCE TO COUNTY AUDITOR FOR CLERK HIRE.

Registration fees paid for the registration of dogs under sections 5652-1 *and* 5652-2 *are to be paid into the dog and kennel fund. These fees are not fees received by the county auditor within the meaning of section* 2977 *G. C. as compensation for his services and cannot be taken into consideration in determining the amount of money to be allowed the county auditor under section* 2980-1 *for clerk hire.*

COLUMBUS, OHIO, July 13, 1918.

HON. JOHN L. CABLE, *Prosecuting Attorney, Lima, Ohio.*

DEAR SIR.—I have your letter of July 1, 1918, as follows:

> "Referring to section 5652, General Code, and following as amended in 107 Ohio Laws 534, kindly advise if the county auditor is entitled to include in his fee fund all money paid in pursuant to this account, that is, can the county commissioners under section 2980, General Code, in determining the amount to be expended for the county auditor for compensation of deputies, assistants, clerks and other employes, include such money so paid in?"

Section 2977 G. C. reads:

> "All the fees, costs, percentages, penalties, allowances and other perquisites collected or received by law as compensation for services by a county auditor, county treasurer, probate judge, sheriff, clerk of courts, or recorder, shall be so received and collected for the sole use of the treasury of the county in which they are elected and shall be held as public moneys belonging to such county and accounted for and paid over as such as hereinafter provided."

Section 2980 G. C. provides:

> "On the twentieth of each November such officer shall prepare and file with the county commissioners a detailed statement of the probable amount necessary to be expended for deputies, assistants, bookkeepers, clerks and other employes, except court constables, of their respective of-

fices, showing in detail the requirements of their offices for the year beginning January 1st next thereafter with the sworn statement of the amount expended by them for such assistants for the preceding year. Not later than five days after the filing of such statement, the county commissioners shall fix the aggregate sum to be expended for such period for the compensation of such deputies, assistants, bookkeepers, clerks or other employes of such officer, except court constables, which sum shall be reasonable and proper and shall enter such finding upon their journal."

Section 2980-1 G. C. provides in part:

"The aggregate sum so fixed by the county commissioners to be expended in any year for the compensation of such deputies, assistants, bookkeepers, clerks or other employes, except court constables, shall not exceed for any county auditor's office, county treasurer's office, probate judge's office, county recorder's office, sheriff's office or office of the clerk of the courts, an aggregate amount to be ascertained by computing thirty per cent. on the first two thousand dollars or fractional part thereof, forty per cent. on the next eight thousand dollars or fractional part thereof and eighty-five per cent. on all over ten thousand dollars, of the fees, costs, percentages, penalties, allowances and other perquisites collected for the use of the county in any such office for official services during the year ending September thirtieth next preceding the time of fixing such aggregate sum; * * *."

Sections 5652-1 and 5652-2 G. C. read:

Section 5652-1.—"Every owner of a kennel of dogs shall in like manner as in section 5652 provided, make application for the registration of such kennel, and pay therewith to the county auditor a registration fee of ten dollars for such kennel. Provided, however, that the owner of such dog kennel shall, in addition to paying such kennel fee, comply with all of the requirements of section 5652 with respect to every dog more than three months of age belonging to such dog kennel not kept constantly confined in such kennel."

Section 5652-2.—"Every person immediately upon becoming the owner, keeper or harbourer of any dog more than three months of age or becoming the owner of a dog kennel, during any year, shall file like applications, with fees, as required by sections 5652 and 5652-1 for registration for the year beginning January first prior to the date of becoming the owner, keeper or harbourer of such dog or owner of such dog kennel."

Section 5652-13 G. C. reads:

Section 5652-13.—"The registration fees provided for in sections 5652-1 and 5652-2 shall constitute a special fund known as the dog and kennel fund which shall be deposited by the county auditor in the county treasury and be disposed of by defraying the cost of furnishing registration applications, certificates and tags, by the payment of animal claims as provided in sections 5840 to 5849 both inclusive of the General Code, as amended herein; and in accordance with the provisions of section 5653 of the General Code as amended herein."

It will be seen from the last four sections quoted that the registration fees received by the county auditor for the registration of dogs are paid into what is known as the dog and kennel fund and is used as provided in section 5652-13, partly for the payment of animal claims and partly as provided in section 5653 G. C. These registration fees are not fees received by the county auditor within the meaning of section 2977 G. C. as compensation for his services, and cannot be taken into consideration in determining the amount of money to be allowed the county auditor under section 2980-1 for clerk hire.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1345.

OFFICES COMPATIBLE—CLERK OF BOARD OF HEALTH AND HEALTH OFFICER.

The positions of clerk of the board of health and health officer are compatible.

COLUMBUS, OHIO, July 13, 1918.

The Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN.—I am in receipt of your request for my opinion as follows:

"Are the positions of clerk of the board of health and health officer compatible?"

I am informed by Mr. Blau, of your department, that the health officer in question was appointed by the local board of health by virtue of the provisions of section 4408 G. C.

So far as I can ascertain, there is no statutory inhibition against one person holding both of these positions at the same time, nor can I see that one position is in any manner a check upon the other. I therefore advise you that the health officer of a city may also hold the position of clerk of the board of health.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1346.

COLLATERAL INHERITANCE TAX—WHEN ADMINISTRATOR MUST PAY PENALTY.

There is no legal reason why an estate all interests in which vest as of the death of the testator or intestate should not be appraised within a reasonable time after such death; it is not necessary to wait until the property is converted into money,

if that is anticipated, before settling the tax; and an administrator who does so and thus postpones the settlement of the tax beyond a year after such death must pay the penalty provided for by the statute.

COLUMBUS, OHIO, July 13, 1918.

HON. D. M. CUPP, *Prosecuting Attorney, Delaware, Ohio.*

DEAR SIR.—I have previously acknowledged receipt of your letter of July 1st, in which you state that "A" died two years ago leaving an estate, both real and personal, subject to the collateral inheritance tax provided for under section 5335 G. C.; that the chattels were disposed of and distributed and the tax paid within one year thereon; that the real estate has just been sold and the fund arising therefrom is ready for distribution and the administrator has tendered the taxes properly computed, except that he refuses to pay eight per cent. interest on such taxes for the time having elapsed one year after A's decease. You further state that claim is made that the administrator could not pay these taxes until the real estate was sold and the amount of taxes therefrom determined, and that this fund, although taxable, is not subject to a penalty in the form of interest, since the administrator was unable to tender the proper amount of taxes within the time fixed by the statute; and you request my opinion as to whether the administrator of "A" is legally bound to pay the penalty provided by section 5335 on these taxes.

In my opinion, the administrator's claim has no foundation in law. The machinery provided in section 5343 G. C. not only should have been, but must now be invoked to determine the value of this property. Its value is not the sum for which the administrator sold it, because, assuming that he got a fair price for it, that price is evidence only of its value at the time it was sold—not of its value at the time of the death of the intestate. The liability for the tax accrues and the amount thereof must be determined as of the date of the death which gives rise to the transfer, except as to interests arising therefrom which do not immediately vest.

I have dealt with this subject in several opinions, among them those found in the Opinions of the Attorney-General for the year 1917, Volume III, pages 2333 and 2365, and in that addressed to the Bureau of Inspection and Supervision of Public Offices under date of February 20, 1918, copy of which I enclose herewith. These opinions furnish the principle which decides the question you submit, though they do not pass upon your precise facts.

The administrator is without excuse for not having the amount of the tax determined and paying it in time to prevent the accrual of the penalty; and there is accordingly no reason which would justify the probate court in remitting the penalty in this case. My advice to you is to resist any such remission and claim the penalty.

I have said that the procedure outlined in sections 5343 et seq., in connection with which I might have mentioned section 5340 of the General Code, must be followed in all cases. I do not wish to lay too great stress on this statement. To save costs the prosecuting attorney and the administrator, with the approval of the court, might agree upon an entry as to the value of the property for purpose of assessing the tax; but if the administrator in anticipation of a sale postpones the valuation and settlement of the tax until the sale takes place to save costs and court procedure, he must do so at the peril of paying the penalty provided for by law, if such postponement carries the settlement of the tax beyond the year, for there is no necessity for any such postponement.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1347.

APPROVAL OF SYNOPSIS OF A PROPOSED LAW RELATIVE TO TAXING LANDS NOW EXEMPT BY STATUTE.

COLUMBUS, OHIO, July 13, 1918.

MR. G. H. LYTLE, 4412 *Euclid Ave., Cleveland, Ohio.*

DEAR SIR:—You have submitted to me, under section 5175-29e G. C., what purports to be a fair and impartial synopsis of a proposed law, which reads as follows

"SYNOPSIS

The law proposed by initiative petition to be submitted to the general assembly of the state of Ohio: 'An act to provide for the taxation of all parcels of land in the state of Ohio now exempt from taxation by statute, houses and appurtenances occupying the same excluded.

Save and except lands owned or leased by the Federal Government. The state government or any political sub-division of the state government. The free non-sectarian public schools, homes for old soldiers, and lands used exclusively as public burying grounds and not for profit. And to provide for the enforcement of such law. And to amend sections 10093, 7915-1, 11723, 5349, 5353, 5354, 5357, 5361, 5362, 5363 and 5364 of the General Code."

The proposed law reads as follows:

"AN ACT

To provide for the taxation of all parcels of land in the state of Ohio, now exempt from taxation by statute, save and except public lands, and lands pertaining to the free non-sectarian public schools, homes for old soldiers, and lands used exclusively for public burying grounds, and not for profit and to amend sections 10093, 7915-1, 11723, 5349, 5353, 5354, 5357, 5361, 5362, 5363 and 5364 of the General Code.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OHIO:

Section 1. That immediately after the passage of this act, county auditors shall place upon the tax duplicate for taxation at their true value in money, all parcels of land in the state of Ohio now exempt from taxation by statute houses and appurtenances occupying the same excluded. Save and except lands owned or leased by the Federal government, the state government or any political sub-division of the state government. The free non-sectarian public schools, homes for old soldiers, and lands used exclusively as public burying grounds, and not for profit.

Section 2. County auditors failing to list such property at its true value, and county treasurers neglecting or refusing to collect the tax upon the same, shall be promptly removed from office upon the evidence of such neglect or refusal being furnished to the state attorney-general, on petition signed by at least fifty electors of the state and the county in question accompanied by two or more affidavits charging such neglect. The attorney-general shall within thirty days investigate such charges and if substantiated, shall at once notify the delinquent official to comply with the law. If at the

end of thirty days from the date of such notification the official is still delinquent the attorney-general shall certify the facts to the governor of the state who shall at once declare the office vacant and appoint a successor."

I have examined said synopsis and said proposed law. I am not passing upon the rhetoric, grammar, spelling or punctuation of either the proposed law or the synopsis.

I hereby certify that said synopsis is a truthful statement of the contents and purpose of said proposed law.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1348.

SECTION 13668-3 AUTHORIZES REIMBURSEMENT TO DEFENDANT AND COUNSEL FOR ACTUAL TRAVELING EXPENSES.

Section 13668-3 authorizes the reimbursement to the defendant for his actual traveling expenses and the traveling expenses of his counsel only.

COLUMBUS, OHIO, July 13, 1918.

HON. CLARE CALDWELL, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR:—On March 15, 1918, you wrote me as follows:

"By virtue of sections 13668 et seq. the defendant, in the case of the State of Ohio v. Allen Edick, took depositions in the state of Florida and Hopewell, Va., of witnesses residing out of this state.

The case was tried in the court of common pleas and the defendant found not guilty. He is a man who has considerable property and was able to employ counsel.

He has now presented a bill for the expenses incurred in the taking of the depositions and demands payment under section 13668-3.

I enclose herewith a copy of the statement and desire to know if the items set forth therein should be paid out of the county treasury under the last named section."

On June 12, 1918, and June 21, 1918, you addressed to me two additional communications from which I gather the following facts:

The expense accounts submitted by Allen Edick cover the expenses incurred in the taking of three depositions, viz., the depositions of Dr. A. R. Parrott, Mrs. Annie Clark, Jacksonville, Fla., and Dr. Robert Evans, of Hopewell, Va.; that depositions of Dr. Parrott, of Jacksonville, Fla., was taken at the request of the defendant and the deposition of Mrs. Annie Clark, of Jacksonville, Fla., taken at the same time, was taken at the request of the state; that the deposition of Dr. Evans, of Hopewell, Va., was taken at the request of the defendant. It seems that the court made an order relative to the Dr. Evans and Annie Clark depositions in relation to the expenses to be incurred, which orders were as follows:

"It is further ordered that the defendant, Allen Edick, and one of his counsel and the prosecuting attorney, may attend the taking of said deposi-

tions and examine the witnesses face to face, and all expenses so incurred in taking said depositions shall be submitted to the court for approval and shall be paid out of the county treasury.

It is further ordered that the defendant, Allen Edick, and one of his counsel, may attend the taking of said depositions in person and examine the witnesses face to face as fully and in the same manner as if in court; and any and all expenses necessarily incurred by the defendant and his said counsel in so attending in taking of said depositions, and the expense of the prosecuting attorney necessarily incurred for said purpose, shall be submitted to the court for approval and shall be paid out of the county treasury as other county expenses."

No such order concerning the expense was made by the court relative to the Dr. Parrott deposition, but a commission to take the deposition was, I take it, properly issued.

Sections 13668 and 13668-1 of the General Code, as amended in 107 O. L. 451. read:

"Section 13668. When an issue of fact is joined upon an indictment, and material witness for the defendant or for the state resides out of the state, or, residing within the state, is sick or infirm, or about to leave the state, or is confined in prison, such defendant or the prosecuting attorney may apply in writing, to the court or the judge thereof in vacation, for a commission to take the deposition of such witness or witnesses. Such commission shall not be granted and said order shall not be made until there is filed with the clerk of said court an affidavit stating in substance the evidence sought to be secured by deposition, and that it is competent, relevant and material that the defendant is not confined, or, if confined in prison, that the deposition is not to be taken outside of the state of Ohio. If it appear to the court, or judge, upon such application supported by said affidavit, that the evidence sought to be secured by deposition is relevant, competent and material, and that the defendant is not confined in prison, or, if confined in prison, that the deposition is not to be taken outside of the state of Ohio, the court or judge shall grant such commission and make an order stating in what manner and for what length of time notice shall be given to the prosecuting attorney or to the defendant before such witness or witnesses shall be examined.

Section 13668-1. When the deposition is to be taken in the state of Ohio, and such commission is granted, and the defendant is confined in prison, the sheriff or deputy shall be ordered by the court or judge to take the defendant to the place of the taking of such deposition and have him before the officer at the taking of such deposition. Such sheriff or deputy shall be reimbursed for actual reasonable traveling expenses, for himself and the defendant, so incurred, the bills for the same, upon approval by the county commissioners, to be paid from the county treasury on the warrant of the county auditor. Such sheriff shall receive as fees therefor one dollar for each day in attendance thereat. Such fees and traveling expenses shall be taxed and collected as other fees and costs in the case."

Sections 13668-2 and 13668-3 G. C., as found in 103 O. L., 443, read:

"Section 13668-2. If counsel has been appointed by the state to defend a defendant under sections 13617 and 13618, General Code, said counsel

shall be authorized to attend upon and represent the defendant at the taking of depositions, and said counsel shall be paid a reasonable fee for his services in such matter, in addition to the fee prescribed in section 13618, General Code, to be fixed by the county commissioners, and he shall also be allowed his actual expenses incurred in going to and from the place of taking the depositions."

"Section 13668-3. In all cases in which depositions are taken by the accused or by the state, to be used by or against the accused, of any witness whose attendance cannot be had at the trial, the court shall by proper order provide and secure to the accused the means and opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court, and any and all expenses necessarily incurred in the securing of said means and opportunity and the expenses of the prosecuting attorney in attending the act shall be paid out of the county treasury as other county expenses, upon the certificate of the court making such order."

I note that you say there is some question in your mind whether section 13668-3 has application to all cases in which depositions are taken, or only those cases referred to in section 13668-2, viz., where the defendant had counsel appointed by the state. After a reading of those sections I cannot bring myself to conclude that such is the case. Section 13668-3 has application, I think, in all cases in which depositions are taken by the state to be used by or against the accused. It now remains for us to determine just what items of the expense account submitted may be paid out of the county treasury by virtue of this section.

Without setting out in full the items submitted for payment by the defendant, Allen Edick, it is sufficient to state the full amount of $539.53, made up of charges as follows:

14 days time	$350.00
Witness fee advanced to witness at Jacksonville, Fla	1.25
Witness fee advanced to witness at Hopewell, Va	1.00
Notary fee paid to notary at Jacksonville	16.80
The balance of $170.48 is made up of actual traveling expenses incurred, such as railroad tickets, pullman tickets, hotel and meals.	

It will be noted that section 13668-3 provides that the court shall, by proper order, provide and secure the accused the means and opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. The words "secure to the accused the means and opportunity to be present in person and with counsel" are rather indefinite, and it is hard to conclude just what sort of an order the legislature had in mind when enacting this section. I do not believe that it is necessary for the court to provide for the payment of the expense in this order, but simply by order to authorize the defendant and his counsel to make the trip. The expense of such trip, after the trip has been authorized by the court, is then made payable out of the county treasury upon the certificate of the court which authorized it. From your letter it is clear that the court made this order with reference to the Dr. Evans and Annie Clark depositions, and while you state that no order similar to the one made in connection with these depositions was made concerning the deposition of Dr. Parrott, yet I take it that the defendant's presence at the taking of the Parrott deposition with his counsel was authorized by the court, the same as in the case of the other two depositions, and if this is true a nunc pro tunc order could now be made by the court concerning the Parrott deposition. To my mind, then, the three depositions are within

the provision of section 13668-3, and whatever payment is authorized by that section may be made. That section provides that the court shall secure to the accused "the means and opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court," and the payment of all expenses necessarily incurred thereby. It seems to me that this section only authorizes the payment of the expense which the defendant and his counsel incurred in making the trip. In other words, the section aims to place the defendant and his counsel in the same position in the taking of the deposition as if the testimony was being given in court. It does not aim to pay the defendant's attorney any counsel fees or to pay witness fees, stenographic fees or notary fees. Some of these fees may be proper items of cost, but if so they are payable by virtue of other provisions of the statute as costs and not out of the county treasury upon the certificate of the court, under section 13668-3.

Applying these conclusions to the expense account submitted, I am of the opinion that the only items which may be paid under section 13668-3 are those covering actual traveling expenses incurred for the defendant and his counsel, which I think total $170.48. It might be noted here that inasmuch as the Dr. Parrott and Annie Clark depositions were taken at the same time on the same trip to Jacksonville, Fla.,the question of whether a proper order was made with reference to the Parrott deposition by the court at the time becomes immaterial.

The charge of $350.00 by defendant's counsel for 14 days of his time should be disallowed and the witness fees and notary fees should I think be paid as costs in the case and not upon the certificate of the court under section 13668-3 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1349.

COUNTY SURVEYOR—HOW VACANCY OCCURS IN SAID OFFICE—ENTITLED TO SALARY UNTIL HE RESIGNS OR OFFICE BECOMES VACANT.

1. *The mere fact that a county surveyor enlists in the army and leaves the county to take training at Ft. Benjamin Harrison, does not ipso facto vacate the office.*

2. *Under the provisions of section 2725 G. C. the county commissioners have authority to fill a vacancy when a vacancy occurs; but they have no authority to declare and create a vacancy in the office of county surveyor.*

3. *County commissioners have no authority to attempt to fill a vacancy in the office of county surveyor unless a vacancy actually occurs either through the death or voluntary resignation of the county surveyor, or unless he is removed under the provisions of section 2790 G. C.*

4. *A county surveyor is entitled to the salary provided by law until he resigns or the office otherwise becomes vacant.*

COLUMBUS, OHIO, July 13, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

DEAR SIR:—I have your communication of June 20, 1918, requesting my opinion upon the following:

"In a certain small county of this state, the county surveyor did not ask the commissioners for any moneys to be set aside for deputies, assistants,

etc., in his office, as he could have done under the provisions of section 2787, as amended, 107 O. L. 70. Quite recently the surveyor entered the officers' training camp at Ft. Benjamin Harrison, Indiana, and after so doing appointed a deputy.

In view of the provisions of section 7181 G. C., as amended 107 O. L. 110, which says that the county surveyor shall give his entire time and attention to the duties of his office, can the surveyor enter the federal service and still receive his salary, or can he appoint a deputy and have the deputy paid for acting in his stead when no request had been made to the commissioners for an appropriation for this purpose? Under the circumstances, can either the surveyor or his deputy be paid out of the county treasury or does a vacancy exist that should be filled?"

The matters set out in your letter naturally divided themselves into two parts: (1) As to the officer and the duties which he has to perform; (2) and the salary pertaining to the office.

You call particular attention to one provision of section 7181 G. C. (107 O. L. 110), which reads as follows:

"The county surveyor shall give his entire time and attention to the duties of his office * * *."

If this provision is construed literally, of course the surveyor could not absent himself from the county for the purpose of taking training at Ft. Benjamin Harrison, but I do not think it should be given a literal construction. This is not the object and purpose of this provision, which will aid us in construing the same.

In the past a custom had prevailed among many of the county surveyors of accepting considerable private employment or employment along the line of ditch work, etc. This was carried on to such an extent that the legislature concluded many county surveyors were neglecting the duties of their office to give their time to those matters for which they received fees.

The object of section 7181, supra, was to give the county surveyors a fair salary for the duties performed by them and at the same time compel them to devote their time and attention to the duties of their office, and not to the acceptance of employment for which they received fees in addition to their regular salary. So I do not believe the county surveyor is placed in any different position than any other county officer. He stands in the same position as does a county auditor or recorder, or other county officer.

The next question to consider is whether the county surveyor vacated his office when he left the county to take training at Ft. Benjamin Harrison. If he vacated the office, he could not, after doing so, appoint a deputy to perform the work of the office so vacated by him.

In connection with the question as to whether the county surveyor vacated the office when he left the state to take training at Ft. Benjamin Harrison, it will be well for us to keep in mind the fact that before he could take such training at Ft. Benjamin Harrison it was necessary for him to be an enlisted member in the United States army. I call particular attention to this fact for the reason that on May 9, 1917, I rendered an opinion to Hon. W. P. Barnum, judge of the court of common pleas of Mahoning county, which is found in Vol. I, Opinions of the Attorney-General for 1917, page 640. In this opinion I was placing a construction upon a provision of our constitution which reads as follows:

"The judges of the courts of common pleas shall, while in office, reside in the county for which they are elected; and their term of office shall be for six years."

In some respects this provision is similar to that of section 7181 G. C., above quoted. In this opinion I held as follows (page 645):

> "It is my opinion that the enlisting in the officers' reserve corps, which will require your being out of the county for ninety days, would not be in violation of either of said constitutional provisions. While you would not be strictly residing in your county during the time you are at Ft. Benjamin Harrison, yet it would be an absence merely for temporary purposes; and, of course, it would not be in violation of the second constitutional provision cited herein, because you would neither be holding office nor drawing a salary."

The opinion rendered in the case of Hon. W. P. Barnum might serve as the basis for this opinion, were it not for the fact that at the time the opinion was rendered to Mr. Barnum the training at Ft. Benjamin Harrison was open to civilians and if they were successful in the test through which they had to pass they received a commission in the United States army. If they were not successful, they were free to return to their usual and ordinary vocations, thus making the stay at Ft. Benjamin Harrison purely a temporary one. However, under present conditions this is not the case, inasmuch as those entering the training at Ft. Benjamin Harrison must be enlisted persons in the army of the United States.

Hence we have this question to consider: Does the fact that the county surveyor has joined the United States army and left the state to take training at Ft Benjamin Harrison, and thus possibly permanently disable himself to perform the duties of his office, amount to a constructive or implied resignation of the office by abandonment, so that it can be held at this time that there is a vacancy in said office?

Section 2785 G. C. reads as follows:

> "If the vacancy occurs in the office of county surveyor because of death, resignation or otherwise, the county commissioners shall appoint a suitable person county surveyor, who upon giving bond and taking the oath of office as required of the county surveyor elect, shall enter upon the discharge of the duties of the office."

Under this section the county commissioners have no power or authority to appoint a person county surveyor excepting where a vacancy occurs either because of death, resignation or otherwise. That is, the provisions of this section are clear to the point that the county commissioners have no authority to create a vacancy. They merely have authority to fill a vacancy, providing one exists. Therefore the vital question is as to whether the office of county surveyor is vacated, which is not an easy matter to determine.

Dillon in his work on municipal corporations in section 420 lays down as an absolute principle of law that an office may be vacated by abandonment. This section reads as follows:

> "An office may be *vacated by abandonment*. A *voluntary enlistment* by a civil officer in *the military service* of the United States for three years, or during the war, vacates the civil office, being a constructive resignation by abandonment. So where *residence within the corporation* is necessary in order to be eligible to hold an office, permanent removal from the municipality may undoubtedly be taken as evincing an intention to resign, and as an implied resignation."

He bases his conclusions mainly upon cases decided by the courts of Indiana, but when we come to examine the decisions in Indiana we find they are based mainly upon

the constitutional provision in that state, which requires that all county officials shall reside, during the term for which they are elected, in their respective counties; for instance, in Relender v. State, 149 Ind. 283, the court say:

> "Where a county commissioner violates the provision of section 6, Article VI of the constitution, requiring county officials actually to reside in the county in which they hold office, by voluntarily ceasing to reside therein during his term of office, it will operate as an abandonment of the office, and *ipso facto* a surrender of all rights and title to the office."

In the opinion on p. 288 the court say:

> "That the title of a public officer may be terminated and his office vacated by abandonment is a rule of the law settled beyond controversy. As the constitution exacts of a county officer the duty to actually reside in the county in which he holds his office, if he violates this provision of the law by voluntarily ceasing to reside therein, during his term, it will operate as an abandonment of the office, and *ipso facto* a surrender of all his right and title to the office."

As authority for this legal proposition the court cites decisions in its own state. It is to be noted that the court used the constitutional provision above referred to as the basis for its conclusion. Hence, I. do not believe that the holdings of the courts in Indiana could be used as authority to the effect that in the case now under consideration the county surveyor has vacated his office, and that the county commissioners of Vinton county have authority in law to fill the vacancy, under the provisions of the section of the General Code above quoted. There are many cases to the contrary on this point.

In Johnson v. Wilson, et al., 2 N. H. 202, the court held:

> "Where once filled, the office, until the term of it expires, can not be deemed vacant except by the death, resignation or removal of the incumbent."

In State v. Sheldon, 10 Neb. 453, the court held:

> "Proceedings to remove a county treasurer from office for wilful neglect of duty must be instituted by a complaint containing the charges against him with the necessary specifications under them and verified by the oath of an elector of the state.
>
> It is not sufficient for the board of county commissioners to declare and resolve that the office of county treasurer is vacant; there must be a judgment of ouster."

In Page, Auditor, v. Hardin, 47 Ky. 648, careful consideration was given by the court, and hence this case is used as authority by many other courts. It had to do with the question as to whether the secretary of state had abandoned his office because of the fact that he failed to reside at the seat of government. On September 1, 1846, the governor of Kentucky made the following entry upon his executive journal: (p. 649)

> "Whereas Benjamin Hardin, by his failure, wilful neglect and refusal to reside at the seat of government, and perform the duties of secretary, has abandoned said office, and said office, in the judgment of the governor, has become vacant for the causes aforesaid, it is, therefore, declared by the governor, and ordered to be entered on the executive journal, that the office of secretary

has become and *is* vacant. Wherefore, to fill said vacancy, the governor this day commissioned George B. Kinkead, Esq. to be secretary till the end of the next general assembly of Kentucky. And George B. Kinkead having qualified to his commission, entered upon the discharge of his duties."

The question arose as to whether the governor of Kentucky had the right in law to declare the office of secretary of state vacant and to fill the same by appointment. On p. 668 we find the following reasoning, in the opinion:

"If, as we have assumed, Hardin, though he failed to reside at Frankfort and perform the duties of his office, performed those duties occasionally in person, and generally by authorized deputy, we are satisfied, that whatever personal deliquency might be involved in his failure, etc., to reside at Frankfort and perform the duties of secretary (if this last be a separate allegation), he cannot be regarded as having abandoned the office. And even if we exclude the assumption as to his performance of the duties occasionally in person, still it is not stated, and cannot be assumed that they were wholly unperformed, or that their performance was not provided for by him. And whatever might have been the effect of a total and continued failure, by which the business remained wholly undone, we are of opinion that the general allegation of failure, etc., to reside at the seat of government, and perform the duties of secretary, does not make out a case of abandonment in the only sense in which it would vacate an office, because it does not establish as an inference of fact or law, a voluntary or actual relinquishment of it.

V. The governor, however, decided that by reason of the alledged failure, etc., Hardin had abandoned the office, and it had become vacant. The response relies upon this decision as conclusive of the question, and it becomes our duty to inquire whether it is conclusive as to the rights of the officer to whom it relates.

The constitution (article 3, section 10), confers upon the governor the express power 'to fill up vacancies that may happen during the recess of the senate, by granting commissions which shall expire at the end of their next session.' But this clause certainly gives no power to make a vacancy by declaration or judgment that one exists, or by granting a commission to fill one assumed to exist. . There must be a vacancy before the power or duty of filling it arises. And although having the power to act in a particular state of case, the governor must decide for the determination of his own action, whether and when the designated state of case exists, still the constitutional power of granting the commission, and therefore, the legal validity of the act, is made to rest upon the fact of an actual vacancy, and not upon his opinion or judgment of the fact. To say that his opinion or judgment of the existence of a vacancy, is to be the sole and conclusive test of the fact, is to make him the sole and conclusive judge of all the acts and causes which may produce a vacancy, is to change a contingent into an absolute power; and must ultimately result in converting the power to fill a vacancy already existing, into the power of creating a vacancy to be filled. Such a power, which would place within the uncontrolled discretion of the governor, not merely the selection of the person to fill an office actually vacant, but the displacing of an officer under the form of filling a vacancy, is not conferred by the clause in question, and is moreover inconsistent with those clauses which fix the tenure of office during good behavior, and which therefore give to the officer the right to hold according to that tenure. If the governor may determine conclusively upon the existence of a vacancy, there is no security

for this right, but by imputing to him an infallibility which belongs to no earthly officer or tribunal—which the constitution imputes to none, and which cannot be regarded as the appointed guaranty of constitutional or legal rights."

Honey v. Graham, 39 Tex. 1, is a case in point The first, second, third, fifth and six branches of the syllabus read as follows:

"1. A proclamation by the governor that the state treasurer elect had absented himself from the limits of the state—not on public business and without leave of absence—leaving no bonded or responsible clerk, but leaving a man acting as such who, when called on to give the bond required by law, was unable to do so; *held*, not sufficient to authorize the courts to infer an abandonment of the office.

2. The right to hold and exercise the functions of an office to which one is elected by the people, is regarded both as property and privilege, and the incumbent can only be deprived of his office in the manner pointed out in the 16th section of the 1st Article of the constitution.

3. Though the governor may assume the existence of a vacancy in such an office, no case can occur wherein he will be authorized to adjudge the office forfeited.

* * * * * * * * * *

5. The power of the governor to create a vacancy in an office exists only where the office is filled by the governor's appointment, without concurrence by the senate or election by the people, and the term of office is undefined by law.

6. The right to an elective office may be lost by nonuser or misuser, though a party continue to assert it, but the determination of the question whether it be lost or not is for the judiciary and not the executive."

On page 12 of the opinion we find the following principle:

"The power of the governor to fill a vacancy, when one exists, is not disputed. The power to create a vacancy is denied by every authority, except where the office is filled by the governor's choice of an incumbent without concurrence of the senate or election by the people, and the term of office is undefined by law. In such case the incumbent holds at the pleasure of the executive, and may be at any time removed from the office."

In State ex rel. Carson v. Harrison, 113 Ind. 434, we find the following principle set forth in the first four branches of the syllabus:

"While it is the right of the governor to determine for his own guidance in each particular case whether a vacancy exists in an office, yet he can not make a valid appointment unless there is a vacancy in fact.

The authority to fill vacancies confers upon the governor no judicial power, and the title of an incumbent can not be affected by the *ex parte* judgment of the executive that the office is vacant.

The final adjudication of such a right is, unless otherwise specially provided by competent authority, a matter of judicial concern, and the prior claimant is entitled to be heard in court.

The word 'vacancy,' as applied to an office, has no technical meaning, but an office is vacant or not according to whether it is occupied by one who has a legal right to hold it and to exercise the powers and perform the duties pertaining thereto."

In the opinion on page 438 we find the following:

"While it is the right of the executive department to determine for its own guidance whether or not a vacancy exists in each particular case, and while every intendment is to be indulged in favor of the action of the executive, it must nevertheless be borne in mind that the power of the governor to make valid appointment does not arise until there is a vacancy in fact. The existing title of an incumbent can not be extinguished or affected by the *ex parte* judgment of the executive that the office is vacant. The authority to fill vacancies confers upon the governor no judicial power.

* * * * * * * * * *

The word 'vacancy,' as applied to an office, has no techical meaning. An office is not vacant so long as it is supplied in the manner provided by the constitution or law with an incumbent who is legally qualified to exercise the powers and perform the duties which pertain to it; and, conversely, it is vacant in the eye of the law whenever it is unoccupied by a legally qualified incumbent, who has a lawful right to continue therein until the happening of some future event. * * *

When an office has been conferred upon one legally eligible, and has been accepted, no vacancy can be said to exist therein until the term of service and right to hold as fixed by the law expires, or until the death, resignation or removal of the person elected or appointed."

In Hedley v. Board of Commissioners, 4 Blackf. 116, the court found as follows in the second branch of the syllabus:

"The board of county commissioners can not create a vacancy in the office of recorder, but when such vacancy has occurred, they may declare its existence, and make an appointment to supply it, in conformity with the statute."

The court reasoned as follows in the opinion on page 118:

"It is said that the board had no authority to declare the office vacant. By the statute, it is expressly made the duty of the board when the office of recorder is vacant, to appoint, etc. The vacancy which it is competent to fill must arise 'by death, resignation, removal, or otherwise.' The order of the board, which is before us, does not create the vacancy in the office of recorder, to which it was unequal, for the vacancy had previously occurred; but it simply states that 'it appearing to the satisfaction of the board that the office of recorder, etc. is vacant in consequence of the removal, etc., the board appoints, etc.' The board by this order does not create a contingency upon which it can act, but declares that the event had occurred upon which its action became necessary. The distinction is palpable between creating a vacancy and declaring that a vacancy had taken place."

I desire to call attention to the fact that the last two cases above quoted from were considered by the supreme court of Indiana upon the authority of which Dillon laid down his principle above quoted.

Throop on Public Officers, section 437, lays down the following propositions:

> "A statute, conferring upon a board power to fill a vacancy, does not empower them to create a vacancy, but they may decide, in the first instance, whether a vacancy has occurred. A constitutional provision, giving the governor power to fill vacancies during the recess of the senate, gives him no power to make a vacancy by a declaration that one exists, and by granting a commission to fill such supposed vacancy, and his decision that the vacancy exists will not conclusively affect the right of others. The appointment by the governor of a person to fill an office, rightfully held by an incumbent, whose term of office has not expired, and who cannot be arbitrarily removed, is void, and the surrender of the office by the incumbent, to the person so appointed, does not validate the appointment, but creates a vacancy."

We are not entirely without authority upon this question in our own state. In State of Ohio ex rel., v. Bryce, 7 Ohio Rep., Part II, p. 82, the court was considering a question which is similar to the one now under consideration. In the syllabus of this case the following principle is laid down:

> "A trustee of the Ohio University can not be regarded as having vacated his place if he has not resigned, unless there is a judicial decision that such vacation has taken place. A legislative appointment of a successor, without such resignation or adjudication, confers no legal right upon the person appointed."

In section 8, of the act creating the Ohio University located at Athens, found in 2 O. L. 193, the following provision was made:

> "That when any member of the corporation shall be removed by death, resignation or otherwise, such vacancy shall be supplied at the next meeting of the legislature of the state."

It is to be noted that this language is similar to that found in section 2785 G. C., above quoted.

In 30 O. L. 326, we find the following resolution:

> "Resolved, by the general assembly of the state of Ohio, that Thomas Bryce of Athens county be, and he is hereby appointed a trustee of the Ohio University, to fill the vacancy occasioned by Jacob Linley having removed out of the state."

The court was called upon to pass upon the validity of this resolution, based upon the following statement of facts: Mr. Linley was appointed a trustee in 1805, he then residing in Athens. He performed his duties until 1828, at which time he removed to the neighborhood of Cincinnati. In 1829 he removed to Virginia. He afterwards removed to Pennsylvania, and resided there on January 11, 1832. Between the time of his removal from Athens in 1828 and January 11, 1832, he was present at but one meeting of the board, which was in 1830, when he transacted business with them without objection.

Upon this state of facts the question was raised whether Mr. Linley had vacated his office, on the theory that he had abandoned it. In the opinion on p. 83 the court say:

> "It is conceded that the legislature have no power of appointment, except in the event of 'a vacancy.' Unless, therefore, the non-residence or non-attendance of Linley renders his office *vacant*, the appointment of Bryce is not good.
>
> It is well settled that neither a neglect to exercise corporate powers, nor even an abuse of them, *ipso facto*, works a forfeiture of the franchise, that the corporation subsists until the forfeiture be ascertained and declared by a competent tribunal, in a judicial proceeding instituted for that purpose against it by government. * * * It is equally well settled that no member of a corporation shall be disfranchised, no officer removed, without the agency of a tribunal competent to investigate the cause and pronounce the sentence of the loss of right. The office is not vacant by neglect or abuse; it requires *an act done*, or the *exercise of power*, to work the forfeiture and determine the title to the office, 2 Black. 156; 4 Kent's Com. 127; for it is the forfeiture of a vested right for the breach of a condition in law. Where the charter prescribes the terms under which the power of a motion is to be exercised, they must be pursued; where the organic law is silent, the corporation itself possesses the inherent power to ascertain and declare the forfeiture either of franchise or office. * * *
>
> This proceeding is essentially adversary in its character. The justice of the common law permits no investigation of facts which may be followed by the loss of a right, or by the infliction of a penalty, to be conducted *ex parte*. It is essential to its validity that the party should be duly summoned. * * *
>
> In the present case, if the relator had forfeited his office by neglecting his duties, it was necessary that the corporation, after reasonable notice to him and an opportunity for hearing, should investigate the facts, and determine his title to the office by sentence, and thus create the vacancy. Until this was done the relator was entitled to his seat, and the contingency had not happened in which the legislature could lawfully appoint a trustee."

In view of all the above, I will note the provisions of another section of the General Code, which reads as follows:

> "Section 2790. Any person may bring a civil action in the court of common pleas against the county surveyor, alleging his incapacity, misconduct in office or neglect of duty. A copy of the petition with the summons shall be served on such surveyor. Such cause shall have precedence over other business, and, if upon trial thereof, the court finds a surveyor guilty of any of the charges, by the judgment of the court he shall be removed from office."

Here is a specific provision made, applying only to the county surveyor. It provides that he may be removed from office for neglect of duty. Inasmuch as sections 2785 and 2790, supra, apply specifically to the county surveyor alone, it is my opinion that the county commissioners would have no authority to attempt to fill a vacancy until a vacancy actually occurred, either through the death or voluntary resignation of a county surveyor, or in case of removal under section 2790 G. C. In other words, they have the authority to appoint if a vacancy occurs, but they have no authority to declare a vacancy.

This leaves the question of salary yet to be considered. So long as the county

surveyor is not removed or does not resign, he is entitled to the salary pertaining to the office. It is a universal proposition, well established, that salary is something which is incident to the office itself and not to the performance of the duties of the office.

In Bryan v. Cattell, 15 Ia. 538, the fifth branch of the syllabus reads:

> "When the statute providing for the compensation of an officer makes no provision for a deduction for absence or neglect of duty, he is entitled to the salary for the time he legally remains in office, without reference to any neglect in the discharge of the duties thereof."

It is clear that the deputy county surveyor is entitled to no compensation from the treasury of the county inasmuch as the county commissioners made no allowance therefor. Under section 2788 G. C. (107 O. L. 70), the county surveyor can not employ deputies and pay them to exceed the amount allowed by the county commissioners. To be sure, if the county surveyor desires to draw his salary and from it compensate the deputy no one could complain.

It might be suggested that under said section 2788 the county surveyor could make application to the court of common pleas for an allowance to take care of deputy hire, but this could not be used to pay the deputy for the services rendered prior to the time the order was secured.

From all the above the following conclusions are reached by me:

1. The mere fact that a county surveyor has enlisted in the army and gone to Ft. Benjamin Harrison to take training, does not *ipso facto* vacate the office by abandonment.

2. The county surveyor, not having vacated his office, was warranted in law in appointing a deputy to perform the duties pertaining to the office, during his absence.

3. So long as the county surveyor remains in office he is entitled to the salary incident to the same.

4. The deputy appointed by the county surveyor, however, is not entitled to draw any compensation from the county treasury, if the county commissioners have made no such allowance and no allowance therefore has been made by the court of common pleas of the county.

5. The county commissioners under the provisions of section 2785 G. C. can not declare a vacancy in the office of county surveyor, but can only fill a vacancy which has already occurred either by death, resignation or removal of the court under section 2790 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1350.

APPROVAL OF BOND ISSUE OF AUGLAIZE COUNTY, $6,000.00.

COLUMBUS, OHIO, July 15, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

> In re:—Bonds of Auglaize county in the sum of $6,000.00 for the purpose of paying the cost and expense of certain repairs and improvements in the county jail of said county.

GENTLEMEN:—I have carefully examined the transcript of the proceedings of

the board of county commissioners of Auglaize county, Ohio, relating to the above issue of bonds, and find said proceedings to be in conformity to the provisions of the General Code of Ohio relating to bond issues of this kind.

I am therefore of the opinion that properly prepared bonds covering said issue will, when the same are properly executed and delivered, constitute valid and subsisting obligations of said county to be paid according to the terms thereof.

No bond form has been submitted to me with and as a part of said transcript and I am therefore holding the transcript until a proper bond form of the bonds to be printed covering said issue has been submitted and approved.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1351.

SHERIFF HAS NO AUTHORITY TO ARREST A DELINQUENT CHILD OUTSIDE OF STATE AND IS NOT ENTITLED TO FEE OR EXPENSES FOR SO DOING.

A warrant of the court is not authority for the sheriff or probation officer to arrest a delinquent child outside the state of Ohio. There is no provision in law for the payment of the expenses of the sheriff or probation officer in pursuing and arresting such child outside the state.

COLUMBUS, OHIO, July 15, 1918.

The Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I have your letter of June 20, 1918, as follows:

> "Under the juvenile court laws, while the judge may issue his writs to the sheriff or the probation officer, may he issue warrant to the sheriff to arrest and bring back a delinquent child from another state, and if so, how is the sheriff to be paid for his services in such a case?"

Section 1660 G. C. provides:

> "The summons, warrants, citations, subpoenas, and other writs of such judge may issue to a probation officer of any such court or to the sheriff of any county, and the provisions of law relating to the subpoenaing of witnesses in criminal cases shall apply in so far as they are applicable."

While the statutes authorize the juvenile court to make such orders as it sees fit relating to the management of delinquent children, I know of no statute which authorizes the court to order the arrest of any delinquent child when such child is out of the state, nor any statute which allows the sheriff or probation officer to go beyond the confines of the state of Ohio in pursuit of a delinquent child.

In an opinion rendered by this department on March 15, 1917, found in Opinions of the Attorney-General for 1917, Vol. 1, page 265, it was said at page 267:

> "There is no authority in law, that I am aware of, for the payment of costs incurred in the pursuit of persons charged with misdemeanors outside of the state of Ohio."

It has frequently been held by this department that sheriffs, chiefs of police and other officers are without authority to pursue criminals out of the state and that the

expense incurred in such pursuit can not be paid except in felony cases when a requisition is had. Delinquency cases are to be viewed in the same light as misdemeanors, and in reply to your inquiry beg to say that it is my opinion that the sheriff is without authority to pursue a delinquent child outside of the state and in case he does so, no allowance can be made him either as fees or expenses in connection with such service.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1352.

ELECTION TO FILL VACANCY IN OFFICE OF REPRESENTATIVE TO CONGRESS IS SPECIAL ELECTION AND SHOULD BE CONDUCTED SEPARATELY FROM REGULAR ELECTION ALTHOUGH HELD AT SAME TIME.

1. *Where a vacancy in the office of representative to congress occurs and the governor issues a writ of election directing that a special election be held to fill such vacancy, and in such writ fixes a date for the primary as provided for in section 4964 G. C.; and where the date so fixed for said primary is the date for holding the regular primary election, the special primary election for nominating candidates to fill the vacancy in the office of representative to congress shall be conducted separately from the regular primary election; that is, there should be a separate ballot, poll books and ballot box for said special election, although conducted by the same election officers.*

2. *In the conduct of a special election on the 5th of November, for the election of a member to congress to fill a vacancy, there should be a separate ballot, poll books and ballot box for said special election, and the election officers at the general election shall conduct said special election.*

COLUMBUS, OHIO, July 15, 1918.

HON. W. D. FULTON, *State Supervisor of Elections, Columbus, Ohio.*

DEAR SIR:—You have requested a ruling of this department on the manner of conducting the election for representative to congress in the fourteenth congressional district of Ohio, for the vacancy now existing in such office and for the special election called by Hon. James M. Cox, Governor.

The governor's writ of election reads as follows:

"TO THE SHERIFFS OF LORAIN, MEDINA, PORTAGE AND SUMMIT COUNTIES.

Whereas a vacancy has occurred in the office of REPRESENTATIVE TO CONGRESS in the fourteenth congressional district of Ohio;

Now, therefore, I, James M. Cox, governor of Ohio, by virtue of the powers vested in me by law, hereby direct that a special election be held to fill such vacancy in such congressional district on Tuesday, the fifth day of November, 1918.

I further direct that on Tuesday, the thirteenth day of August, 1918, a special primary be held in such district for the purpose of nominating candidates for such election.

In Testimony Whereof, I have hereunto subscribed my name and caused the Great Seal of the State of Ohio to be affixed at Columbus, Ohio, this first day of July, in the year of our Lord one thousand nine hundred and eighteen.

(Signed) JAMES M. COX,
Governor."

This writ of election is issued under the provisions of section 4829 G. C., which reads as follows:

> "When a vacancy in the office of representative to congress or senator or representative to the general assembly occurs, the governor, upon satisfactory information thereof, shall issue a writ of election, directing that a special election be held to fill such vacancy in the territory entitled to fill it on a day specified in the writ. Such writ shall be directed to the sheriff or sheriffs within such territory who shall give notice of the time and places of holding such election as in other cases. Such election shall be held and conducted and returns thereof made as in case of a regular election."

The nomination of candidates for members of the house of representatives in the congress of the United States for the regular term is provided for in section 4963 G. C. (107 O. L. 400), but as will be noted in the writ of election, the nomination and election provided for therein is for a vacancy.

Art. I, Sec. 2, clause 4 of the Constitution of the United States provides:

> "When vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies."

So it is evident that such writs of election direct the holding of a special election to fill the unexpired term, and that this election to fill such vacancy under the provisions of section 4829 G. C. must be a special election.

Section 4964 G. C. provides:

> "When a call is issued for a special election, the date of the primary shall be fixed at the same time and in the same manner by the authority calling such special election, which primary shall be held at least two weeks prior to the time fixed for such special election. Declarations of candidacy and certificates for such primary shall be filed and fees shall be paid at least ten days before the date for holding the same and such election shall be called so as to allow at least five days for preparing and filing such nomination papers."

Acting under the provisions of this section, the governor fixed the date of the primary as well as the date of the election. Said section provides that the date of the primary shall be fixed at the same time and in the same manner by the authority calling such special election, and further that the primary shall be held at least two weeks prior to the time fixed for such special election.

There is a further provision in said section that the declaration of candidacy and certificates for such primary shall be filed and fees shall be paid at least ten days before the date for holding the same and that such election shall be called "so as to allow at least five days for preparing and filing such nomination papers." This last provision merely guards against the calling of the primary election at too early a date, having reference to the ten-day period for filing declarations of candidacy, provisions being made that the call be made at such time as to allow at least five days for preparing and filing the nomination papers, so as to give candidates at least a five-day period prior to the ten-day period mentioned in the section for such preparation as might be necessary.

So it is evident that both the primary and the election to be held under the writ of election issued by the governor are special elections. It has so happened that in fixing the dates for the special primary and the special election the governor has fixed

the primary on the regular primary election day and the special election for the regular November election day, but this does not make these elections any less special.

Section 4829 G. C. provides that the special election to fill the vacancy in the office of congressman "shall be held and conducted and returns thereof made as in case of a regular election." Ordinarily, special elections are called for voting on questions or propositions, and section 5020 G. C. provides that "when the approval of a question, other than a constitutional amendment, is to be submitted to a vote, such question shall be printed on a separate ballot and deposited in a separate ballot box, to be presided over by the same judges and clerks of election."

There does not seem to be any special section of the statute making similar provisions when candidates are to be voted for at a special election, but since it is only rarely that such special election would be called for the regular election day, and since such election must be a special election, it necessarily follows that while it is held upon the same days as the primary and the regular election, it is entirely separate and distinct from the primary and the regular election, and, while conducted by the same election officers, must be kept separate and apart. This necessitates a separate ballot, poll books and ballot box for the special election.

Section 5050 G. C., providing for the contract for printing ballots and other supplies, which at regular elections must be advertised, provides that in case of special elections notice may be given by mail instead of publication.

Sections 5103 and 5104 G. C. are special provisions governing the returns of special elections for member of congress, abstracting and canvassing the vote thereon.

In view of the fact that the provisions of law make the primary at which a candidate to fill a congressional vacancy shall be nominated, and the election at which such candidate shall be elected, a special election, and in view of the other provisions of the election laws regarding special elections, it is my opinion:

(1.) That as to the nominations for congress to fill the vacancy, the special primary is to be conducted as if there were no other election being conducted on that day; that is to say there should be a separate ballot, poll books and ballot box for the special primary, although of course conducted by the same election officers.

(2) In the conduct of the special election on the 5th of November, the election to fill the vacancy in the office of congressman should be conducted as if there were no other election on that day; that is, there should be a separate ballot, poll books and ballot box for the special election for congressman, conducted by the same election officers that have charge of the regular election.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1353.

APPROVAL OF LEASES OF CANAL LANDS TO THE MEAD PULP AND PAPER COMPANY, DAYTON; THE B. F. GOODRICH COMPANY, AKRON; A. W. KEPLER, LAKE ST. MARYS; CHARLES H. BOLLEY, HENRY COUNTY; CHARLES MARTIN AND CHARLES SCHNEIDER, NEWCOMERSTOWN, OHIO.

COLUMBUS, OHIO, July 18, 1918.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of July 12, 1918, in which you enclose the following leases (in triplicate) of canal lands, upon which you ask my approval:

	Valuation.
The Mead Pulp and Paper Co., M. & E. Canal lands at Dayton	$13,200 00
The B. F. Goodrich Co., Ohio Canal lands in Akron	3,333 33
A. W. Kepler, cottage site at Lake St. Marys	500 00
Chas. H. Bolley, M. & E. Canal land at Damascus Bridge, Henry County	300 00
Chas. Martin, Ohio Canal land at Newcomerstown, Ohio	200 00
Chas. Schneider, Ohio Canal land at Newcomerstown, Ohio	150 00

I have carefully examined these leases, find them correct in form and legal, and have, therefore, endorsed my approval thereon, and am forwarding the same to the governor of Ohio for his consideration.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General

1354.

APPROVAL OF BOND ISSUE OF CLARK COUNTY, $9,138.92.

COLUMBUS, OHIO, July 18, 1918.

The Industrial Commission of Ohio, Colimbus, Ohio.
GENTLEMEN:—

In re:—Bonds of Clark county, Ohio, in the sum of $9,138. 92, in anticipation of the collection of assessments to pay Clark county's share of the cost and expense of the construction of the Thomas joint county ditch improvement.

I have made a careful examination of the corrected transcript of the proceedings of the board of county commissioners and other officers of Clark county, Ohio, relating to the above issue of bonds, and find said proceedings to be in substantial conformity to the general provisions of law relating to bond issues of this kind. I am, therefore, of the opinion that properly prepared bonds covering said issue will, when the same are properly executed and delivered, constitute valid and binding obligations of said county to be paid in accordance with the terms thereof.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1355.

APPROVAL OF BOND ISSUE OF LANCASTER CITY SCHOOL DISTRICT, $20,000.00.

COLUMBUS, OHIO, July 18, 1918.

The Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

In Re:—Bonds of Lancaster City School District, in the sum of $20,000.00, for the purpose of completing and improving the South Public School Building

in said school district by installing therein a heating and ventilating system, and by making other necessary and desired improvements, changes and repairs therein.

I have carefully examined the corrected transcript of the proceedings of the board of education of Lancaster city school district, relating to the above issue of bonds, and find said proceedings to be in conformity to the provisions of the General Code of Ohio relating to bond issues of this kind.

I am, therefore, of the opinion, that bonds covering the above issue, when the same are prepared according to bond form submitted and the resolution providing for their issue, will, when properly executed and delivered, constitute valid and subsisting obligations of said school district, to be paid in accordance with the terms thereof.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1356.

APPROVAL OF BOND ISSUE OF BROWN COUNTY, $27,800.00.

COLUMBUS, OHIO, July 18, 1918.

The Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

In Re:—Bonds of Brown county, Ohio, in the sum of $27,800.00, for the purpose of paying the respective shares of said county, and of the owners of benefited property assessed of the cost and expenses of improving intercounty highway No. 30, section N.

I have carefully examined the transcript of the proceedings of the board of county commissioners of Brown county, Ohio, and of other officers relating to the above issue of bonds, and find said proceedings to be in conformity to the provisions of the General Code of Ohio relating to bond issues of this kind.

I am, therefore, of the opinion that bonds covering the above issue, when prepared according to bond form submitted and properly signed and delivered, will constitute valid and subsisting obligations of said county, to be paid in accordance with the terms thereof.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1357.

BOND ISSUE—WHEN COUNCIL PASSES A RESOLUTION OF NECESSITY AND ORDINANCE TO PROCEED WITH STREET IMPROVEMENT AND ACCEPTS WAIVER OF PROPERTY OWNERS AGREEING TO ASSESSMENT OF COST OF GRADING ONLY, AND COUNCIL PROCEEDS WITHOUT OTHER ACTION, VALIDITY OF BONDS DOUBTFUL.
DISAPPROVAL OF BOND ISSUE OF WESTERVILLE, $4,540.00.

Where the council of a municipality, having passed a resolution of necessity, and an ordinance determining to proceed with a paving improvement, accepts a waiver signed

by the owners of all the abutting property agreeing to the assessment of the cost of grading only, and proceeds to make that part of the improvement and assess the cost thereof without in any way amending or changing the resolution of necessity and ordinance determining to proceed with the improvement, there is grave doubt as to the validity of the bonds issued in anticipation of the collection of the assessment.

COLUMBUS, OHIO, July 18, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In Re:—Bonds of the village of Westerville, Ohio, in the amount of $4,540.00, in anticipation of special assessments for the purpose of improving Glenwood drive in said village.

I find myself unable to advise you that the proceedings of the council of the village of Westerville in the issuance of the above described bonds are legal.

The transcript shows that proceedings were properly initiated and carried through for the purpose of improving a street by grading, draining, setting curb and paving with vitrified block, and laying sewer and water connections therein, and that the village manager duly advertised for bids for this purpose; that bids were received and all of them rejected; that thereafter there was filed with the council a waiver signed by all the owners of property abutting upon the improvement and to be assessed for the cost thereof, by which they undertook to "waive all the improvements provided for in the legislation * * * except the improvements by grading the same," and each of them undertook to "consent to the improvements by grading only, and to assessing the costs of said grading against the property owners per front foot, less two per cent. (2%), and the cost of the intersections, and further consent and agree that any time in the future that the village of Westerville, through its council deems it necessary to further improve Glenwood drive, by draining, paving, curbing, etc., that the said village shall have the right to do so notwithstanding the special assessments heretofore made by reason of the cost of grading." Thereupon, without any further legislation, council entertained and accepted a bid for the grading work only, and, no assessment ordinance having been previously passed, adopted an ordinance to levy special assessments for the improvement of the street in question by grading only. After the adoption of this ordinance the ordinance for the issuance of the bonds was duly passed.

The waiver may be regarded as the predicate of proper action on the part of the council for proceeding to the completion of the partial improvement therein agreed to; but it seems to me that the projected improvement could not be departed from without at least amending the ordinance determining to proceed with the improvement. Whether or not it is also necessary to amend the resolution of necessity is a different question, inasmuch as this measure is intended for the protection of the owners of the property to be assessed, and their rights are probably foreclosed by the waiver which they have entered into. On the other hand, however, the referendum, by which the public rights are protected, is available under the general statutes which are applicable to the village of Westerville (see 103 O. L. 784, section 1), and is applicable only to the first of the series of measures necessary to make a public improvement, i. e., to the resolution of necessity. The effect of acting in accordance with the "waiver" is, of course, to substitute an entirely different improvement for the one originally contemplated, and on the whole it would seem that the point referred to respecting the referendum would necessitate the repassage of the resolution of necessity as well as the amendment of the ordinance determining to proceed with the improvement.

We have it ,then, that on the public side, so to speak, the council has not so acted

as to make its proceedings immune from attack say by a taxpayer; on the other hand, so far as the private rights of the owners of abutting property are concerned, they would seem to be foreclosed by the waiver which has been entered into.

The question as to the effect of this irregularity upon the validity of the bonds which are issued in anticipation of the assessment is very doubtful. On the one hand, it might be argued that the assessments themselves could not be challenged because the property owners have waived their rights to object; and that the bonds issued in anticipation of them are likewise not open to objection for the same reason. On the other hand, however, assessment bonds are ultimately the general obligation of the municipality, and if any jurisdictional step in the procedure is lacking or defective it would seem that the defect would be reflected in the bonds themselves.

On the whole, while I am not certain as to the exact legal result of the peculiar procedure which has been followed in this case as regards the validity of the bonds, my very uncertainty prevents me from advising you that the same should be purchased.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1358

COLLATERAL INHERITANCE TAX—WHEN TESTATOR DEVISES ALL HIS PROPERTY TO A CORPORATION AND BY AGREEMENT SUCH CORPORATION IS TO ADMINISTER THE PROPERTY UPON CERTAIN TRUSTS, THE QUESTION OF WHETHER OR NOT INHERITANCE TAX APPLIES TO WHOLE ESTATE IS AN OPEN QUESTION.

A testator devised all of his property, both real and personal, to a corporation absolutely; but by agreement with the corporation, executed in writing contemporaneously with the execution of the will, it was stipulated that the corporation should administer the property on certain trusts, which trusts according to the doctrine prevailing in Ohio are enforcible against the corporation so far as they are legal, and in case of illegality a constructive trust arises in favor of the heirs and next of kin. When beneficiaries of the trust thus created are exempt persons or institutions under the inheritance tax law, HELD

That in contemplation of law the beneficial interests thus arising in favor of such exempt persons must have passed at the death of the testator through the non-exempt corporation as a conduit; so that, momentarily at least, the entire beneficial and legal interest in all the property rested under the will in the corporation. Whether the inheritance tax applies to the whole estate or not is an open question in Ohio and should be settled by the courts.

COLUMBUS, OHIO, July 18, 1918.

HON. GEO. C. VON BESELER, *Prosecuting Attorney, Painesville, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of recent date enclosing a copy of the last will and testament of Henry A. Everett executed on November 1, 1916, and copy of a trust agreement between Henry A. Everett and The Cleveland Trust Company of even date therewith. By supplemental letter you advise that The Cleveland Trust Company as executor under the will has offered the same for probate and has filed an application in regard to fixing the collateral inheritance tax in the probate court, to which it has attached a copy of the trust agreement.

The application suggests a finding to the effect that certain annuities created, or attempted to be created, by the trust agreement are subject to the collateral inheritance tax and that the remainder of the estate legally vesting in The Trust Company under the will is either not subject to said tax or exempt therefrom. My opinion on the question thus raised is requested.

The will referred to disposes of the entire estate of the testator to The Cleveland Trust Company, which is appointed executor. There is in the will itself no qualification of the devise and bequest thus made. In so far as the testator was competent at the time of his death to transmit the legal and beneficial interest in the property covered by the will he has done so as far as the will is concerned.

The trust agreement is lengthy, but I find myself under the necessity of abstracting its provisions. It is signed in the presence of two witnesses by Henry A. Everett and by The Cleveland Trust Company, by its president and vice-president. It witnesses that Henry A. Everett has "this day sold, assigned, transferred, conveyed, delivered and set over unto The Cleveland Trust Company, of Cleveland, Ohio, as trustee, the property described in 'Schedule A' which, initialed by me, is hereto attached and made part hereof."

I pause here to state that no copy of "Schedule A" is before me, and I can only assume from the correspondence in my possession and from the face of the remainder of the trust agreement itself that it includes all kinds of property—that is, real estate, tangible personal property, stocks and bonds and choses in action.

The trust agreement goes on to say that the property thus referred to is to be "held, managed and controlled by The Cleveland Trust Company as trustee, upon the trusts and for the uses and purposes hereinafter set forth." The trusts thus attempted to be declared are as follows:

> (1) To dispose of, invest and re-invest all the property, subject to the power reserved to the trustor.
>
> (2) To determine whether accessions shall be treated as principal or income, and to employ agents and attorneys.
>
> (3) To borrow money during the life of the trustor upon his written approval and after his death at any time for the protection, improvement or preservation of the estate, with a lien upon the trust estate for such advances, and with power to mortgage or pledge to secure the same."

The foregoing, with others of similar character, constitute the special powers attempted to be reposed in the trustee by the trust agreement.

Continuing, the agreement proceeds to define the trust as follows:

The trustee is to pay the entire net income derived from the trust estate to the trustor during his life, together with such amounts from the principal as the trustee may deem proper and necessary for the trustor's maintenance, etc.

During the life of the trustor the trustee is to secure his written approval, wherever practicable, to all sales or purchases of securities which it may propose to make.

The trustor is to return for taxation any personal property held by the trustee during his life, and the trustor also reserves the right to exercise the voting privilege upon any stocks standing of record in his name, and the right to the use and enjoyment of all real estate conveyed to the trustee under the trust agreement, assuming the obligation to look after the payment of taxes and the maintenance of insurance thereon.

The trustor reserves the right to revoke the settlement evidenced by the agreement so long as he is competent to act in the matter.

The trustor directs that

> "any and all property received by the Cleveland Trust Company under any will executed by me shall be held, managed, controlled and disposed of by it as trustee under the powers and for all the purposes set forth in this trust, unless the terms of the will otherwise specifically provide. The execution of this instrument by the Cleveland Trust Company shall constitute its agreement to administer all property so received by it in trust for such purposes."

The trust agreement goes on to provide that after the death of the trustor the trustee shall pay out of the trust estate the just and valid debts of the trustor or the trust estate; that the trustee shall allow the trustor's wife, during her life, the use and enjoyment of all household goods and other tangible chattel articles which may be of use or enjoyment in or about any places of residence the trustor may be occupying at the time of his death; upon the death of the wife all such articles then unconsumed are to be divided between the trustor's two daughters.

From the net income derived from the remainder of the trust estate certain annuities are to be paid to eight named persons during their lives.

The trustor then directs that the net income derived from a certain parcel of real estate in the city of Cleveland, or from the proceeds of sale thereof, shall be paid to his wife and daughters, share and share alike, and the survivor of them, during their lives and the life of the survivor; and that upon the death of the last survivor of the three the parcel, or the proceeds of sale and reinvestment if sold, shall become part of the residuary trust estate; that the net income derived from the residue of the trust estate not otherwise disposed of shall be paid to the trustor's wife during her life, and upon her death to the daughters, in equal shares, during their lives, with power in the trustee to allow to the wife or daughters further amounts from the principal if necessary for their maintenance, etc. Upon the death of either of the daughters leaving issue surviving, the daughter's share is to be paid to her issue for the period of twenty-one years after the death of the last survivor of the three. After the death of the last survivor and her issue the net income from the estate is to be annually expended or appropriated, perpetually, until the principal may have been disbursed for the purposes of the Cleveland Foundation, which is designated as a community charitable trust; a certain tract of real estate in Lake county is to be used "in caring for and aiding in the cure of consumptives;" a certain other tract of real estate in the same county is to be used "for the purpose of caring for persons afflicted with cancer." There is a further provision which attempts to create a spendthrift trust with respect to the interests of any of the individual beneficiaries.

Of course, the trust agreement was ineffectual to create a perfect trust as of the date of its execution, unless such acts as would be necessary to vest legal title in the various parts of the property to which it relates were done at the time.

The principle is well established that equity will not aid a volunteer, and that a gift which is imperfectly made will not be perfected in chancery.

Flanders v. Blandy, 45 O. S. 108;
Worthington v. Redkey, 86 O. S. 128.

Clearly as to the lands involved no perfect trust could have been created without conveyances, and such information as I have does not disclose that Henry A. Everett ever conveyed any of his lands by deed to the Cleveland Trust Company. As to the personal property and choses in action more would be required, I think, than the mere trust agreement to amount to such delivery to the trustee as to constitute an effectual gift. It is true that there is a consideration for the trustee's agreement in that the trust is an active one; and that the trustee has an interest in it arising from the compensation which it is to receive (consisting of five per cent. commission), but the expressly reserved power of revocation in the trustor establishes, I think, the fact that the trustor did not part irrevocably with the beneficial interest in any personal property which he had during his life time. See Worthington v. Redkey, supra, which seems to cover this feature of the case completely. In that case Davis, C. J., quoted from Wadd v. Hazelton et al., 137 N. Y., 215, 219, as follows:

> "The acts must be of that character which will admit of no other interpretation than that such legal rights as the settlor retains are held by him

> as trustee for the donee; the settlor must either transfer the property to a trustee or declare that he holds it himself in trust. An intention to give, evidenced by a writing, may be most satisfactorily established, and yet the intended gift may fail because no delivery is proved. And where an intention to give absolutely is evidenced by a writing, which fails because of its non-delivery, the court will not and cannot give effect to an intended absolute gift by construing it to be a declaration of trust and valid, therefore, without delivery."

In that case also there was the reservation of the right to revoke. Davis, C. J. says of that:

> "It reflects a strong light on the question whether he ever did intend to finally and forever abandon all control over the fund during his life."

The question in the present case being as to what, if any, beneficial interest the testator's wife and daughters, and the charitable enterprises which he had in mind acquired by virtue of the trust agreement itself without the will, I am forced to the conclusion that in the absence of a showing of facts to the effect that Henry A. Everett so acted as to put the legal title of all the property mentioned in "schedule A" in the hands of the Cleveland Trust Company prior to his death no such beneficial interest existed.

Of course, if the beneficial interests of these persons and institutions actually did exist prior to the death of the testator, they would have to be predicated upon the existence of legal title in Henry A. Everett, coupled with a declaration of trust on his part, and the trust agreement does not amount to such a declaration of trust or upon legal conveyances or deliveries sufficient to pass legal title to the Cleveland Trust Company as trustee, in which event the will would not operate at all as to the property mentioned in "schedule A," both the legal title and the beneficial interest having passed from Henry A. Everett at the date of his death. In such event the solution of the question as to inheritance taxes would be easy so far as the property mentioned in "schedule A" is concerned, for such property would have to be considered as vesting beneficially in direct heirs or exempted institutions, either by a transaction completely *inter vivos* or "by deed, grant, sale or gift made or intended to take effect in possession or enjoyment after the death of the grantor," and in either view the tax would not be collectible as to this part of the estate.

But for the reasons already stated I find myself obliged to assume, without other evidence than that which is before me, that no valid, complete and effectual trust was created even in the property mentioned in "schedule A" by any act of the testator during his lifetime, the mere execution of the trust agreement not being efficacious to create such a trust. This assumption necessarily leaves both the legal title and the beneficial interest in all the property mentioned in "schedule A" in Henry A. Everett, at least up until the instant of his death.

This legal title and this beneficial interest were then subject to testamentary disposition by Henry A. Everett, so that if he had willed all of the property to any other person or corporation than the Cleveland Trust Company such devisee and legatee would have taken an absolute and unqualified interest therein.

But the testator saw fit to allow the will which he had made contemporaneously with the execution of the trust agreement to stand until his death, and the question now arises as to the operation and effect of the will and the trust agreement considered together. It is clear that they do not constitute a single testamentary act, for so to hold would work a violation of the statute of wills. However, it has likewise become ultimately settled by authority that a devisee or legatee taking by will under circum-

stances like these will not be permitted in equity to enjoy the beneficial interest in the property passing to him by the will.

Winder v. Scholey, 83 O. S., 204.

It is believed that the case just cited fully determines for Ohio the question now immediately under consideration. I, therefore, quote copiously from the syllabus and the opinion of the court therein.

The following are quotations from the syllabus:

"1. Where a testator is induced to make an apparently absolute legacy, by a promise, express or implied, on the part of the legatee that he will transfer the legacy to another, although no express trust is created, and although the legatee at the time of the promise intended no fraud, a court of equity may interfere to prevent a wrong, and declare the legatee a trustee *ex maleficio* for the protection of the testator's intended beneficiary.

2. A trust in an absolute legacy may be established by parol evidence, and the contemporaneous declarations of the testator, and subsequent declarations of the legatee, that the bequest was made for the benefit of a third person upon the promise of the legatee to hold it in trust, are admissible for that purpose."

The following is quoted from the opinion per Summers, C. J. (page 215):

"Counsel for defendant say that there is no reported case in Ohio, in which a trust has been engrafted on a will by parol, and contend that a beneficiary under a will can be declared a trustee *ex maleficio* only when the testator was influenced by the legatee's actual intentional fraud.

Pomeroy on equity, section 1054, is cited as follows: 'There are a few cases which seem to hold that a trust will arise under these circumstances from a mere verbal promise of the devisee or legatee to hold the property for the benefit of another person. This position is clearly opposed to settled principle. The only ground upon which such a trust can be rested, and is rested by the overwhelming weight of authority, is actual intentional fraud.'

In a note to this section, in the second edition of that work, it is said, 'A majority of the recent decisions do not insist on an actual fraudulent intention on the part of the legatee or devisee as necessary to the creation of a trust of this nature.'

It is conceded that in cases of actual intentional fraud equity will raise a trust, notwithstanding the statute of frauds or the statute of wills. In equity what difference can there be whether the fraudulent intention existed at the time the testator acted or not until it was time for the devisee to act? In either case the testator acted upon the faith that the devisee would keep his promise; the result of his refusal or failure to do so is the same in either case and equally fraudulent. * * *

The rule is founded on the principle that the legacy would not have been given * * * unless the promise had been made, and, hence, the person promising is bound in equity to keep it, as to violate it would be fraud. * * * The trust does not act directly upon the will by modifying the gift, for the law requires wills to be wholly in writing, but it acts upon the gift itself as it reaches the possession of the legatee, or as soon as he is entitled to receive it. The theory is that the will has full effect by passing an absolute legacy to the legatee, and that then equity, in order to defeat fraud, raises a trust in favor of those intended to be benefited by the testator and com-

pels the legatee, as a trustee *ex maleficio*, to turn over the gift to them. The law, not the will, fastens the trust upon the fund by requiring the legatee to act in accordance with the instructions of the testator and his own promise. Neither the statute of frauds nor the statute of wills applies, because the will takes effect as written and proved, but to promote justice and prevent wrong the courts compel the legatee to dispose of his gift in accordance with equity and good conscience. * * *

It is next contended that the action was barred by the six years' statute of limitations. The six years' statute bars an action upon a contract not in writing, either express or implied. This is not an action upon a contract. *It is an action for relief on the ground of fraud.* Such actions are barred within four years, but it is expressly provided that the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud, * * *."

The only difference between the facts involved in *Winder v. Scholey*, supra, and those now under consideration, lies in the fact that the agreement in the case cited was that the legatee would turn over the legacy to a lodge, while in the present case the promise is that the Trust Company will administer an active trust. In other words, if both had been express trusts in the full sense of the word, one of them would have been a mere dry trust and the other an active trust. This difference in facts raises the question as to whether a difference in principle is here involved. It might be argued that an active trust of this kind could not be engrafted upon a will in the way in which the dry trust involved in *Winder* v. *Scholey*, supra, was raised and enforced; on the other hand, it might be argued that the designation of the dry trust as one arising *ex maleficio* could not be made where the agreement was of such character as to give rise to an active trust.

The point is doubtful, but I am of the opinion that though the case is somewhat anomalous the principles of *Winder* v. *Scholey* apply to the facts now under consideration in their entirety. That is to say, we have here not an express but a constructive trust bottomed upon the rule against unjust enrichment, and the case is not altered by the fact that the constructive trust involves the performance of active duties. The Cleveland Trust Company gets the full legal and beneficial interest so far as the will is concerned, but it will not be permitted to enjoy the beneficial interest. That this is the case is apparent from the discussion in Perry on trusts, sixth edition, section 181, note (a), page 289. In his text as originally prepared the learned author of this work had used the following language:

"There must be some actual fraud in procuring a deed or devise to one's self; the mere breach of a promise to convey is not enough."

In the sixth edition, however, Mr. Howes, the editor thereof, used the following language embodied in the note above cited:

"Recent decisions show a conflict of authority upon this point. In many cases it has been held that it is necessary to show a fraudulent intention at the time the promise was made. * * * (Citing cases from Alabama, Georgia, Indiana, Iowa, Kansas, Minnesota, New Jersey and Pennsylvania).

The weight of authority, however, is to the effect that it is unnecessary to show any actual fraudulent intent at the time the promise is made,or at the time the title vests in the alleged trustee, if the promise was the main inducement of the transfer to him * * *. Some of the decisions are based upon the theory that fraud at the time of making the promise will be inferred from failure to perform it subsequently. (Citing cases.) But most of the

cases go to the extent of holding that the fraud lies in failure to carry out the parol agreement made under such circumstances, even if the agreement was made with an honest intention of performing it." (Citing numerous cases. This is the class in which Winder v. Scholey, supra, belongs.)

It has been suggested that in view of the prevailing American doctrine respecting the enforcement of the statutes of Frauds and of Wills, a parol trust like the one under consideration should be held void, with the result of raising a constructive trust for the heirs of the settlor as when testamentary trusts fail for other reasons, and that "the decision of the courts (in cases like Winder v. Scholey) may be viewed as a specific enforcement of the agreement, with the statutory objection overcome by the strong equitable consideration that, as the testator is dead, in no other way could his wish to do something for C (the beneficiary) ever be carried out." (20 Harvard Law Review, 403.)

A searching analysis of this suggestion shows that the transaction amounts to a constructive trust (the right to specific performance) to hold upon an express trust; that is to say, the agreement the specific performance of which is enforced is an agreement to administer as upon trusts. There is no direct express trust, but there is a trust agreement, a contract to declare and administer an express trust. The working out of the rule thus really involves two steps, though the result is the same as if an express trust had been created in the first place.

Putting it in another way: The Cleveland Trust Company in the case under consideration was not made the trustee of an express trust by any act of Henry A. Everett, but by agreement with Henry A. Everett it promised to hold such property as Henry A. Everett should give to it absolutely upon certain trusts. This was in contemplation of law an agreement to declare and administer a trust and enforcible against the Cleveland Trust Company in the teeth of the statute of wills in order to prevent fraud. The maxim that equity will not aid a volunteer by completing an imperfect gift does not operate because the trust agreement is a perfect declaration in trust on the part of the Cleveland Trust Company and operates upon the beneficial interest passing to the Cleveland Trust Company under the will as soon as that interest is received.

To discern in the process by which the result is reached the two distinct steps which have been pointed out avoids much of the difficulty that courts and commentators have encountered in dealing with the subject.

Thus in a note to the case of *McDowell* v. *McDowell*, 141 Iowa, 286, reported in 31 L. R. A. n. s. 177, the editor, distinguishing cases like *Winder* v. *Scholey* from cases in which a decedent is dissuaded from making a will prior to his death on the promise that his heirs at law will carry out his wishes, says:

"In the one (the latter) case the fraud lies at the root of the transaction, and the trust springing from the fraud by which the title was obtained is purely constructive, while in the other case the trust is based upon the promise itself, rather than upon its breach, and so is express rather than constructive."

But later on in a note to *Winder* v. *Scholey*, wherein a trust of the second class was held to be constructive, he says: (33 L. R. A. n. s. 996.)

"Since in the class of cases herein under discussion the element of personal fraud is wanting, its very existence being often expressly negatived by the continued willingness of the promisor to carry out decedent's wishes into execution, the only fraud which can justify the interposition of equity is the so-called 'constructive fraud' upon the decedent, which *would* be occasioned by a failure to execute his wishes. The question stated is therefore merely a

concrete aspect of the general question whether constructive fraud, as well as actual and intentional fraud, is sufficient to raise a trust *ex maleficio*. * *

From what may be termed the technical point of view, the doctrine that a trust *ex maleficio* may be erected upon the anticipated breach of a parol promise to devote property received from the promisee to certain purposes is open to the serious objection that, by the simple expedient of giving it another name, it gives effect to a trust created by parol, and thus evades the express provision of * * * the statute of wills with respect to the formalities necessary to a valid testamentary disposition, unduly extending the judge-made exception which obtains where property has been acquired by *actual fraud*. * * *

On the other hand, looking at the matter from a practical viewpoint, with the idea of doing justice to the parties, * * * and bearing in mind that the essential purpose of the statutes of frauds and wills is to interpose a safeguard against fictitious claims by requiring a satisfactory form of proof, the objections which stand in the way of the enforcement of a parol undertaking to hold property for the benefit of a third person, though unaccompanied by actual fraud, seem to be satisfactorily overcome by the court's insistence on clear and convincing proof of such undertaking. * * *

It would seem, therefore, as though the courts which are willing to accept this doctrine might as well abandon the pretense that they are enforcing a trust *ex maleficio*, and instead announce that the statute of frauds will not in all cases preclude the enforcement of a parol trust, * * *. Such a course would do away with the difficulty of observing the tenuous boundary between the rule that the mere breach of a promise to hold property in trust is, in the absence of fraud in procuring the transfer, insufficient to raise a trust *ex maleficio*, and the doctrine that the constructive fraud upon the promisee in event of nonperformance of a promise in reliance upon which property is transferred will warrant a court of equity in constructing such a trust."

It is submitted that this argument is unsound, and that the designation of such trusts as the one involved in the case under consideration as primarily constructive is no mere pretense gotten up to evade the statute of wills, but an accurate description of the real situation.

But however this may be, *Winder* v. *Scholey* certainly treats such trusts as constructive in the first instance, and it would seem that in the absence of further adjudications in Ohio this question is, for this state at least, foreclosed.

For the purposes of the question at hand the debate as to whether the trust which is to be enforced against the Cleveland Trust Company is constructive or express may be ignored and the trust may be classifed on another principle. That is to say, we may think of trusts, whether express, resulting or constructive, as classified with respect to the identity of the person whose acts give rise to them. In this view all trusts fall into two classes:

First: Those in which the trust arises because of the act or promise of the person who will be held as trustee; and

Second: Those in which the trust arises because of the directions of one other than the person upon whom the transaction ultimately casts the obligations of a trustee.

All constructive trusts belong in the first class. Most express trusts fall in the second class, but where there is a valid and complete declaration of trust, though the trust is express, it falls in the first class. In the early paragraphs of this opinion I have described Henry A. Everett as the trustor. On more careful analysis it has developed that he was not the creator of this trust. He did not create a trust by signing the trust agreement, for reasons which have been pointed out. He did not create a trust by leaving his will, because the will gave both the equitable and the

legal title to the Cleveland Trust Company. The Cleveland Trust Company is, nevertheless, to be held as trustee. For what reason? Obviously because of its promise to carry out Everett's directions. These directions and this promise concerned themselves with the disposition of the equitable use in the property, the legal title of which is, without dispute, in the Cleveland Trust Company. It must necessarily follow that before these directions and this promise could have anything upon which to operate the equitable use must have vested in contemplation of law in the Cleveland Trust Company. This point is capable of demonstration to a mathematical certainty. I have already mentioned the consequences of a subsequent revocation of the will of Henry A. Everett, and the execution of a codicil or another will by him vesting legal title in some person other than the Cleveland Trust Company. Suppose, however, that instead of vesting legal title in another the testator had executed a codicil or another will revoking the former will and vesting legal title in the Cleveland Trust Company upon trusts other than those declared in the trust agreement, and had then died. There can be no question but that under such circumstances the trust agreement would have yielded to the subsequent will, and the Cleveland Trust Company, though vested by such subsequent will with just as full legal title as it has under the will which Everett actually left, would have been subject to the trust obligations declared by the second will and would have been relieved of the obligations set forth in the trust agreement. Why would this be so? Obviously because the trust agreement would have had nothing on which to operate.

Suppose, also, that between the date of the execution of the trust agreement and the death of Henry A. Everett, leaving the will which he did leave, the Cleveland Trust Company had dissolved as a corporation and had passed out of existence. There would then have been an intestacy as to the legal title. Would, then, the heirs at law and next of kin have held the legal title to the property passing to them by the statutes of descent and distribution as trustees for the uses mentioned in the trust agreement? I think not. If the trust had been of the second class, above referred to, it would have been enforced against such heirs and next of kin on the principle that equity will not let a trust fail because of the lack of a trustee, but the trust is one which can be enforced only against the Cleveland Trust Company by virtue of its agreement to deal with what it might receive under the will.

In short, the Cleveland Trust Company's promise is the foundation of the enforcibility of the trust in question. All the cases say so and they are, in my opinion, right. So that it makes no difference whether we call the trust a constructive one or an express one, as the act or the declaration, whichever it be that creates it, is that of the Cleveland Trust Company, the person held as trustee, and not that of Henry A. Everett, the third person, nor that of the beneficiaries.

Now in order that a trust of the first class, in which the one under consideration falls, may arise it is absolutely necessary that the actor or the declarant shall at the time he commits his act or makes his declaration, or at such subsequent time as he may acquire the legal title, have the beneficial interest. His agreement relates to that beneficial interest, and it can have nothing on which to operate unless such interest is in him. The Cleveland Trust Company's promise is to deal with the use in certain ways. Before that promise can have any legal effect the Cleveland Trust Company must have that use in itself.

It would have been very different if Everett had made a will declaring these trusts. In that event he would have disposed by his testamentary act of the legal estates and the beneficial uses to different people, and the disponees of the beneficial uses could have enforced them not only against the Cleveland Trust Company as holder of the legal title, but also against the heirs at law and next of kin of Henry A. Everett, should the Cleveland Trust Company because of dissolution or otherwise have failed to take the legal title. In that event the beneficial uses would have been directly disposed of by Henry A. Everett and the court would have been enforcing his dis-

position; as it is, the beneficial uses are declared by the promise of the Cleveland Trust Company.

The situation then is that the Cleveland Trust Company was at least the necessary conduit of the equitable interest in the property of the late Henry A. Everett. That is to say, this beneficial interest could not vest in the intended beneficiaries of the decedent without passing through the Cleveland Trust Company. It did not pass directly from Henry A. Everett to these beneficiaries, as it would have done if he had created the trust by will.

In this state of affairs what is the application of the inheritance tax law? The statute which is to be applied provides as follows:

> "Section 5331. All property * * *, and any interests therein, * * * which pass by will or by the intestate laws of this state, * * * to a person in trust, or otherwise, other than to or for the use of the father, mother, husband, wife, lineal descendant or adopted child, shall be liable to a tax * * *."
>
> (It will not be necessary to quote the provisions of succeeding sections which make exemptions in favor of certain public and charitable institutions.)

If the foregoing analysis is correct the property in question passed by will to the Cleveland Trust Company, and so far as that vesting was concerned it did not pass for the use of any one excepting the Cleveland Trust Company. However, the use of this property immediately vested in exempt persons (with the exception of the beneficiaries of the annuities), so that for no appreciable period of time did the Cleveland Trust Company hold both the legal title and beneficial interest to the property in question.

A technical view will justify the imposition of the inheritance tax upon the entire property. Such a view was taken by the court of appeals of New York in *In re Edson*, 159 N. Y. 568, affirming 38 N. Y. App. Dec., 19, 56 N. Y. Supp. 409. In that case the testator, moved by what was apparently the same motive as actuated Henry A. Everett, disposed of a certain property to a friend upon a secret trust to convey or make over the same to a charitable institution in attempted avoidance of the mortmain statutes of New York, prohibiting testamentary gifts to such institutions save under certain circumstances. The court held that the secret trust was void; that the testamentary donee would not be permitted to retain the beneficial interest which passed to him by the will, but that a constructive trust arose in favor of the heirs or next of kin of the decedent who were direct relatives and whose interest therefore, if arising under the will, would not be subject to the collateral inheritance tax. The court held that so far as the will was concerned the entire beneficial interest passed to the devisee and legatee, and that the whole estate so passing was subject to the collateral inheritance tax.

A contrary result was reached by the supreme court of Illinois in the case of *People* v. *Schaefer*, 266 Ill. 334. An attempt was made in that case to distinguish the New York case, but the grounds of distinction relied upon are not wholly satisfactory. To my mind the two cases can not be reconciled, although in the Illinois case the secret or parol trust was, like that in favor of the wife and daughters, and the issue of the latter, in the case under consideration, not illegal, so that the trust which arose existed in favor of the beneficiaries actually intended by the testator.

I quote the following from the opinion in *People* v. *Schaefer:*

> "Only the beneficial interest passing from the decedent to the heir or legatee, and vesting at the time of the death, is taxable. (Citing cases.) A beneficial interest, when considered as a designation of the character of an estate, is such an interest as a devisee takes solely for his own use or benefit,

and not as a mere holder of the title for the use of another. (Citing cases.) The property here in question * * * was impressed with a trust * * * at the time of the death of the testator and at the exact moment of time the property passed to the respective donees, and therefore, in both instances, the respective donees only received the legal title, the beneficial interest passing at once to other persons, as provided for in the memorandum. It is true that all property, whether real or personal, must pass at the moment of the death of the owner, but the laws under which it passes and vests include all laws of the state which govern not only as to the vesting of the legal but the beneficial title as well, and include all rules of law in force in this state. (Citing cases.)

* * * It has repeatedly been held that the legislative intention under this law was that a person should be taxed only upon the beneficial interest that he received; that it was not a tax upon the estate, but upon the right to receive the beneficial interest of a portion of the estate. * * * To hold * * * that the interest left under the will * * * should pay an inheritance tax, would be to hold that the person receiving the legal title, only, to property should be required to pay the inheritance tax on the title so received, notwithstanding he received no beneficial interest therein. This is contrary not only to the letter but to the spirit of the statute and all of our former decisions construing it. * * *"

It will be observed that this reasoning ignores the fact that the beneficial interests necessarily must vest, though but for a moment of time, in the promisor in order that his promise to deal with them may be enforcible against him. The decision looks to the result of the process, but shuts its eyes to the steps by which it is worked out.

The answer to the question which you submit depends, as I see it, upon which line of reasoning the courts of this state will ultimately adopt. Much is to be said in favor of the Illinois rule, which ignores technicalities and gives effect to the substance of things. On the other hand, something is to be said in favor of the New York rule, inasmuch as to the extent that the testator's wishes were legal he could have expressed them in such a way as to avoid the imposition of the inheritance tax had he so desired; but having chosen an irregular method of disposing of his property the beneficiaries of his bounty ought not to complain because of the imposition of the inheritance tax when the courts go as far as they do to sustain their interest in the teeth of the statute of wills.

As I see it, the New York rule is technically correct. Brief as is the instant of time in which the beneficial interest must have vested in the Cleveland Trust Company in order to give operation and effect to the promise of that company to deal with it, the right of the state to inheritance taxes attaches; for the thing taxed, as the supreme court of Illinois correctly holds, the holding being equally applicable to the Ohio statute, is the right to receive the property which vests by the will. In the case at hand this right was exercised both as to the legal title and as to the beneficial interest by the Cleveland Trust Company, though by its own promise it immediately divested itself of the latter. In contemplation of law the case should be treated in its technical aspect just as if the Cleveland Trust Company had made a trust agreement amounting to a declaration of trust a day or a week after it had received the full, legal and beneficial interest to the property involved. What the donee under a will may choose to do with the interests which vest in him under a will is no concern of the state in the administration of the inheritance tax law, though he may have committed such acts or made such promises or declarations as to deprive himself of the beneficial interest before the tax is assessed or collected. Everything dates back to the instant of the testator's death, and I can not see that in the technical view it makes any difference

that the donee's act or declaration by which he disposed of the interest vesting in him under the will may have taken place before the death of the testator and by agreement with the testator; though done or made before, it could not take effect until after the death of the testator and not without the momentary vesting of the beneficial interest in the testamentary donee.

But satisfied as I am with the technical correctness of my conclusion, I find myself unable to advise you positively in the matter. The case is actually for decision in a court having jurisdiction to decide the question. My advice to you is that, as prosecuting attorney, you present to the probate court the arguments which I have tried to outline with a view to sustaining the claim of the state for inheritance taxes, at the same time acquainting the court with the Illinois decision which I have cited. I would not presume to go further than this in the present posture of the case. The question is an open one in Ohio, and I would strongly urge that if the amount involved is considerable, as seems likely, you determine to present the affirmative view as I have outlined it, not only to the probate court, but also, if necessary, to the appellate court, to the end than an authoritative decision may ultimately be obtained.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1359.

PROSECUTING ATTORNEY MAY BE REIMBURSED FOR EXPENDITURES FOR OIL AND GASOLINE USED IN OPERATION OF HIS OWN MACHINE UPON OFFICIAL BUSINESS.

The prosecuting attorney may be reimbursed for expenditures for gasoline and oil paid by him in connection with the operation of his own automobile upon official business. However, no allowance can be made him under such section for wear and tear on his machine

COLUMBUS, OHIO, July 19, 1918.

HON. F. J. BISHOP, *Prosecuting Attorney, Jefferson, Ohio.*

DEAR SIR:—I have your request of June 20, 1918, as follows:

> "I would be glad of your opinion on the following proposition: Section 3004 provides that there shall be allowed annually to a prosecuting attorney an amount equal to one-half of his salary to provide for expenses that may be incurred by him in the performance of his official duties and in the furtherance of justice not otherwise provided for.
>
> This county, as you will remember, from point of territory is the largest county in the state, and the railroad accommodations east and west across the county are very poor, and in making trips to those parts of the county which cannot be reached by railroad, I have been in the habit of using my own automobile and have made no charge in my expense account for its use. I have never charged for an automobile except when I have hired one from a livery, but this seems like an excessive expense and I would rather use my own if I would have a right to charge my expense account with the actual cost of operation when going on official business or making investigation of some criminal action. The cost of operation would only include oil and gasoline and wear and tear on tires.
>
> Now the question which I desire answered is this, Would it be proper for me to charge a reasonable amount per mile as expenses to include gasoline and

oil and wear on tires if I use my own automobile in going on official business? Of course I would undoubtedly have the right to hire a machine at a livery, but as I said before that is more expensive to the county, and I would rather use my own machine if I could charge the actual expenses of operation."

Section 3004 G. C. reads in part:

"There shall be allowed annually to the prosecuting attorney, in addition to his salary, and to the allowance provided by section 2914, an amount equal to one-half the official salary, to provide for expenses which may be incurred by him in the performance of his official duties and in the furtherance of justice, not otherwise provided for. * * *"

In an opinion rendered by this department April 13, 1917, found in Opinions of the Attorney-General for 1917, Vol. I, page 478, it was said:

"I know of no express provision of law allowing the prosecuting attorney railroad fare, automobile hire and such expenses incurred in the discharge of his duties, and I am of the opinion that inasmuch as they are 'incurred by him in the performance of his official duties, and in the furtherance of justice,' and are 'not otherwise provided for,' they may be paid by the prosecuting attorney under section 3004 G. C."

From this statement it will be seen that this department has already held that automobile hire is a proper expense to be allowed under section 3004 G. C. when incurred by the prosecuting attorney in the discharge of his official duties. The only question then remaining is whether or not the prosecutor may be allowed his expenses in operating his own car in the discharge of his official duties.

In an opinion rendered by my predecessor, Hon. Edward C. Turner, found in Opinions of the Attorney-General for 1915, Vol. 1, page 295, it was held:

"Under section 2997 G. C., county commissioners shall make an allowance to the sheriff for actual and necessary expenses incurred by him in paying for repairs on his automobile and in keeping it in good condition, only when said machine is used by him in the discharge of his official duties."

In another opinion rendered by Mr. Turner, found in Opinions of the Attorney-General for 1915, Vol. 2, page 1276, it was held:

"County commissioners may allow a sheriff a reasonable amount to cover the expense of maintaining and operating an automobile owned by him and used in the discharge of his official duties, having due regard to the extent of the use of the machine in public and private business."

These opinions were based upon the theory that it is often more economical to pay such expense than to pay the cost of livery hire.

I find myself in harmony with these opinions, and, applying the same to the question you present, I advise you that it is my opinion that the expense of gasoline and oil used by you in operating your machine on official business may be paid from the fund provided for by section 3004 G. C.

As to the wear and tear, I can see no way in which a proper estimate of the county's liability could be determined, and for that reason am not convinced that any allowance could be made to you for such purpose from this fund.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1360.

APPROVAL OF ARTICLES OF INCORPORATION OF THE BUCKEYE UNION MUTUAL INSURANCE COMPANY.

COLUMBUS, OHIO, July 23, 1918.

HON. WM. D. FULTON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have carefully examined the articles of incorporation of the Buckeye Union Mutual Insurance Company and find said articles to be in compliance with the provisions of sections 9607-2 et seq. of the General Code, as amended in 107 O. L., 647, and not inconsistent with the constitution and laws of this state, or of the United States, and said articles are herewith approved.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1361.

TAXES—OVERPAYMENTS UNDER MISTAKE OF FACT MUST BE RETAINED BY COUNTY TREASURER—LIABILITY OF TREASURER—TREASURER MAY NOT EMPLOY ASSISTANT TO INVESTIGATE OVERPAYMENT AND PAY HIM FROM INTEREST ON SUCH FUND—WHERE SUCH PAYMENT HAS ONCE BEEN MADE TREASURER MAY NOT COLLECT OTHER TAXES FOR THAT YEAR ON SAME ENTRY, ALTHOUGH PERSON TENDERING SUCH PAYMENT IS THE ONE WHO OUGHT TO PAY THEM.

The county treasurer when collecting taxes on the general duplicate is not the agent of the county, but of the state. Overpayments under mistake of fact are not, therefore, to be credited to any county fund subject to allowance by the county commissioners as claims against the county, but must be retained by the treasurer in his official capacity and turned over by him to his successor, the treasurer who made the collection being subject to suit for money had and received and entitled to reimbursement out of the surplus undivided taxes for that year in the event that he is required to make restitution.

The county treasurer is without authority to employ an assistant, deputy or clerk to investigate overpayments and ascertain to whom restitution is due, paying him out of the proceeds of the depositary interest on such surplus moneys.

Under most, if not all, circumstances any payment of taxes on an entry of real estate on the general duplicate where the real estate is properly entered thereon is valid and binding as between the payer and the county treasurer, although the former may not have been under any legal duty to pay the taxes. Where such a payment has been made the treasurer has no right to collect any other taxes for that year on the same entry, his warrant being discharged, even though the person offering to pay the taxes a second time is the one who ought to pay them; therefore the treasurer may not accept the second tender and refund the first payment when he knows that the taxes have once been paid. In all cases where the treasurer has reason to believe that the taxes have once been paid, though he can not conveniently ascertain the fact at the time, he should receive the second offer to pay as a tender only and not make a collection unless it appears that the taxes thereon have not actually been paid.

COLUMBUS, OHIO, July 23, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—At the request of Hon. John J. Boyle, treasurer of Cuyahoga county, I have reconsidered my opinion to you under date of April 15, 1918, No. 1145.

In that opinion I reviewed an opinion rendered by Hon. E. C. Turner, attorney-general (found in Opinions of the Attorney-General for the year 1916, volume I, page 517), in which Mr. Turner had held that excessive tax collections produced by a duplicate payment of taxes under a mistake of facts constitutes "public money" within the meaning of section 286 of the General Code, but that such payments may not be "used by the county for public purposes, or * * * credited to any fund of the county to be used for public purposes;" but that "the money so received * * * becomes, is and must continue to be until exhausted a trust fund for the benefit of those who created it by mistake and who are entitled to be repaid from it upon proof of such mistake and their consequent right to such repayment." Conceding that "there are no statutory provisions applicable to this situation," Mr. Turner advised that

> "this money be held by the county treasurer until his semi-annual settlement with the county auditor. In the meantime each treasurer should make every possible effort to return all duplicate payments to those who are entitled to the same. At the time of making the semi-annual settlement whatever amount of such payments remains in the hands of the treasurer should be reported by him to the auditor and turned into the county treasury to be credited to a special trust fund, and thereafter all claims against such fund should be paid upon the allowance of the county commissioners; said allowance to be made upon the written request of the treasurer and upon proof that the party making the claim is rightfully entitled thereto."

Without expressing adherence to all the foregoing conclusions, I advised in my previous opinion to which I have referred that the county treasurer's duty to care for such moneys was one imposed upon him in his official capacity and to be discharged by his regular official force; so that the interest on the surplus fund might not be used to employ a clerk to perform the clerical work incidental to the handling of the fund.

Strong objections to this ruling having been lodged by the officials of Cuyahoga county, who have designed a course of dealing with funds of the character mentioned which has been working to their complete satisfaction, and to that of the interested taxpayers, I have felt that it would be appropriate for me to consider the questions involved in a somewhat more fundamental way than they have heretofore been considered by this department.

Of course, it is elementary that money paid under a mutual mistake of fact, without negligence on either side, and in the absence of a change of position on the part of either party predicated upon the payment, is recoverable. In a great majority of cases the question as to whether or not the equitable principles upon which such recovery is allowed are such as to stamp it as founded upon a constructive trust will not arise; for the law has so long since developed a perfectly adequate remedy for the enforcement of the right of restitution in the shape of what is known as the "implied assumpsit" that recourse to distinctly equitable remedies has been unnecessary. In fact the whole theory of the law of quasi contracts in this particular is borrowed from the principles of equity. Inasmuch as the right of the plaintiff to recover is not traced to the invasion of any primary rights of his by the defendant, but rather results from a duty on the part of the defendant to make restitution of whatever he can not, in equity and justice, conscientiously retain, the measure of recovery in all such cases is the amount of the defendants' unjust enrichment rather than the damage to the plaintiff; so that when this form of recovery is permitted as an alternative remedy for an action sounding in tort the choice of remedy may very substantially affect the measure of damage.

It is easy to imagine instances, however, in which, legal remedies being barred or inefficacious, the issue as to the nature of the defendant's duty which arises from his unjust enrichment would be squarely raised. One such case, of course, is that of

bankruptcy. If the payer of money under a mistake of fact is to be regarded merely as a general creditor of the bankrupt payee, then one result will ensue; whereas, if upon the making of the payment by mistake the situation which arose amounted to a trust, the ownership found in the bankrupt payee would be legal merely and the payer would be entitled to a full recovery in preference to other creditors out of the assets in course of administration in a court essentially one of chancery.

This question was answered in the case of *In re Berry*, 16 Am. Bankruptcy Rep., 564, by holding that a constructive trust arises upon payment of money under mistake, so that the bankruptcy of the payee will not discharge his obligation to make restitution to the payer.

On the authority of this case, which is the only one I have been able to find upon the exact point, I am constrained to agree with one of the premises adopted by Mr. Turner when he held that essentially a fund produced by duplicate payment of taxes under what must be assumed to be a mutual mistake of fact is a trust fund.

But I do not find it so easy to follow Mr. Turner in the next step taken by him. I do not think that it necessarily results from the point just established that a fund is thereby created by operation of law in the county treasury, to be administered without the warrant of statute in the way in which he suggests. While it is true that no statute deals specifically with surpluses produced by duplicate payment of taxes, as such, there are statutes which seem to me to cover every possible case which may conceivably arise and furnish legal remedies available to the taxpayer, and which, because of their complete adequacy so far as he is concerned, render unnecessary and therefore preclude the adoption of any such extra-statutory procedure as that to which Mr. Turner refers.

A brief statement of the framework of the county government and the statutes relating to the collection of taxes will be necessary at this point.

In the first place, the county, as such, is not a body corporate. It can not sue or be sued in its own name, but only through its proper officers. It is true that the county commissioners in many respects may represent the county in its proprietary capacity, but the quasi corporate capacity of this board is limited to certain specified matters.

Thus under section 2408 of the General Code the commissioners may sue and be sued in matters involving the maintenance of public roads, bridges, ditches, etc., but as to claims against the county sounding in contract and not fixed by law the procedure outlined in sections 2460 et seq. governs; and such claims must be presented to the county commissioners for allowance subject to an appeal to the common pleas court, as therein provided. There are other statutes of similar import which I do not find it necessary to quote, because the question which now arises is as to the interest, if any, of the *county*, as such, in moneys collected as taxes on the general duplicate. Both previous opinions of this department have apparently assumed that a surplus created by duplicate payment of taxes belongs legally to the county, though equitably to the payers; so that it should be treated as public money of the county, but as a trust fund to be administered through the ordinary machinery for the presentation of claims against the county. In other words, assuming a trust fund, the previous opinions seem to regard the county as the trustee.

With a view to testing the validity of this assumption I have examined a large number of statutes, viz.: Sections 2633, 2638, 2639, 2640, 2642, 2645, 2568, 2595, 2596, 2598, 2602, 269, 2683, 2688, 2689, 5671, 5697, 5699, 5700, 12075 and 2571 of the General Code, together with the cases of *Wasteney* v. *Schott*, 58 O. S. 410, and Woolley v. Staley, 39 O. S. 354, and have arrived at the following conclusions:

(1) The county treasurer, as collector of taxes charged on the general duplicate, is not the agent of the county in its proprietary capacity, and his legal title to the funds he collects under color of this authority is not acquired by him as a representative of the county, as such. Though he is a county officer in the same sense that all officers

having to do with the machinery of levying and collecting taxes are county officers (State ex rel. v. Groom, 91 O. S. 1), it does not necessarily follow that he is the agent of the county, as such, when acting in this capacity.

(2) On the contrary, the function of collecting taxes is a state function. Before they are collected the right to collect them is a chose in action which the state owns (Wastency v. Schott, supra), and after they are collected they belong to the state until distribution at the semi-annual settlement.

(3) By virtue of the joint operation of some of the sections above referred to, and section 286, General Code, referred to in Mr. Turner's opinion, it is clear that all money collected under color of authority of the county treasurer as tax collector belongs to him in his official capacity as agent of the state, and not personally, so that he is obliged to account for it in his account current with the county auditor and to pay it over to his successor in office.

(4) There is, therefore, no authority in law for crediting balances remaining after settlement and arising from duplicate payment of taxes to any fund set up in the county treasury, as such, and making claims for recovery of money so paid by mistake subject to the procedure for the allowance of claims against the county. Such a claim is not a claim against the county in any sense; it is a claim against the treasurer in the capacity above described. The treasurer is subject to suit for the recovery of such taxes under section 12077 of the General Code, even though he has settled with his successor; but he is entitled to reimbursement on account of any judgment rendered, together with costs and expenses, under favor of section 5700 of the General Code, such reimbursement to come from the undistributed and undistributable amount constituting a constructive trust fund, which as a matter of bookkeeping must remain in the undivided taxes. That is to say, the operation of section 5700 under such circumstances is such that the person who collected the sum paid by mistake as county treasurer and has been obliged to make restitution may be reimbursed out of the undivided and undistributed surplus general taxes, and no further distribution or allotment of the sum so withdrawn for the purpose of reimbursement is to be made under said section.

(5) Such surplus moneys, standing nominally to the credit of the undivided taxes, but in reality constituting a constructive trust, should be placed in the county depositary as are all other undivided tax moneys, and the interest thereon should go to the undivided taxes themselves, but not be distributed; in other words, the interest belongs to the constructive trust. As to whether the payers are entitled to participate in the interest I am in doubt, as the ordinary measure of recovery for money paid by mistake is the amount paid with interest at the legal rate from the time of demand for restitution and its refusal. Such interest may well be used, however, to pay costs accruing in the action, if any, brought under sections 12075 et seq. of the General Code.

(6) As a necessary corollary to what has been said I should have stated earlier that the county treasury is not entitled as residuary legatee, so to speak, to all moneys collected as taxes and not otherwise distributable. It is entitled to the proceeds of the levies it has made, and to nothing else, from the undivided taxes.

(7) There is no authority in law for any activity on the part of the county treasurer in seeking out the makers of erroneous payments, and he can not lawfully spend any public moneys whatsoever on this account; moneys collected by him in his official capacity being public moneys, even though as a result of their payment under mistake of fact the public may be a constructive trustee of them, he may not lawfully devote any part of the principal or interest of such moneys to the expense of investigating such duplicate payments. The burden of showing that such payments have been made and of claiming restitution rests in law upon the persons making such payments. Where, however, the treasurer has discovered and knows the identity of the person who has made such payment he may, of course, incur such expense as

may be involved in advising the person of the fact and making proper restitution. In all cases of doubt, however, the question as to whom the payment is due should be settled by the common pleas court in an appropriate action.

(8) For all these reasons I reaffirm the general conclusion arrived at in my previous opinion, to the effect that the county treasurer may not lawfully employ a person to investigate duplicate payments of taxes and pay him out of the interest arising from the deposit of the fund produced by such duplicate payments. I feel constrained, however, to modify Mr. Turner's opinion by advising that the fund so produced does not belong to the county, as such, and that the county commissioners have nothing whatever to do with it; but, on the contrary, it belongs nominally in the undivided tax fund and in substance to the county treasurer, the custodian of that fund, as the agent of the state, and in his official capacity.

I do not feel that I ought to let this opportunity pass to emphasize what Mr. Turner said in his opinion, to the effect that there is no reason why any such duplicate payments should occur.

The treasurer of Cuyahoga county advises that more than one hundred thousand dollars in four years have been collected in this way. The treasurer also advises that a former incumbent of the same office, who originated the practice which has been followed, devised a scheme along the following lines:

> "In all cases where there was demand made for a tax bill, the original of which had been taken away, I issued to the person demanding a second bill, a bill in duplicate, at the same time taking the name and address of the person to whom such second bill was issued.
>
> This was followed up later by forwarding notice to both parties, * * *.
>
> In addition, the names of all those and the amount of overpayment was made known through the daily newspapers, and lists containing the names and amounts were posted on the bulletin board in the court house, where they remained for many months."

This scheme is in its essential respects an excellent one and up to a certain point is quite in harmony with the law. I take it that all the duplicate payments in question arise in reference to taxes charged on real estate. I deem it pertinent to suggest here that such taxes are assessed *in rem*, and that it is immaterial who pays them. When they are once paid the tax lien is discharged and there is no obligation on the part of any one to pay the taxes. If a third person, who has no interest whatsoever in the real estate in question, and never had any, should voluntarily pay the taxes charged against it, that would be a perfectly legal payment so far as the county treasurer is concerned; it is neither his duty nor his right to see to it that the proper person pays the taxes charged on real estate. (37 Cyc. 1152, and cases cited.)

It is true that sections 5682 and 5683 of the General Code provide as follows:

> "Section. 5682. Each person owning lands, may authorize or consen to the payment by another of the taxes levied upon such lands. A person so paying such taxes shall first obtain from the owner or owners of such lands a certificate of authority to pay them, signed in the presence of two witnesses, and acknowledged before an officer authorized to administer oaths. Such certificate shall contain an accurate description of the property as shown by the tax duplicate, the amount of the taxes levied thereon, the year for which they were levied, the name of the person authorized to pay them, and the date of the payment thereof."
>
> "Section 5683. The person so paying such taxes, within ten days from the date of the payment thereof, shall file such certificate in the office of the county recorder for record. When the certificate has been filed the amount thereof

with interest at eight per cent per annum from the date of the payment of such tax, shall become a lien upon such real estate in preference to all liens thereafter attaching to the property and in preference to all pre-existing liens the holders of which have executed and acknowledged such certificate of authority. The money so paid, with the interest thereon, may be recovered by action for money paid to his use against the person legally liable for the payment of the tax. Such action may be brought by the person so paying the tax, at any time after the expiration of one year from the date of the payment thereof. The certificate, so filed with the recorder, shall be recorded and cancelled, in like manner as mortgages on real estate, in a book to be separately kept and indexed by him for that purpose, and the recorder shall receive such fees as are prescribed by law for recording real estate mortgages."

The force of these sections is, however, in my opinion, exhausted in the creation of the lien of which section 5683 speaks, and in the statutory right of action for money paid for the use of another. Without these statutes a mere volunteer could acquire, of course, not even a right of action for reimbursement, but that would not prevent his paying the taxes at his own peril. In my opinion, the statutes found in the chapter of which the above sections are a part are intended to and do govern the rights of taxpayers *inter se;* they have nothing whatever to do with the duties of the county treasurer as tax collector.

From these considerations it follows that when taxes on real estate have once been paid the charge on the duplicate has become discharged, and any one subsequently paying taxes assessed on account of such real estate, whether as between him and the first payer he should have paid the taxes in the first instance or not, is under no obligation to pay the same a second time. If he does pay them, he it is *in all cases* who is entitled to restitution from the county, if any one is. If he knows that the taxes have been paid once, and insists upon paying them a second time because of his belief that it is his duty to do so, he can not obtain restitution because he has made a voluntary payment not under a mistake of fact but under a mistake of law, viz: that it was his duty to pay the taxes a second time. Under such circumstances he is entitled to no refunder at all, and the money which he pays to the county treasurer does not constitute a part of any trust fund.

These things being true, it seems to me that when, in the language of the county treasurer's letter, "a demand is made for a tax bill, the original of which has been taken away," and when the treasurer "issues to the person demanding a second bill, a bill in duplicate, at the same time taking the name and address of the person to whom such a second bill was issued," he should give his personal receipt to such second person for money *tendered as taxes,* and not assume to collect it as taxes at all. If upon investigation it appears that the absence of the tax bill is due to the fact that the taxes on the real property in question have actually been paid once, he should immediately refund the tender to the person who made it. So far as the rights of the two taxpayers are concerned that is a matter to be worked out between them, and it is a waste of the time of the county treasurer's office and a perversion of the duties of his office for him, or any other officer engaged in the collection of taxes, to attempt to decide such questions. The money so received by way of tender should not be credited to the undivided tax funds, nor included in the daily statement of the county treasurer to the county auditor. In fact it should not be "collected" at all.

In point of fact, if at the time the treasurer receives a demand for a duplicate bill he is able to see from the entries on the duplicate that the taxes have been paid, he should *refuse* the second tender, as he would then know that he is being asked to collect moneys for the collection of which he holds no warrant. I assume that he would be able to do this in all cases, but for the enormous pressure of work that is thrown upon the treasurer's office in a populous county during the last days of the

collection, when it is impossible to keep the duplicate up with the payments. The fact that the original bill is gone, however, is a suspicious circumstance which should place the treasurer upon his inquiry at the outset, and it has been so regarded by the officials of Cuyahoga county. The error into which they have fallen is in assuming that they had a right to receive the collection and that restitution was due, not necessarily to the person making the second payment, but to the person who ought to hav paid the taxes on the entry in the first place. This, as I have shown, is not so. In all cases the person making the second payment is entitled to the recovery unless he knew when he made it that the first payment had been made; in which event no one is entitled to any recovery from the public.

I should have stated, of course, that if the first payer was in point of fact under no duty to pay the taxes, and yet there was a charge on the duplicate against the lands on which the taxes were paid, he could not claim recovery upon the theory that he had made the payment under a mistake of fact, at least in very few cases could he do so. His mistake would almost always be one purely of law. There would be a legal charge on the duplicate against the lands as such, not against any person in particular. If, then, some person, believing himself liable to pay the taxes on account of such charge, should pay them, I can not see how the principles of payment under a mistake of facts could apply; his payment would be perfectly good as between him and the county treasurer, and his remedy, if any, would be against the person who ought to have paid the taxes.

Again, suppose that the mistake consisted of a failure on the part of the payer to remember the fact that he had previously conveyed away the property on which he pays taxes. Here there would be some doubt as to whether a recovery would be permitted.

The general principle as stated in 30 Cyc., page 1318, is as follows:

> "Money paid under a *bona fide* forgetfulness of facts *which disentitled the party to receive it* is paid under a mistake of fact and may be recovered. To authorize a recovery the mistake must be as to a material fact, but need not be mutual. It is immaterial that the mistake of fact was accompanied by a mistake of ignorance of law."

Here the *bona fide* forgetfulness would exist, but the fact forgotten is not one which disentitled the treasurer to receive the payment, but rather one which destroys the obligation of the particular payer to make it. The treasurer is entitled to receive payment from some one, and it is immaterial who pays him. There is no mistake as to the existence of the charge on the duplicate, which is the essential fact.

On the contrary, it is stated in 37 Cyc. 1153, previously referred to, that

> "Payment of taxes by a mere stranger who knows he has no title to the land can not create any liability on the part of the owner, * * * although it is otherwise where the payment is made under an honest, but mistaken, belief as to the state of the title, provided the mistake does not arise from the party's own carelessness or ignorance of the law."

So that a payment under the circumstances mentioned would seem to give a right rather against the person who should have paid the taxes than against the public. The doctrine of Woolley v. Staley, supra, is limited to cases in which there is no charge on the duplicate whatsoever on which liability could be predicated.

Sec. 2. Cooley on Taxation, 3d Ed. p. 1495 et seq.

I incline, therefore, to the belief that cases of this type should be treated in the

manner already indicated, and that the first payment should be regarded as final so that the second payment should be refused if it is possible to ascertain the facts in time.

I can not too strongly urge upon the bureau, and through it upon the county treasurers, the impropriety of allowing any such duplicate payments to be made. There is absolutely no necessity for it, and it is easily avoided by simply refusing to accept as payment moneys tendered as taxes upon real estate entries when the first bill has been withdrawn until it is discovered that no actual payment has been made.

Of course, even where all precautions are taken it is conceivable that some duplicate payments may occur, and that they have occured to a very large extent because of the erroneous practice which has prevailed in some of the counties is manifest. Therefore, I have felt it necessary to go at length into the matters discussed in the body of this opinion. For the future, however, such problems ought to be reduced to a minimum in quantity and will be if the simple and lawful practice of refusing to accept payment on real estate entries more than once is rigidly adhered to.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

P. S. Since preparing the above opinion I have seen a copy of the bureau's instructions to county auditors and county treasurers provided in Circular No. 64, under date of November 16, 1912. I note two features of this circular which invoke comment in connection with what I have held in the foregoing opinion:

(1) It is suggested in the circular that

> "if the undivided general tax fund shows a surplus at any August settlement, it be transferred to a separate fund to be styled 'Surplus Fund 1912,' or some other suitable name, and the undivided general balances at each August settlement."

This suggestion is an excellent one and in nowise inconsistent with what I have held in saying that, as a matter of law, the surplus is a constructive trust unless accounted for by the failure of the treasurer to stamp as paid items actually collected, though as a matter of bookkeeping it properly belongs in the undivided taxes. Though there is no statutory warrant for so doing, convenience would certainly dictate that the auditor and treasurer should keep an accurate account of the surplus of each year, and for this purpose they may, in my opinion, set up as a matter of convenience such accounts as those recommended for each year.

(2) The circular further states that

> "The balances remaining in each surplus fund may be held until the general assembly provides for their disposition, or transferred to the general county fund as soon as it is reasonably certain that all discoverable errors have thus been corrected."

With the first part of this statement I, of course, agree; with the last part of it I have expressed disagreement. Under no circumstances may these surpluses be transferred to the general county fund nor to any other fund in the county treasury as such, unless the legislature by passage of a law where no law now exists may authorize this particular disposition of such surpluses. The only thing to be done with surpluses for the time being, other than that suggested in the opinion, is to allow them to accumulate.

Except as last noted the suggestions which I have made are consistent with those in the circular, and if all the suggestions referred to are followed it seems to me that the difficulties which have been encountered will in time largely, if not completely, disappear.

1362.

RETIRED PATROLMAN MAY RECEIVE COMPENSATION FROM POLICE FUND AND ALSO SERVE AS PARK POLICEMAN AND RECEIVE COMPENSATION THEREFOR.

A retired patrolman under one-half pay from the police fund can legally serve as park policeman and receive his pay therefor, even though both compensations are paid from the funds of the municipality.

COLUMBUS, OHIO, July 23, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Under recent date you request my opinion upon the following:

> "A patrolman of a city has served the time set forth by the rules governing the police department of his city and has been retired upon half pay, such one-half pay being paid from the police pension fund. The man in question is still able to perform duty and was appointed and has been serving as park policeman in the park department of the municipality where he is paid from the regular payrolls of such park department.
>
> Can a retired patrolman under one-half pay from the police pension fund legally serve as a park policeman and receive his pay therefor, both compensations being paid from the funds of the municipality?"

Sections 4616 et seq. G. C. provides a scheme for a "police relief fund." This fund is created by certain tax levies, proceeds of certain taxes in certain instances, certain fines, penalties and license fees, donations, and in certain instances contributions from members of the police department.

Section 4628 G. C. provides that the trustees shall make all rules and regulations for the distribution of the fund, including the qualification of those to whom any portion of the fund shall be paid and the amount thereof, the rules being subject to the approval of the director of public safety, or the marshal, as the case may be.

When a person under the rules of the organization is entitled to participate in the fund his status is fixed as far as the fund is concerned at least for the time being. The mere fact that the patrolman has been retired and is entitled to a pension does not mean that he is incapacitated to perform any further physical labor. It may be that he has served a sufficient number of years to entitle him to retirement and that he still may be in fit condition for certain work.

I do not find in the statutes any inhibition against a person being appointed park policeman in the park department of a municipality because of the fact that he is receiving a pension from the police pension fund. Assuming that the person in question has been legally appointed to the position, it is my opinion that the fact that he receives a pension from the police pension fund would not in any manner interfere with his receiving pay as park policeman. A person retired from the police department and receiving a pension under the rules and regulations of the police relief fund is not

an officer, nor has he any official duties to perform on behalf of the municipality, consequently there would be no incompatibility.

It will be noted that a pension is not payment for present services rendered or to be rendered. "Pension" is defined as a periodical allowance for an individual on account of past services, or some meritorious work done by him. So it is apparent there is a difference between receiving both a pension and pay for present services and the receiving of pay for services rendered in two positions in the same municipality.

Coming then to answering your question, it is my opinion that a retired patrolman under one-half pay from the police pension fund can legally serve as park policeman and receive his pay therefor, even though both compensations are paid from the funds of the municipality.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1363.

A CORPORATION WHOSE PURPOSE CLAUSE IN ITS ARTICLES OF INCORPORATION MAKES IT A REAL ESTATE AND BUILDING COMPANY IS NOT EXEMPT FROM SECURING A LICENSE FOR THE FLOTATION OF ITS SECURITIES WHEN SUCH SECURITIES ARE NOT PREDICATED UPON PROPERTY.

The statement of the purpose for which a corporation is formed, shown by its articles of incorporation on file with the secretary of state, makes it a "real estate or building company." The application for license to dispose of its securities together with contracts submitted therewith shows that its securities are not predicated upon property. Such company is not entitled to be exempt from securing a license for the flotation of such securities upon the ground that it is "a real estate or building company, all of whose property upon which securities are predicated is located in this state," under the exception contained in section 6373-14.

COLUMBUS, OHIO, July 23, 1918.

HON. P. A. BERRY, *Commissioner of Securities, Columbus, Ohio.*

DEAR SIR:—On April 18, 1918, you addressed the following request to this department:

> "We are desirous of getting a ruling from you as to the construction on section 6373-14 'e' with particular reference to 'nor of a real estate or building company all of whose property, upon which such securities are predicated, i slocated in this state.'
>
> We have an application on our blank form No. 4 wherein application is made that the securities of the Three in One Apartment Company be exempt because of the fact that its securities are those of a real estate or building company, and the property upon which such securities are predicated is located in Ohio. We are inclosing said application, together with other data relative thereto. We particularly wish to know whether this corporation is considered a real estate or building company."

The above request is accompanied by the forma statement under section 6373-9 on the regular printed blanks; also a contract between the Cleveland Mansions Company and E. G. Haskell, and another contract between said E. G. Haskell and the Three In One Apartment Company.

From these attached documents, upon which you base your inquiry, the company does not appear to be a real estate or building company, but its essentia objects and purposes are clearly shown to be to exploit a patent and dispose of goods produced under and by virtue of said patent.

As this proposed company is a corporation, however, I have examined its articles of incorporation, and find that from the purpose for which it is incorporated as shown thereby, it is a real estate and building company. The purpose for which it is incorporated is stated in the articles as follows:

> "Said corporation is formed for the purpose of constructing and maintaining buildings to be used for hotels, apartment houses, residences, dwelling houses, store rooms, offices, warehouses and factories, and acquire by purchase or lease, rent and sell all such real estate and personal property as may be necessary for such purpose, and the doing of all things necessary or incident thereto. All of the company's funds invested in real estate and buildings must be invested within the state of Ohio."

The statement shows that there is to be either $30,000.00 or $45,000.00 of stock (there is a contradiction) of which $15,000.00 is preferred stock. It is not shown that the company has any assets, but is stated that 125 of the shares of preferred of $10.00 each have been subscribed for, for cash; that the common stock was issued for rights to use "Merrill" furniture in Cuyahoga county, one-half of same "trusteed" back to company. The commission paid for sale of stock will not exceed 15 per cent.

The contract shows that there is some kind of a patent furniture placed on revolving panels; that the owner of these patents is located in Chicago, but that the Cleveland Mansions Company, through some right it has acquired, is contracting with Haskell to use the patent in Cuyahoga county, in order to do which Haskell agrees to furnish a corporation, which turns out to be this Three In One Company; that its capital stock shall not exceed $30,000.00; that 15 per cent of the stock shall be turned over to the Cleveland Mansions Company, who shall have a right to inspect its books and name a director.

The contract between Haskell and the Three In One Company recites that Haskell owns the above contract with the Cleveland Mansions Company; that the Merrill corporation of Chicago does not sell the Merrill furniture outright, but always on a royalty basis in some manner so that it can secure a part of the excess profit earned by the furniture; that the new company believes it for its own best interest to own the contract, and that it is worth to it the sum of $15,000. This last contract then proceeds to transfer the former contract, and the company agrees to issue 3,000 shares of common stock as fully paid in full of Haskell's subscription to common stock. Then Haskell agrees to turn back 1,500 of these shares to be given as bonuses to purchasers of preferred stock, and to give 450 shares of the common stock to the Merrill corporation, which is to have a right to inspect the company's books and have a director.

Here, as has been said, is no trace of a real estate or building company or anything that looks like one, although the corporation actually formed is a building and real estate company as shown by the purpose of its incorporation set out in the articles.

It is not rendered necessary, however, to determine the question of whether your department may look back of the articles of incorporation to determine whether it be such real estate and building company or whether you are concluded as to its character by the record of its charter. The company places before you not what it is, but what it does, not its charter showing its nature and identity, but its contracts and transactions, and the contract and the transactions of other persons before its existence, and under the terms of which, and by reason of which, it came into existence, and from them claims exemption from the requirement of the license as provided in section 6373-14.

The only statement in this application which bears any relation to the nature of the company is paragraph No. 4, which is as follows:

> "Are the securities those of a real estate or building company, and is all of the property upon which such securities are predicated, located in Ohio? Yes."

This may be taken as a statement that the purpose of the corporation makes it a real estate or building company, but not the latter part of the inquiry as to whether the property upon which its securities are predicated is located in Ohio. The answer to that is "yes", but the other statements of the application show that this is only true prospectively; that is, if the company ever gets any real estate it has declared in advance that it will only have it in Ohio. How can it be said that these securities which it is proposed to sell are real estate located in Ohio, or is property located in Ohio when the company has no property at all located any place, except the mere intangible right to use a patent, and to require subscribers to stock to pay $1,250 for shares subscribed for.

This intangible property having in a sense only an imaginary existence, existing by the operation of law upon the acts of individuals, is by the same law located at the domicile of its owner, which of course is in Ohio, and as shown by the articles of incorporation, it is a building and real estate company, which seems literally to fulfill the requirement. It fails, however, because the application shows that the securities, namely, the remaining 1,375 shares of preferred stock still unsold are not predicated upon this property, or at least only partially so. They are predicated upon business to be done in the sale and installation of furniture, which business is to be done by means of the very proceeds of the sale of the securities itself.

The blue sky law provides for two licenses, one for a "dealer" which is personal, and the intended effect of which is to permit the business coming under the purview of the statute, to be done only by honest and proper persons; the other, a license applying to the property to be disposed of—the security itself—which is the one here inquired about.

It seemed to be in the legislative contemplation that while the licensing of dealers generally would afford sufficient protection to the public from the evils the statute was intended to prevent, that such mere supervision of the persons doing such business would not be sufficient when it came to the flotation of the securities of a new company. And, therefore, in addition to the other powers it confers upon the department, full authority is given to investigate the nature of the new company, its resources and purposes and the manner in which it is proposed to transact its business. From this additional regulation it makes certain exceptions, one of which is that quoted above, as to the real estate and building company whose property upon which the securities are predicated is located in this state. It is suggested that to come under this exception, it is necessary that the securities should be predicated at least upon property, without for the present deciding that it would necessarily be real property.

If the securities be not predicated upon property at all, but upon prospects, however bright, or upon hopes and future intentions, it is not within the exception, but remains under the general requirement.

The question you ask is in the following words: "We particularly wish to know whether this corporation is considered a real estate or building company." Answering this question literally, it does have that character, but it does not follow from its being such real estate or building company that it is exempt from the requirement

of license. Such exemption must be based upon the additional facts above required; that is, the securities must be predicated upon property, and the property upon which they are predicated must be located in this state, which under the circumstances set out in this application is not true in the present case.

Yours very truly,
JOSEPH McGHEE,
Attorney-General.

1364.

SHERIFFS, DEPUTY SHERIFFS, CONSTABLES, ETC., NOT ENTITLED TO FEES IN FISH AND GAME CASES.

Section 1397 of the General Code providing that the fees of sheriffs, deputy sheriffs, constables and other police officers, in fish and game cases, should be the same as allowed game wardens, has become inoperative since the amendment of section 1397, denying fees to game wardens, and no fees in these cases may now be charged by sheriffs, deputy sheriffs, constables or other police officers.

COLUMBUS, OHIO, July 23, 1918.

The Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I have your letter of April 22, 1918, as follows:

> "Did the amendment of section 1394 G. C., 107 O. L. 487, repeal by implication that portion of section 1397 G. C., which presumes to fix fees for sheriffs, deputy sheriffs, constables and other police officers in fish and game cases? If section 1397 G. C. was repealed, what fees are sheriffs, deputy sheriffs and constables to be allowed in fish and game cases, it having heretofore been held that no fees are taxable to marshals or chiefs of police in state cases?"

Sections 1394 and 1397 G. C., prior to the amendment in 107 O. L., read as follows:

> "Section 1394. The board of agriculture may allow the chief warden, each special warden and each deputy state warden such compensation as it deems proper and his necessary expenses. In addition to the salaries and compensation herein provided, each warden shall be entitled to receive the same fees as sheriffs are allowed for like services in criminal cases. The salaries and expenses of the chief warden and each special warden and the compensation allowed each deputy state warden shall be paid by the state upon the order of the board."
>
> "Section 1397. Sheriffs, deputy sheriffs, constables and other police officers shall enforce the laws for the protection, preservation and propagation of birds, fish, and game, and for this purpose they shall have the power conferred upon the wardens and receive like fees for similar services. Prosecutions by a warden or other police officer for offenses not committed in his presence shall be instituted only upon the approval of the prosecuting attorney of the county in which the offense is committed, or upon the approval of the attorney general."

It will be noted from these sections that at this time the game wardens were to receive in fish and game cases the same fees as sheriffs received for like services in criminal cases, and that sheriffs, deputy sheriffs, constables and other police officers were to receive the same fees as wardens. However, in 107 O. L., page 487, section 1394 was amended to read as follows:

"The compensation of the chief warden, deputy state wardens and special wardens shall be fixed and paid in the same manner provided for in section 1087 of the General Code for the compensation of other agents of the secretary of agriculture. They may also be allowed and paid in the manner provided in section 1087 all necessary expenses incurred by them in the performance of their duties."

It will be noted that in this amendment the provisions allowing game wardens fees in fish and game cases were stricken out, and it has been since held by this department in an opinion found in vol. III of the Attorney-General's Opinions for 1917, page 2300, that no fees may be any longer allowed game wardens for services in these cases. The question is now presented, whether or not section 1397 is any longer effective. In other words, since in section 1397 reference was made to section 1394, and since the provisions of section 1394, to which reference is made in section 1397, has been repealed, does section 1397, which now has reference to the repealed provisions of section 1394, become inoperative.

In the case of Collins v. Blake, 79 Me., 218, it was held:

"The statute giving a lien for feeding and sheltering animals provided that it should be enforced 'as liens on goods and personal baggage by inn holders or keepers of boarding houses.' Held: That repealing the mode of remedy in the latter case did not repeal or change the remedy applicable to the former."

The court said at page 220 in that case:

"The statute gave a lien on animals for feeding and sheltering them, the lien 'to be enforced in the same manner as lien on goods and personal baggage by inn-keepers or keepers of boarding houses.'

That meant enforcement in the manner then existing, not as it might be in the future by a new enactment. A reference was the readiest way to describe the process to be employed for enforcement. The repeal of the process in the one case does not repeal the process in the other, there being no words in the act of repeal including the latter. Suppose the inn-holders' lien had been wholly abrogated, would it be pretended that the lien on animals would fall with it? There is no dependency between the two classes of liens or their enforcement. The case of Lord v. Collins, 76 Maine, 443, by implication, so settles the question."

It will be seen that in this case the reference in the incorporating statute to the statute incorporated was hardly more specific than the reference in section 1397 G. C., above quoted, to the provisions of section 1394 G. C., which section 1397 sought to adopt, and, applying the holding in this case to the situation your communication presents, it would seem that the provisions of section 1394, as they were originally enacted, are to be still read into section 1397. However, the weight of authority seems to draw a marked distinction between those cases in which the incorporating statute has made a specific and descriptive reference to another statute, and the cases in which the adopting statute makes no reference to any particular statute by its title or otherwise, but merely adopts a general law governing a certain subject. This distinction is well set out in a note entitled "Effect upon adopting statute of amendment or repeal of adopted statute," found in volume 40, Am. & Eng. Anno. cases, 1916 B, 375. That note read in part:

"In State v. Leich, 166 Ind. 680, 9 Ann. Cas. 302, the general rule was recognized that when a statute adopts a part or all of another statute by a speci-

fic and descriptive reference thereto, such adoption takes the statute as it exists at that time, subsequent amendments or a repeal of the adopted statute having no effect on the adopting statute." (Many cases are cited in support of this doctrine.)

The note further says at page 376:

"A different rule, however, prevails in case of the adoption of a general law on a particular subject. In such a case, where the adopting statute makes no reference to any particular statute by its title or otherwise, but merely adopts the general law governing a certain subject, such adoption includes all subsequent amendments and changes in the law on that subject. In re Guenthoer, 235 Pa. St., 67, 83 Atl. 617. See also People v. Crossley, 261 Ill. 78, 103 N. E. 537. Thus in the case of In re Guenthoer, supra, the court, after adverting to the rule that changes in a statute specifically adopted do not affect the adopting statute, said: 'While this general rule of statutory construction is well settled, and recognized by judicial decisions as well as by text writers, yet it is equally well established as a rule of statutory construction that where the reference in an adopting statute is to the law generally which governs the particular subject, and not to any specific act or part thereof designated in the adopting act, the reference means the law at the time the exigency arises as to which the law is to be applied. We have frequently recognized this distinction and applied the rule that where the reference in an adopting statute is to the law generally upon any subject, the adopting statute means the law in force on the subject at the time it is invoked.' In re Vernon Park. 163 Pa. St. 70, 29 Atl. 972; Kugler's Appeal, 55 Pa. St. 123."

I believe the above rule to be the correct one. It might be well, however, to give some consideration here to two cases of the Ohio Supreme Court and an opinion rendered by former Attorney-General Timothy S. Hogan, all of which discussed the subject matter of this opinion.

The two cases are the Heirs of Ludlow v. C. and J. Johnston, 3 Ohio 553, and Stall v. Macalester, 9 Ohio 19, and the opinion referred to is found in annual report of the attorney-general for 1913, Vol. I, page 164. In the first of the two cases referred to the referring statute provided that a guardian of an idiot, lunatic or insane person shall be authorized to discharge the debts of such person "out of the real estate, in such manner as executors or administrators are by law enabled to discharge the debts of deceased persons, when the personal property is found insufficient." In this case the law defining the duties of the administrator, etc., was repealed, and the question was what effect such repeal had upon the statute referring to the duties of a guardian. On this subject the court said on page 572:

"When in one statute a reference is made to an existing law, in prescribing the rule or manner in which a particular thing shall be done, or for the purpose of ascertaining powers with which persons named in the referring statute shall be clothed, the effect, generally, is not to revive or continue in force the statute referred to, for the purpose for which it was originally enacted, but merely for the purpose of carrying into execution the statute in which the reference is made. For this purpose the law referred to is, in effect, incorporated with and becomes a part of the one in which the reference is made, and so long as that statute continues, will remain a part of it, and although the one referred to should be repealed, such repeal would no more affect the referring statute than a repeal of this latter would the one to which reference

is made. Such references are common in our legislation, and a slight examination will show that this is the effect intended to be produced. We will take, for instance, the several laws for the recovery of money secured by mortgage."

In the other supreme court case referred to, Stall v. Macalester, 9 Ohio, 19, the court said on the same subject, beginning at page 22:

"On the 11th of February, 1828, in an act amendatory to the act regulating the duties of executors and administrators, provision is made that after sale of real estate by these officers, return shall be made to the court for confirmation, thereby placing these sales in this respect upon the same footing as sales by sheriffs. It is insisted by the plaintiff's counsel, that this change in the law prescribing the duties of administrators shall be so construed as to effect a similar change in the law relative to the duties of guardians. Such, however, is not the opinion of the court. As has been already remarked, the law for the appointment of guardians does not in itself prescribe the mode in which real estate shall be sold, but refers to another law upon a different subject as to this mode. And as has been already shown by this reference, the law referred to becomes a part of this law for this particular purpose. Such being the case, a repeal of the law referred to would not divest guardians of the right to sell in a proper case. Nor can any change in the law relative to the duties of administrators effect a change in the law relative to the duties of guardians, unless this latter is expressly referred to. 3 Ohio, 556. On full consideration, we are of opinion that the law does not require that a guardian shall make return to the court of a sale by him made, of the real estate of his ward, nor is a confirmation of such sale by the court necessary to its validity."

In the opinion of former Attorney-General Hogan, referred to, he gives consideration to a similar situation in the following language, found at page 167:

"As has been noted, section 9856, General Code, provides that title guarantee and trust companies shall make such reports to the auditor of state as are required of safe deposit and trust companies, and be subject to like examinations and penalties. In the enactment of the provisions of this section prescribing the duties of title guarantee and trust companies, with respect to reports to the auditor of state, and prescribing the authority of such offer with respect to the examination of such companies, the legislature, by necessary intendment, had reference to the provisions covering the same subject-matter with reference to safe deposit and trust companies, now contained within sections 9834 and 9835, General Code. The effect of this reference was to adopt and incorporate the provisions as to reports and examinations applying to safe deposit and trust companies into the act applying to title guarantee and trust companies, the same as if such provisions had been in terms re-enacted in the latter act.

When in one statute a reference is made to an existing law, in prescribing the rule or manner in which a particular thing shall be done, or for the purpose of ascertaining powers with which persons named in the referring statute shall be clothed, the effect, generally, is not to revive or continue in force the statute referred to, for the purpose for which it was originally enacted, but merely for the purpose of carrying into execution the statute in which the reference is made. For this purpose, the law referred to, is, in effect, incorporated with, and becomes a part of the one in which the reference is made, and, so long as that statute continues, will remain a part of it, although the one referred

to should be repealed, such repeal would no more effect the referring statute than a repeal of this latter would the one to which reference is made.

Ludlow v. Johnson, 3 Ohio, 533, 572.
Stall v. Maccallister, 9 Ohio, 19, 23.
Shull v. Barton, 58 Neb. 741, 743.
Phoenix Assur. Co. v. Fire Dept. 117, Ala. 631, 646.
Sika v. C. & N. Co., 21 Wis. 370.
In re Heath, 144 U. S., 92, 94.

Applying the principle of construction just noted, it follows that the provisions of sections 9834 and 9835, adopted by reference by the provisions of section 9856, and by legal intendment incorporated in the latter section as applying to the title guarantee and trust companies, are not affected in their application to such companies by the fact that they have been impliedly repealed and abrogated in their application to safe deposit and trust companies by the later provisions of the Thomas banking act."

It will be noted that in this opinion Mr. Hogan relied upon the cases of Ludlow v. Johnston, and Stall v. Macallister, above quoted.

The supreme court cases and the opinion of the former attorney-general do not discuss the distinction pointed out by the authorities heretofore referred to between a specific reference to some special statute and the reference to and adoption of a general law upon a subject. The distinction pointed out in these other authorities amounts practically to this: that where the referring statute employs such language as to fasten some specific provision of another statute as it then exists to the referring statute, no subsequent change of the statute to which reference is made can affect the referring statute, but where the language employed in the referring statute is of a general nature and does not seek to incorporate a provision of law, as it may exist at any certain time, the amendments of the statute referred to become a part of the referring statute. With this distinction in mind I believe the two supreme court cases cited, and the opinion of the attorney-general referred to, can be brought within the rule as stated by the authorities hereinbefore quoted.

It will be noted that in the case of Ludlow v. Johnston, 3 Ohio, 572, the referring statute uses the term "in such manner as executors or administrators *are* by law able to discharge the debts of deceased persons." In the case of Stall v. Macallister, 9 Ohio, 19, the statute provided that the sale of real estate by guardians should be governed "by the same regulations as *are* required of administrators in the sale of real property in the case of insolvents' estates."

In the opinion of former Attorney-General Hogan, referred to, the statute provided that "title and trust companies should make such reports to the auditor of state as *are* required of safe deposit and trust companies." In these two cases and the opinion of Mr. Hogan the word "are" is used and was of the same effect, I think, as though the word "now" had been used in conjunction with it. In other words, the legislature in these cases sought to adopt not a general law on the subject, but the law as it existed at the time of the passage of the adopting statute. This was the view taken by the court in a similar case, viz., Atkinson v. Swords, 11 Ga. App. 167, 74 S. E. 1093. In that case it was held that a clause in an enactment to the effect that a certain liability should be the same as "the liability fixed by the law governing, etc.," adopting by force of the ordinary and usual meaning of the word of the act, the law at that particular time did not extend to future enactments. I think the use of the word "are" in the two supreme court cases and the opinion of Mr. Hogan referred to, is sufficient to indicate a similar intention. In the statute we have under consideration, however, no such language is used. Section 1397 merely provides

that sheriffs, etc., shall "receive like fees for similar services." This language is in my opinion such as to affect an adoption of a general rule upon the subject, and under the rule laid down in the authorities quoted in this opinion, such adoption would include all subsequent amendments and be affected by the repeal of the incorporated sta u e.

Viewing the situation presented in the light of this rule, it is my conclusion that section 1397 has become inoperative in so far as the fees of sheriffs, deputy sheriffs, constables and other police officers in fish and game cases are concerned. This being so, no fees can be allowed these officers in these cases by reason of this section. If section 1397 were not on the statute books, resort might be had to the general provisions of law to give fees to sheriffs, constables and police officers in this case, but inasmuch as the provisions of section 1397 still stand, but are merely inoperative as to these fees, because of the amendment of section 1394, I do not believe any fees may be allowed to these officers in fish and game cases under the general provisions of the fee statutes.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1365.

SCHOOL DISTRICT—TRANSFERRING TERRITORY AND CREATING NEW DISTRICT, TO WHOM THE PRIVILEGE OF REMONSTRATING EXTENDS.

1. *When territory is transferred from one district to another, the privilege of remonstrating extends to the electors only who reside in the territory so transferred.*

2. *When a new school district is created, the right to remonstrate extends only to the electors of the newly created district.*

COLUMBUS, OHIO, July 23, 1918.

HON. D. M. CUPP, *Prosecuting Attorney, Delaware, Ohio.*

DEAR SIR:- My opinion is requested by you on the following statement of facts:

> "When territory is transferred from one district to another, does the privilege of remonstrating, as provided for in section 4736, extend to the electors of the district to which the territory is transferred, as well as to the electors of the district in the territory transferred?
>
> The section further provides for the creation of a new school district from one or more school districts or parts thereof. Does this privilege of remonstrating extend to the electors of such newly created school district, also. does the privilege extend to electors of a part of an existing school district not taken in to such new district?"

Section 4736 G. C., to which you refer, reads as follows:

> "The county board of education shall arrange the school districts according to topography and population in order that the schools may be most easily accessible to the pupils and shall file with the board or boards of education *in the territory affected,* a written notice of such proposed arrangement; which said arrangement shall be carried into effect as proposed unless, within thirty days after the filing of such notice with the board or boards of education, a majority of the *qualified electors of the territory affected* by such order of the county board file a remonstrance with the county board against the arrangement of school districts so proposed. The

> county board of education is hereby authorized to create a school district from one or more school districts or parts thereof. The county board of education is authorized to appoint a board of education for such newly created district and direct an equitable division of the funds or indebtedness belonging to the newly created district. Members of the boards of education of the newly created district shall thereafter be elected at the same time and in the same manner as the boards of education of the village and rural districts."

That is to say, the county board of education is by said section granted the authority to arrange the school districts according to topography and population and in order that the schools may be most easily accessible to the pupils, and when such proposed arrangement is completed by the county board of education, it shall file a written notice of such proposed arrangement with the board or boards of education in the territory affected. The territory affected is primarily the territory which, in arranging the school districts, would be taken from one district and added to another district, according to topography and population, so that the schools may be most easily accessible to the pupils, and, given a strict construction, no other territory in such district is affected. True, the districts are affected, but the statute does not say that a notice shall be given to the board or boards of education in the school district affected, but only to the board or boards of education in the territory affected. The arrangement shall not be carried into effect if, within thirty days after the filing of such notice with the board or boards of education, a majority of the qualified electors *of the territory affected* by such order file with the county board of education a written remonstrance against such proposed arrangement. Here, again, we use the words "territory affected" and not the words "districts affected." The county board is authorized to create a school district from one or more districts or parts thereof. If a new district is created from two or more entire school districts, then it is clear that the territory which is affected is the entire territory of the new district and that alone and it was so held by this department, in opinion No. 368, Opinions of the Attorney-General for 1917, Vol. 1, page 987. In that case the county board of education united the Sparta village district and the South Bloomfield rural district into a new district and named the new district the South Bloomfield rural school district, and the question was, whether a remonstrance from the qualified electors of only one of such districts was sufficient, but inasmuch as the whole of the two entire districts was taken in the creation of the new school district, the territory affected was held to be all the territory of both of said districts, and the fact that the new district was named the South Bloomfield rural school district, instead of some other name, made no difference. Some light upon the intention of the legislature in this matter may be gathered from the history of the legislation in relation to said section.

Section 4736 was first enacted February 5, 1914, 104 O. L., p. 138, wherein it was provided that the county board of education shall, as soon as possible, after organizing, make a survey of its entire district, that is, the entire county school district. The old section then provided that "the board shall arrange the schools according to topography and population in order that they may be most easily accessible to pupils." As far as the above quotation goes, the old and new sections were very similar. But the old section then provided:

> "To this end the county board shall have power by resolution at any regular or special meeting to change school district lines and transfer territory from one rural or village school district to another."

No such provision is now contained in section 4736, although if action is taken under section 4736, and school districts are now arranged according to topography and popu-

lation, and it is necessary in so doing to change district lines, it is necessary to proceed in substance according to the last above quoted language. Said last above quoted language, while not contained in the new section, is in substance contained in section 4692, which will be hereinafter referred to.

Section 4736 next provided that:

> "A map designating such changes shall be entered on the records of the board, and a copy of the resolution and map shall be filed with the county auditor."

This provision is no longer contained in the new section 4736, but in substance the language is found in new section 4692. Old section 4736 then provided:

> "In changing boundary lines the board may proceed without regard to township lines, and shall provide that adjoining rural districts are as nearly equal as possible in property valuation. In no case shall any rural district be created containing less than fifteen square miles. In changing boundary lines, and other work of like nature, the county board shall ask the assistance of the county surveyor, and the latter is hereby required to give the services of his office at the formal request of the county board."

When said section 4736 was amended the last above mentioned language was entirely omitted, and is now found in no part of the school laws. At the same time, however, that section 4736 was amended, and in the same bill, viz.: amended senate bill 282, passed May 27, 1915, section 4692 was amended to read as follows:

> "The county board of education may transfer a part or all of a school district of the county school district to an adjoining district or districts of the county school district. Such transfer shall not take effect until a map is filed with the auditor of the county in which the transferred territory is situated, showing the boundaries of the territory transferred, and a notice of such proposed transfer has been posted in three conspicuous places in the district or districts proposed to be transferred, or printed in a paper of general circulation in said county, for ten days; nor shall such transfer take effect if a majority of the qualified electors residing in the territory to be transferred, shall, within thirty days after the filing of such map, file with the county board of education a written remonstrance against such proposed transfer. If an entire district be transferred the board of education of such district is thereby abolished, or if a member of the board of education lives in a part of a school district transferred the member becomes a non-resident of the school district from which he was transferred, and ceases to be a member of such board of education. The legal title of the property of the board of education shall become vested in the board of education of the school district to which such territory is transferred. The county board of education is authorized to make an equitable division of the school funds of the transferred territory either in the treasury or in the course of collection. And also an equitable division of the indebtedness of the transferred territory."

In said section are found many of the provisions in relation to the transfer of territory which was formerly contained in section 4736, and in both sections 4692 and 4736 was added language which gave certain electors a right to remonstrate. No right to remonstrate was theretofore contained in any of the General Code sections which refer to the transfer of territory from one school district to another. In section 4692 the language is perfectly clear, that is, the persons who have a right to remonstrate are "the qualified electors residing in the territory to be transferred," and it might also be added that at the same time and in the same bill, section 4694, which provided for

the transfer of territory from one county school district to another, or to an adjoining exempted village school district, or city school district, was amended, and in said section is found language as follows:

> "Provided at least fifty per centum of the electors of the territory to be transferred petition for such transfer."

While no right of remonstrance is given in section 4696, the above language is only referred to as showing that the legislature intended that only those electors who resided in the territory to be transferred should be the electors who could petition, and so in section 4692 the language is clear that only those qualified electors who reside in the territory to be transferred are those which are permitted to remonstrate. Just why the legislature should use different language in the different sections in relation to the same matter is difficult to understand and ordinarily in giving full effect to each word, clause and sentence it would be necessary to give a different meaning to the language which is contained in section 4736 than that which is contained in sections 4692 and in 4696; but I am advised by the superintendent of public instruction that the universal administration of the law has been to permit only those electors in the territory of the newly created district or in the arranging of school districts in the territory which is transferred from one school district to another to remonstrate against such arrangement or the creation of such new districts.

This view also seems to be the view which has been taken by our courts and I call attention to a case found in 6 O. App. Rep. 415 entitled Fisher v. Whitters et al., wherein the county board of education consolidated two village districts into one district and thus created a new school district as provided by section 4736. On page 417 Houck J. in delivering the opinion of the court uses the following language:

> "No claim is made in the amended petition that advantage was taken by the *electors of the new school district* of the provisions of section 4736 General Code, part of which reads 'Which said arrangement shall be carried into effect as proposed unless within thirty days after the filing of such notice with the board or boards of education a majority of the qualified electors of the territory affected by such order of the county board file a written remonstrance with the county board against the arrangement of school districts so proposed.' "

The court in the above language refers to the right of remonstrating to the electors of the new school district and while in said case the same as in my opinion above referred to the entire districts were created into a new school district yet instead of using the language "territory affected" the court uses the language "of the new school district."

I can come to but one conclusion from the history of said legislation and that is that the legislature when it amended section 4736 and used the language "qualified electors of the territory affected" meant the same as when it used the language in section 4692, "qualified electors residing in the territory to be transferred" and the same as in section 4696 when it used the language "electors of the territory to be transferred." I therefore advise you in answer to your several questions as follows:

1. When territory is transferred from one district to another the privilege of remonstrating extends to the electors only who reside in the territory so transferred.
2. When a new school district is created the right to remonstrate extends only to the electors of the newly created district.
3. My answer to your second question answers your third.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1366.

APPROVAL OF ABSTRACT OF TITLE FOR LOT NO. 35 OF WOOD-BROWN PLACE, FRANKLIN COUNTY, OHIO.

COLUMBUS, OHIO, July 27, 1918.

HON. CARL E. STEEB, *Secretary Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—I beg to ackowledge receipt of the abstract of title for the following described real estate in Clinton township, Franklin county, Ohio:

> Being Lot No. Thirty-five (35) of Wood-Brown place, as the same is numbered and delineated on the recorded plat thereof, Plat Book 5, pages 196 and 197, in the recorder's office in Franklin county, Ohio.

I have carefully examined said abstract and find no defects in the title to said real estate as disclosed thereby which lapse of time has not cured. There are no liens or incumbrances against said real estate excepting the taxes for the year 1918, which are undetermined, are unpaid and a lien, also special taxes noted on the treasurer's duplicate for the improvement of Edgeview lot, five-year plan, balance 40 cents, with 5% interest. One installment of 10 cents and interest was due in June, 1918.

Subject only to the payment of said taxes and said assessment, I am of the opinion that the abstract discloses a good and sufficient title in fee simple in Thelma Burnett to said Lot No. 35, above mentioned.

I am returning the abstract herewith.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

P. S.—I have also this day examined the mortgage records of Franklin county, Ohio, and find from the indexes thereof no mortgages of record against said property.

1367.

VILLAGE INCORPORATED, OR VILLAGE TO WHICH TERRITORY IS ANNEXED, AFTER BONDS ISSUED BY TOWNSHIP FOR ROAD IMPROVEMENT, DOES NOT ASSUME PART OF INDEBTEDNESS, INDEBTEDNESS IS LIABILITY AGAINST TOWNSHIP.

COLUMBUS, OHIO, July 27, 1918.

(1) *A village incorporated after the issuing of bonds by the township trustees for a road improvement under the provisions of sections* 3298-15d *and* 3298-15e *does not assume any part of said bonded indebtedness even though a part of the road improved is included within the corporate limits of said village. The bonded indebtedness so created is a liability against the township as a whole, and the levy that is made to take care of this bonded indebtedness is made against all the property*

of the township whether lying within or without the limits of municipal corporations therein.

(2) *A village to which territory is annexed, and in which territory there is a road, for the improvement of which the township trustees had issued bonds, does not assume any part of said bonded indebtedness. The bonded indebtedness so created is a liability against the township as a whole, and the levy that is made to take care of this bonded indebtedness is made against all the property of the township whether lying within or without the limits of municipal corporations therein.*

HON. C. G. ROETZEL, *Prosecuting Attorney, Akron, Ohio.*

DEAR SIR:—I have a communication of July 17, 1918, signed by W. A. Spencer, assistant prosecuting attorney of your county. This communication reads as follows:

> "Will you please give me an opinion upon the following questions:
>
> Some six months ago Silver Lake village was incorporated out of a part of the territory which was formerly Stow township, Summit county, Ohio. Previous to this incorporation, Stow township had improved and constructed a road known as Payne avenue, and for its share of the cost of this road issued bonds which it obligated itself to pay. When Silver Lake village was incorporated it took within its limits a portion of Payne avenue. The trustees of Stow township now want to know whether Silver Lake village must pay a proportionate part of this bond issue which would cover that part of the road within the village limits, or whether what remains of Stow township is still obligated to pay the whole of its share of the bonds as per the agreement originally made.
>
> A somewhat similar situation exists with reference to the village of Cuyahoga Falls, Summit county. Cuyahoga Falls also recently annexed to their village a part of what was Stow township. Previous to this time, Stow township has issued bonds to cover its share of the cost for improvement of what is known as the Stow-Tallmadge road.
>
> We wish an opinion as to whether or not the village of Cuyahoga Falls will share with Stow township the payment of these bonds in proportion to that part of the road taken in the village, or whether Stow township will have to pay its share of the entire bond issue as it originally obligated itself to do."

The communication naturally divides itself into two parts, the one having to do with the incorporation of a new village called Silver Lake village from territory originally forming a part of Stow township, Summit county, Ohio, and the other having to do with the annexation of certain territory to the village of Cuyahoga Falls, Summit county, Ohio, which territory originally formed a part of Stow township lying outside of said village.

Let us consider these two questions in the order set out in the communication: In the first question you ask whether the bonds issued by Stow township to pay for the cost and expense of a road lying in the township, a part of which road falls within the incorporated village of Silver Lake, should be paid in whole by a tax levy upon the territory lying outside of the village of Silver Lake, or whether Silver Lake village should assume a part of this indebtedness proportioned to the part of the road that now lies within said village.

It is my opinion that neither of these alternative propositions is correct. It is my opinion that these bonds must be paid from a tax levy made upon all the taxable property of the township whether this property lies within the incor-

porated village of Silver Lake or any other village within Stow township, or whether it lies without the incorporated village of Silver Lake or within the corporate limits of any other village. In other words, when the township trustees of Stow township issued bonds to take care of the cost and expense of the improvement of what was known as Payne avenue road, the bonds became an obligation against the township as a whole, and the levy which is made from time to time by the township trustees to provide a fund out of which these bonds may be redeemed is made against all the property of the township whether it lies within the limits of an incorporated village or lies without said limits.

While your communication does not distinctly indicate, yet I take it that the bonds were issued by the township trustees under the provisions of the White-Mulcahy law, which became effective on the 28th day of June, 1917, and I shall, therefore, note a few provisions of said law. The principle, however, would be the same, even though the bonds were issued under the provisions of the Cass law.

Section 3298-15d, 107 O. L. 79, reads as follows:

> "The proportion of the compensation, damages, costs and expenses of such improvement to be paid by the township shall be paid out of any road improvement fund available therefor. For the purpose of providing by taxation a fund for the payment of the township's proportion of the compensation, damages, costs and expenses of constructing, reconstructing, resurfacing or improving roads under the provisions of section 3298-1 to 3298-15n inclusive, of the General Code, and for the purpose of maintaining, repairing or dragging any public road, or roads, or part thereof, under their jurisdiction in the manner provided in sections 3370 to 3376 inclusive, of the General Code, the board of trustees of any township is hereby authorized to levy annually a tax not exceeding three mills upon each dollar of the taxable property of said township. Said levy shall be in addition to all other levies authorized by law for township purposes and subject only to the limitation on the combined maximum rate for all taxes now in force. The taxes so authorized to be levied shall be placed by the county auditor upon the tax duplicate against the taxable property of the township and collected by the county treasurer as other taxes. When collected such taxes shall be paid to the treasurer of the township from which they are collected, and the money so received shall be under the control of the township trustees of such township for the purposes for which such taxes were levied."

From the provisions of this section it is to be noted that the levy which is made annually by the township trustees is made "upon each dollar of the taxable property of said township." That is, the levy covers the entire property of the township whether within or without the limits of a municipal corporation.

It is to be noted that this section further provides that the county auditor shall place the tax levy upon the tax duplicate "against the taxable property of the township."

Section 3298-15e provides that:

> "The township trustees, in anticipation of the collection of such taxes and assessments, or any part thereof, may, whenever in their judgment it is deemed necessary, sell the bonds of said township in any amount not greater than the aggregate sum necessary to pay the estimated compensation, damages, costs and expenses of such improvement."

This section further provides:

> "Prior to the issuance of such bonds the township trustees shall, in case all or any part of said bonds are to be redeemed by special assessments, provide for the levying of a tax upon all the taxable property of the township to cover any deficiencies in the payment or collection of any such special assessments."

From the provisions of these two sections it is clearly evident that the bonds issued by your township trustees are obligations against the township as a whole, including not only the territory lying outside of any municipal corporation but as well the territory lying within a municipal corporation, and that the redemption of these bonds must be made from a fund created by a levy of taxes upon all the property of the township.

Hence, the levy made annually by the township trustees of Stow township will be made against the property lying within the incorporated village of Silver Lake just the same as it would have been levied against this same property if the village had not been incorporated. But the village as a village does not assume any part of this obligation, neither do the authorities of the village make any levy of taxes to create a fund out of which to redeem any part of these bonds.

From this I think it is clear that neither of the alternatives set out in the communication is correct. The village does not assume any part of the obligation; but on the other hand, the part of the township outside of the incorporation of said Silver Lake village does not assume the entire obligation, but the obligation stands against the township as a whole.

I think this answers your first question.

The second question is to this effect: Certain territory originally lying outside of the village of Cuyahoga Falls, and in Stow township, has been annexed to the village of Cuyahoga Falls, and through the territory so annexed a part of the Stow-Tallmage road runs, for the construction of which bonds had been issued by the township trustees of Stow township, and some of the bonds have not as yet been redeemed.

The question is as to whether Cuyahoga Falls should assume a part of this obligation, or whether Stow township will have to pay the bonds so issued.

The same answer and the same reasoning will apply to this question as applied to the first question. Cuyahoga Falls as a village will not assume any part of said obligation neither will the property of Stow township outside of Cuyahoga Falls be compelled to bear the entire obligation, but the township trustees in making a levy from the proceeds of which the bonds shall be paid, will make the levy upon all the taxable property of the township whether it lies within the village of Cuyahoga Falls or whether it lies outside the corporate limits of Cuyahoga Falls.

Hence, the tax levy made by the township trustees from year to year will be levied against the territory annexed to Cuyahoga Falls just the same as if it had not been so annexed.

In passing, I might say that I am assuming that the trustees of Stow township have not created a special road district of the territory lying outside of the municipal corporations within Stow township under the provisions of 3298-25 General Code.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General

1368.

COUNTY DITCH—WHEN NEW ESTIMATE MAY BE MADE—NOTICE—WHEN COMMISSIONERS MAY NOT CHANGE CHARACTER OF IMPROVEMENT.

The sale of the work of construction of a county ditch, having been prevented by injunction for such period of time owing to the increase in prices it is impossible to secure a bid at the cost of construction as estimated by the engineer, a new estimate may be made.

No further notice to interested persons is legally required as to the making of such re-estimate, but it is advisable to notify the owners of assessed lands in some manner of the change in the estimate.

After a petition has been filed, praying for the construction of a ditch improvement, and the proceedings have reached the point where the next step is the sale of the improvement, the commissioners have no power to change the character of such improvement by changing an open ditch to a tile one, or such other change as makes it a different improvement from that originally found for.

COLUMBUS, OHIO, July 27, 1918.

HON. CHARLES L. FLORY, *Prosecuting Attorney, Newark, Ohio.*

DEAR SIR:—On June 20, 1918, you addressed the following inquiry to this department:

> "In November, 1915, a petition was presented to the commissioners of Licking county, praying for the establishment of a county ditch. The petition was granted and the proceedings progressed according to law up to the point where the county surveyor, who was doing the engineering work, was about to sell the work, at which time one of the land owners, to be assessed for the work, obtained an injunction against further proceedings; the letting of the work was not advertised, and consequently no contract was ever made for the construction work.
>
> The injunction proceeding has just terminated in favor of the commissioners, and it is now desired to proceed with the construction of the ditch, but the commissioners are confronted by three propositions.
>
> The engineer's estimate of the cost of the work was made in 1915. Material and labor have greatly advanced in price since the estimate was made, so that such estimate is now far below what the work will cost at the present time. Also, a part of the ditch, as designated in the specifications, was to be an open ditch. It is now desired to make the entire improvement a tile ditch.
>
> I shall appreciate your opinion on the following propositions:
>
> First—May the commissioners now have the engineer prepare a new estimate, and proceed to let the contract and have the work done on the basis of such new estimate?
>
> Second—If so, may such action be taken without any further notice being given the land owners whose property will be assessed?
>
> Third—May the entire ditch be now constructed of tile, in view of the fact that the original specifications, made in 1915, called for part of the ditch to be of tile and a part to be an open ditch?"

Your request has not been complied with sooner because of the difficulties presented by the first of your three questions.

It is, of course, necessary to examine the statutes upon the subject, which are contained in the chapter "Single County Ditches," and so far as they affect these questions, are as follows:

> "Section 6443. The board of county commissioners, at a regular or called session, when necessary to drain any lots, lands, public or corporate road or railroad, and it will be conducive to public health, convenience or welfare, in the manner provided in this chapter, may cause to be located and constructed, straightened, widened, altered, deepened, boxed or tiled, a ditch, drain or watercourse, * * * *."

It will be here noted that there are a number of different things which may be done under the authority of this section, two or more of which were done in the case in hand. Your inquiry shows that an order has been made for the location and construction of a ditch and for tiling a part of the same. This section contains the authority of the commissioners to do these things, and directs that they shall be done in the manner provided in this chapter.

Section 6446 provides who may make application for such improvement, and 6447 makes provision for a petition and bond. The beginning of the section is as follows:

> "A petition shall be filed with the county auditor setting forth the necessity and benefits of the improvement and describing the beginning, route and termini thereof."

Of course, it follows that this petition must designate the character of the improvement; that is, it must be a petition for one or more of the things which the commissioners by 6443 are empowered to do, as it is in the present case.

It further follows from the provision giving commissioners jurisdiction to do certain specified things, and then providing for invoking their action by a petition filed by qualified persons that the specific thing or things sought to be done are to be set forth in the petition, and that the jurisdiction of the commissioners in the particular proceeding is limited to an improvement of the character prayed for in the petition.

Section 6449 and 6450 provide for notice to land owners.

Section 6451 is as follows:

> "The county commissioners shall meet at the place of beginning of the ditch, as described in the petition, on the day fixed, as provided in this chapter, and hear the proof offered by any of the parties affected by said improvement, and other persons competent to testify. They shall go over and along the line of the improvement, and by actual view of the ditch and the premises along and adjacent thereto which are to be drained or benefited thereby, determine the necessity thereof, and may adjourn from time to time and to such place as the necessity of the work may require. If the commissioners find for the improvement, they shall fix a day for the hearing of applications for appropriations of land taken therefor and damages that persons, affected by said improvement, may sustain thereby, and for the approval of the report of the county surveyor as hereinafter provided for."

Section 6452 provides for combining different improvements or for the exercise by the commissioners of the power to do different things provided in 6443

in one proceeding. While it does not include construction and tiling, the two must necessarily be united, as construction, while used in 6443 especially to designate an improvement which is entirely new from one which is a modification of some former improvement, yet *ex vi termini* must include all the other improvements, all of which must be constructed. There would, therefore, seem no doubt of the power of the commissioners to construct a new ditch, a part of which might be tiled and a part constructed as an open ditch.

Section 6453 provides for a finding against improvement, and section 6454 provides as follows:

> "If the county commissioners find for the improvement, they shall cause to be entered on their journal an order directing the county surveyor to go upon the line described in the petition, or as changed by them as provided in this chapter, and survey and level it, and set a stake at every hundred feet, * * * * * and make a report, profile and plat thereof, and estimate the number of cubic yards of earth or other substance to be removed, and the cost per cubic yard for each working section as hereinafter provided, and of each section of one hundred feet."

This section furnishes data from which the total cost of location and construction, or rather an estimate of the total cost of the improvement, may be ascertained, and 6455 contains the following:

> "The county commissioners, by such order, shall direct the county surveyor or engineer to make and return a schedule of the lots and lands, and public or corporate roads or railroads that will be benefited, with an apportionment of the cost of location, and the labor of constructing the improvement, *in money*, according to the benefits which will result to each * * * * *."

It will be noted here that what the engineer is called upon to do is to make an apportionment; that is, to compare the benefits received by each benefited owner, and how much they are relatively to each other. This apportionment he is directed to make "in money." This can mean nothing else than that he is to make this apportionment by ascertaining the total cost according to the estimate made by him under 6454, and then show the apportionment thereof by making the proper division of the estimated cost among the different parties benefited. The section further provides that certain kinds of benefits shall be taken into account in making this apportionment, and that there shall be "a specification of the manner in which the improvement shall be made and completed, the number of flood-gates, waterways, * * * * *," etc.

This is quoted to show that all details as to the character and manner of the construction of the improvement are to be settled in advance of selling the work.

Section 6457 requires the commissioners to review the apportionment made by the surveyor, and that they may so amend it as to make it fair and just in proportion to the benefits, providing that they may adjourn for that purpose and go upon the premises, make an entire reapportionment and bring in new parties, if necessary.

Section 6460 provides that on or before the day set for the hearing when the commissioners find for the improvement, any persons whose lands are affected may make application for compensation and damages. Of course, the amount of this compensation and damages would depend upon the character of the improvement, and would be entirely different in a tile ditch from what it would be in an open ditch.

Section 6461 provides for the agreement of an allowance of such compensation and damages, and other sections provide for the payment before entering upon the work of improvement. Then follow detailed provisions for an appeal (6469-6480) and 6481 is as follows:

> "When an appeal has been taken, after the transcript of the proceedings before the probate judge and the other papers in the case are returned to the auditor's office, the county commissioners shall cause such entry to be made on their journal as will give effect to the verdict and findings of the jury. In such cases and in cases where no appeals have been taken, they shall fix a time for the public sale of the construction of the improvement in sections not less than one hundred feet nor more than sixteen thousand feet in length, or it may be sold as an entirety in the discretion of the county commissioners and county surveyor or engineer."

Section 6482 then provides for advertising, for selling the construction of the work, at which point your proceedings have arrived.

It now appears in your case that it is useless to proceed to take the next statutory step, and that the improvement cannot be sold under the present estimate, because there will be no bid as low as the estimated cost, and therefore under 6482 the work cannot be sold. There is in the whole statutory scheme no provision for abandoning an improvement after it has been found for. So you find yourself in a dilemma; that is, you can neither go on nor stop.

Of course, this difficulty must be resolved by finding a way to go on. The principal difficulty lies in the requirement upon the engineer of making the apportionment under 6455 "in money." It has already been shown that this is not a finding in dollars and cents of what each one must eventually pay. It is nothing but a division of the cost, which for convenience and uniformity is expressed in dollars and cents. It seems necessarily to follow from the fact that a bid cannot be received in excess of this estimate that the amount apportioned to each one would constitute a maximum above which he could not be required to pay. This conclusion, however, disappears in view of the necessity for paying compensation and damages which are not included in this estimate at all. It, therefore, is not a maximum sum of money beyond which the land owner cannot be required to pay for the improvement, but remains nothing more nor less than a division of the burden among those who receive the benefit.

If, therefore, you cannot stop, but must go on, and if you cannot take a bid above this estimate, and cannot get a bid which is not above it, something has to give way, and that "something" in the necessity of the case is the estimate.

This estimate is of the probable cost of construction. It has been made by an engineer with the best lights he possessed at the time. The construction of the improvement has been held up by the courts; during this period of delay the mutations of time have been beyond all human foresight or calculation, and money now has substantially less purchasing power than at the time of making this estimate. The estimate was nothing but an estimate at that time. Of course, the statute contemplated that the improvement would be carried out before such lapse of time as would create such change as upsets human calculation, but it was not so. It, therefore, must follow that another estimate could now be made enabling this proceeding to go on, which must go on because it cannot stop, and your first question is therefore answered that a new estimate may be made. This estimate does not, however, include the making of a new apportionment, but in order to express it in money a simple arithmetical calculation is necessary.

However, it would seem to me that it would possibly be best to first offer the

work under the old estimate in order that no question can be raised that the work might have been let thereunder. After it is demonstrated that the old estimate is too low a new estimate could be made.

Coming to your second question, there is no statutory provision for further notice, or, in fact, for but one notice, in common with all other quasi judicial proceedings. It would be advisable, however, to give informal notice to all the affected land owners of the change of the estimate, as by doing this the commissioners might stand better in equity if injunction proceedings were invoked on account of the change.

As to your third question, the answer must already be apparent from what is premised as to the jurisdiction of the commissioners and the manner in which it must be invoked.

It is too late after a specific improvement has been prayed for and granted, and it has proceeded to the point of selling the work, to change and make an improvement of a different character; that is, to do one of the different things that the commissioners had power and jurisdiction to have done if properly initiated.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

1369.

ENGINEER AND ASSISTANTS EMPLOYED UNDER SECTION 2411 MUST BE PAID FROM THE GENERAL COUNTY FUND—MONEY CANNOT BE TRANSFERRED FROM A FUND CREATED FOR A SPECIAL PURPOSE TO THE GENERAL COUNTY FUND.

1. *The engineer and assistants provided in section* 2411 *G. C. must be paid from the general county fund and not from the fund created to take care of the cost and expense of an improvement in reference to which said engineer and assistants perform labor.*

2. *There is no authority in law to transfer money from a fund created for a special purpose to the general county fund.*

COLUMBUS, OHIO, July 27, 1918.

HON. CLARE CALDWELL, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR:—I have your communication of some days since which is as follows:

> "In case the county commissioners have employed an engineer in accordance with section 2411 G. C., and in the case the county surveyor has in his employ certain assistants, deputies and inspectors, in accordance with section 2788, and all of these persons are engaged exclusively upon a certain special improvement—for example, a bridge—may the compensation due all these employes, or any of them, be paid from the fund created for the purpose of paying the cost and expense of constructing the given improvement?
>
> If your answer is that the payment must be made from the general fund of the county, is there any provision under which the general fund of the county may subsequently be replenished to the amount of the payment of the compensation, from the special fund created for the cost and expense of the improvement?"

Your question naturally divides itself into two parts: (1) as to whether the engineer and assistants employed under section 2411 G. C. should be paid from the proceeds of the special fund created for taking care of the cost and expense of a certain improvement upon which they devote their time and labor, or whether they should be paid from the general county fund; and (2) whether there is any authority in law for transferring a portion of the special fund to the general fund of the county, provided I hold that these employes should be paid from the general fund.

Section 2411 G. C. reads as follows:

> "When the services of an engineer are required with respect to roads, turnpikes, ditches or bridges, or with respect to any other matter, and when, on account of the amount of work to be performed, the board deems it necessary, upon the written request of the county surveyor, the board may employ a competent engineer and as many assistant engineers, rodmen and inspectors as may be needed, and shall furnish suitable offices, necessary books, stationery, instruments and implements for the proper performance of the duties imposed on them by such board."

Under this section the engineer and assistants and clerks employed by the county commissioners to assist him are employed to perform work which otherwise would devolve upon the county surveyor and his office force, and for the performance of which the surveyor and his force would not be entitled to compensation over and above the salary pertaining to said office. So if the county surveyor and his force performed the work which under the law becomes a part of his duties, they are entitled to receive no compensation from the fund created to take care of the cost and expense of the particular improvement upon which the work is performed. They obtain their salaries from the general county fund, under the allowance made by the county commissioners, or the court of common pleas in the event it makes an extra allowance.

As the engineer and assistants provided for under section 2411 G. C., are employed to perform work, which would otherwise devolve upon the county surveyor, due to the fact that the county surveyor cannot perform the work himself, said engineer and assistants are not entitled to receive any compensation from the special fund so created. This is the logical conclusion deduced from said section 2411.

Further, the legislature has seen fit to make specific provisions in reference to this matter. Section 2413 G. C. reads as follows:

> "Sec. 2413. The board of county commissioners shall fix the compensation of all persons appointed or employed under the provisions of the preceding sections, which, with their reasonable expenses shall be paid from the county treasury upon the allowance of the board. No provisions of law requiring a certificate that the money therefor is in the treasury shall apply to the appointment or employment of such persons."

Under this section all persons employed by the county commissioners under section 2411 G. C. must be paid from the county treasury.

The conclusion herein reached by me is in harmony with an opinion rendered by one of my predecessors, Hon. Timothy S. Hogan, and found in Vol. II of the Annual Report of the Attorney-General for 1913, p. 1144. Mr. Hogan held as follows at p. 1146:

"When an engineer is employed, pursuant to the provisions of section 2411, I am of the opinion that he may perform the services prescribed by section 2343, as to bridges. His compensation, however, must be paid in the manner set forth in section 2413 and not from any fund contemplated by sections 2343 and 2344."

This disposes of your first question and the answer to it makes one necessary to your second question. The answer to your second question is based upon the provisions of section 5654 G. C. This section reads as follows:

"Sec. 5654. The proceeds of a special tax, loan or bond issue shall not be used for any other purpose than that for which the same was levied, issued or made, except as herein provided. When there is in the treasury of any city, village, county, township or school district a surplus of the proceeds of a special tax or of the proceeds of a loan or bond issue which cannot be used, or which is not needed for the purpose for which the tax was levied, or the loan made, or the bonds issued, all of such surplus shall be transferred immediately by the officer, board or council having charge of such surplus, to the sinking fund of such city, village, county, township or school district, and thereafter shall be subject to the uses of such sinking fund."

It will be noted that there are two separate and distinct provisions in this section. The first one is to the effect that the proceeds realized from a special tax, loan or bond issue shall not be used for any other purpose than that for which the same was provided. The second provision states that when any of the fund so realized cannot be used for the purpose for which it was created, or is not needed for such purpose, the surplus shall immediately be transferred to the sinking fund of the proper subdivision and thereafter shall be subject to the uses of such sinking fund.

From this section it seems clear to me that there is no authority in law for transferring any part of the money in a fund created for a special purpose, to the general county fund, for the reason that the statute provides that it must be used for the specific purpose for which it was created and for no other, and if there should be a surplus, it must *immediately* be transferred to the sinking fund.

When we turn to the provisions of section 2296 G. C., which has to do with the transfer of money from one fund to another upon the order of the common pleas court, we find a special inhibition against the transfer of public funds which are the proceeds or balances of special levies, loans or bond issues. This section reads as follows:

"Sec. 2296. The county commissioners, township trustees, the board of education of a school district, or the council, or other board having the legislative power of a municipality, may transfer public funds, except the proceeds or balances of special levies, loans or bond issues, under their supervision, from one fund to another, or to a new fund created under their respective supervision, in the manner hereafter provided, which shall be in addition to all other procedure now provided by law."

Hence from all the above it is evident that there is no authority in law to transfer money from a fund created for a special purpose to the general county fund.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1370.

OFFICER ENTITLED TO SALARY REGARDLESS OF WHETHER OR NOT HE PERFORMS THE DUTIES OF HIS OFFICE.

Salary is incident to the office, and not to the performance of the duties of the same. Hence, so long as an officer does not resign, or die, or is removed, he is entitled to the salary pertaining to that office.

COLUMBUS, OHIO, July 27, 1918.

The Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I have your communication of recent date which reads as follows:

> "We respectfully request your written opinion upon the following matter:
>
> STATEMENT OF FACTS.
>
> A man who holds a position requiring all of his time becomes a candidate for treasurer of a city. He receives the nomination and is properly elected and qualified. His compensation by ordinance is fixed at $2,000.00 per annum. Knowing that his time is occupied, to meet the conditions he appoints a deputy, whose compensation is fixed by council at $1.00 per month, he paying one-half of his salary or $1,000.00 to the deputy, of course, not through the municipal records. The deputy performs the duties of the office and the treasurer devotes little, if any, time to the duties of the office, and if any time is devoted it is outside of office hours.
>
> *Question:* Is such treasurer legally entitled to the compensation fixed by council for the city treasurer?"

The answer to your question is based upon the familiar rule of law that salary is incident to the office and not to the performance of the duties pertaining to the office. This principle is generally followed by the courts.

In Bryan vs. Cattell, 15 Iowa, 538, the principle is stated thus:

> "When the statute providing for the compensation of an officer makes no provision for a deduction for absence or neglect of duty, he is entitled to the salary for the time he legally remains in office, without reference to any neglect in the discharge of the duties thereof."

In Larsen vs. the City of St. Paul, 83 Minn., 473, we have the following:

> "The salary annexed to a public office is incident to the title to the office, and not to its acceptance and exercise, nor to the usurpation or colorable possession of it."

In Meagher vs. the County of Storey, 5 Nevada, 244, and in the opinion on page 250, the principle is stated as follows:

> "The right to the salary or compensation of an office depends upon the title to such office, and cannot be recovered by one who is simply an officer *de facto*."

In the case submitted by you the city treasurer was duly elected and qualified for the said position. He has not died, nor resigned, nor has he been removed from said office; hence he is still the legally qualified treasurer of the city in which he was elected, and is therefore entitled to the salary of city treasurer as fixed by the council of said city.

In this opinion I am passing merely upon the question as to whether the city treasurer is entitled to the salary under the present conditions. If he is guilty of nonfeasance, provision is made in the law whereby he can be removed and someone appointed in his place. I am not passing upon the question at all as to whether he is guilty of nonfeasance or not, neither am I passing upon the question as to whether he has authority to appoint a deputy and pay him a part of the salary received by him from the municipality, nor am I passing upon the question as to whether the one appointed by him is entitled to receive the salary provided for by council.

I am passing only upon one question, and that is the one which is set out in your communication.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

1371.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN ADAMS, ALLEN, ASHLAND, ASHTABULA, BROWN, ERIE, GUERNSEY, HIGHLAND, LAWRENCE, LUCAS AND PERRY COUNTIES.

COLUMBUS, OHIO, July 30, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of July 25, enclosing for my approval, final resolutions for the following named improvements:

Cincinnati-West Union Road—I. C. H. No. 30, Sec. A, Adams county.
Lima-Sandusky Road—I. C. H. No. 22, Secs. k, l, m, Allen county.
Kalida-Lima Road—I. C. H. No. 134, Sec. o, Allen county.
Savannah-Vermillion Road—I. C. H. No. 149, Sec. G, Ashland county, types A and B.
Cleveland-Buffalo Road—I. C. H. No. 2, Secs. N (O) and P, Ashtabula county.
Ripley-Hillsboro Road—I. C. H. No. 177, Sec. b-1, Brown county.
Cincinnati-West Union Road—I. C. H. No. 30, Sec. N, Brown county.
Columbus-Sandusky Road—I. C. H. No. 4, Sec. K, Erie county.
Steubenville-Cambridge Road—I. C. H. No. 26, Sec. T, Guernsey county.
Steubenville-Cambridge Road——I. C. H. No. 26, Sec. S, Guernsey county.
Hillsboro-Chillicothe Road—I. C. H. No. 258, Sec. B, Highland county (in duplicate).
Ohio River Road—I. C. H. No. 7, Sec. K, Lawrence county, type B.
Toledo-Wauseon Road—I. C. H. No. 20, Secs. H-1, I, J and K-1, Lucas county.

Zanesville-New Lexington Road—I. C. H. No. 350, Sec. E-1, Perry county.

I have carefully examined said resolutions, find them correct in form and legal, and am therefore returning the same to you with my approval endorsed thereon.

However, I desire to call attention to two of these resolutions which are irregular in form to a slight extent, which I think should be corrected, although not of vital importance.

In the resolution relating to the Lima-Sandusky improvement, I. C. H. No. 22, Allen county, the state highway department has appropriated $11,100.00, while from the resolutions themselves it would appear that the state should appropriate but $11,000.00. As stated in other communications to your department, I cannot say whether it is an improvement that would warrant an appropriation from the maintenance and repair fund, or not.

In the resolution pertaining to the Hillsboro-Chillicothe road, I. C. H. No. 258, Highland county, the county commissioners have signed the same without indicating the name of the county of which they are commissioners.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1372.

APPROVAL OF BOND ISSUE OF BELLEFONTAINE CITY SCHOOL DISTRICT, LOGAN COUNTY—$25,000.00—$80,000.00.

COLUMBUS, OHIO, July 30, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of Bellefontaine city school district, Logan county, Ohio—two issues: One in the sum of $25,000.00, for the purpose of purchasing site and erecting and equipping school building thereon; and one in the sum of $80,000.00, for the purpose of improving certain various school buildings.

I have recently advised the commission against the purchase of both of the above described issues of bonds on grounds which, in my opinion, have been obviated by further action taken by the board of education and additional facts appearing in an amended transcript of the proceedings.

In the other opinion I stated an objection common to the proceedings in respect of both issues. This objection had to do with the form of that clause of the respective resolutions providing for the issuance of bonds in which provision was made for the tax levies to meet principal and interest. The amended transcript shows that the board of education, at a meeting at which all members were present, has amended both of the resolutions so as exactly to comply with the requirement of article XII, section 11 of the constitution in this respect.

This defect was the only one existing with respect to the $25,000.00 issue, and without further comment I advise that the proceedings now had with respect

to the issuance of these bonds are in all respects legal, and that said bonds, when properly executed, will constitute valid and binding obligations of the school district of the city of Bellefontaine.

I also found in the opinion to which I have referred another defect which existed respecting the $80,000.00 issue only. The point in question was, in effect, that these bonds were issued under the supposed authority of section 7630-1 of the General Code for the purpose of making certain repairs and improvements upon several school buildings which had been ordered to be made by certain state authorities. Of the aggregate sum of $80,000.00, $60,000.00 was issued on account of repairs and improvements to be made in and upon the East school building, in compliance with an order issued by the state inspector of plumbing. This was the recital of the resolution submitting the bond issue to a vote of the people, which set forth the said order in full. I then advised that action under section 7630-1 General Code could not be predicated upon an order of the state plumbing inspector, but only upon an order of the division of workshops, factories and public buildings of the department of inspection of the industrial commission; and that the bond issue being a unit and accepted by you subject to my opinion, as such, I could not advise that any part of these bonds could be safely purchased.

The amended transcript in setting forth the form of the bonds evidences an effort to separate this issue into two parts, and to have one series of bonds in the aggregate amount of $60,000.00 for the purpose of making the improvements on what is known as the "East School Building," and another series aggregating $20,000.00 for the purpose of making the other improvements which were properly predicated upon orders of the division of workshops and factories, etc. I intimated in the other opinion that if such a separation were made it might be possible to say that the $20,000.00 series would constitute a valid and binding legal obligation of the district, regardless of any infirmity which might attach to the remaining $60,000.00 of the entire issue. For reasons which I shall presently state, I do not find it necessary to determine whether such a separation as is attempted in this respect can be made.

Returning now to so much of the $80,000.00 issue as relates to the making of repairs and improvements in and upon the so-called East school building, I note that the amended transcript sets forth additional information from which the following facts will be gleaned:

On December 21, 1915, the division of workshops, factories and public buildings of the department of inspection of the Industrial Commission of Ohio had actually issued an order with reference to the East school building, requiring the replacement of the entire sanitary system therein, the installation of a new heating and ventilating system in accordance with the state building code; the laying of new floors in the first and second stories; the removal of loose plaster and the replastering of certain rooms; and as an alternative to strengthening the walls of the third story, the removal of the entire third story and the remodeling of the whole building into a two-story edifice in accordance with the requirements of the state building code for the type of construction to which it belongs.

Subsequently, on January 24, 1918, the state inspector of plumbing made an order covering substantially the same ground. In perhaps greater detail he required the replacement of the sanitary equipment of the building in accordance with the building code, the installation of a new system of heating and ventilating, removal of loose plaster and the conversion of the building into a two-story edifice. He went a little further and required the installation of a rest room, with first aid equipment, and the removal of the manuel training room to the basement. But these details, in my opinion, are immaterial. Suffice it to say that the orders of the two departments respecting this building were substantially

identical, and that to comply with one would necessarily comply with the other, at the same outlay of money. I do not know how it happens that two state departments are thus overlapping each other in their respective fields, but call attention to the fact as one of possible interest to the industrial commission.

It appears that the board of education, when it took the initial step in the issuance of the $80,000.00 of bonds now under consideration, overlooked the existence of the order promulgated by the industrial commission, and recited in its resolution that it was about to comply with the order of the state plumbing inspector. However, as I have pointed out, the orders were substantially identical, and the board was in point of fact proceeding to comply with the order of the industrial commission, though it said that it was complying with the order of the plumbing inspector. Under all these circumstances I feel that there has been a substantial compliance with the requirements of section 7630-1 General Code, which is as follows:

> "If a school house is wholly or partly destroyed by fire or other casualty, or if the use of any school house for its intended purpose is prohibited by any order of the chief inspector of workshops and factories, and the board of education of the school district is without sufficient funds applicable to the purpose, with which to rebuild or repair such school house or to construct a new school house for the proper accommodation of the schools of the district, and it is not practicable to secure such funds under any of the six preceding sections because of the limits of taxation applicable to such school district, such board of education may, subject to the provisions of sections seventy-six hundred and twenty-six and seventy-six hundred and twenty-seven, and upon the approval of the electors in the manner provided by sections seventy-six hundred and twenty-five and seventy-six hundred and twenty-six issue bonds for the amount required for such purpose. For the payment of the principal and interest on such bonds and on bonds heretofore issued for the purposes herein mentioned and to provide a sinking fund for their final redemption at maturity, such board of education shall annually levy a tax as provided by law."

The mere misomer of the order involved in the original resolution is immaterial in this instance, even though the popular election which followed was legally referable to that resolution, because the board determined to do the very things in the case of the East school building which the industrial commission had commanded to be done. The case is unique because of the almost absolute identity of the substance of the orders issued by the two departments respectively. If there had been a substantial variance between them, then I would feel obliged to hold that the proposition submitted to the electors, being that of borrowing money for the purpose of complying with the orders of the state plumbing inspector, could not by subsequent action of the board be converted into a proposition to comply with the orders of the industrial commission; so that the approval of the electors could not be made the predicate of action referable to the orders of the industrial commission. But the two orders being substantially identical in purport, the proposition to comply with the one order is the legal equivalent of one to comply with the other; so that the people when they voted determined that the things ordered by both departments, being one and the same set of improvements, should be done and that moneys should be borrowed under section 7630-1 G. C. for this purpose, and that taxes should be levied outside of the limitations of law to pay the interest and retire the principal of the money so borrowed.

I am of the opinion, therefore, that despite the erroneous recital in the preamble of the resolution submitting the question of the issuance of the bonds to a vote of the electors of the district, the electors actually did approve in substance the proposition of issuing bonds in order to comply with the orders of the industrial commission. That being the case, the objection which I had previously lodged against this issue of bonds, so far as that portion of it which was to be used for the purpose of making improvements on the East school building is concerned, is effectually obviated.

I may add that though the orders of the industrial commission do not, in terms, prohibit the use of the buildings respecting which they are issued for their intended purpose, this is the legal effect of them by virtue of the provisions of sections 1013 et seq General Code, with which the commission is familiar.

For all the foregoing reasons I am of the opinion that there has been a substantial compliance with section 7630-1 G. C. in the issuance of the entire $80,000.00 of bonds here under consideration. This department has previously held that formal defects in proceedings under this section may safely be ignored, and that bonds issued in substantial compliance with its terms are valid. (Opinions of Attorney-General for the year 1917, Volume II, page 1439.)

I advise therefore that the bonds of the $80,000.00 issue above described will, when properly executed, constitute valid and binding legal obligations of the Bellefontaine City School District.

The transcript contains forms for each of the issues, which are entirely acceptable.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1373.

DITCHES—CLEANING AND REPAIRING—APPORTIONMENT OF WORK—EFFECT OF FAILURE TO HOLD MEETING FOR ENTERTAINING COMPLAINTS, AND ADJOURNMENT OF MEETING WITHOUT TAKING ANY ACTION IN REFERENCE THERETO.

The proceedings provided in chapter 8 of the drainage laws, G. C. 6691 et seq. authorizing the cleaning and keeping in repair of ditches under the direction of the township ditch supervisor is applicable to tile ditch improvements.

Under the terms of those sections such township ditch supervisor can only apportion such work of cleaning and repair by assigning a certain lineal portion of the ditch to each benefited land owner.

If the trustees fail to hold a meeting for the entertaining of complaints, and appeals from such action of the ditch supervisor, or if upon holding such meeting they adjourn sine die without taking any action in reference thereto, the power and jurisdiction to enforce the apportionment so made is thereby lost, and it is necessary to serve notice fixing another day for such meeting, or to begin de novo.

In case of a ditch where comparatively costly local works are constructed as a part of the improvement, which are liable to become out of repair, and thereby render the apportionment of such ditch into working sections impracticable, a better proceeding is provided by the act of March 12, 1913, section 6726-1 to 4, providing

for the appointment of a superintendent of such ditch, with power to keep the same in repair, and causing the cost to be assessed back upon the land owners.

COLUMBUS, OHIO, July 30, 1918.

HON. HARRY M. RANKIN, *Prosecuting Attorney, Washington C. H., Ohio.*

DEAR SIR:—On July 10, 1918, you addressed the following request for an opinion to this department:

> "In the year 1905 W. filed with the commissioners of Fayette county a petition for the location and construction of a ditch. The commissioners granted the prayer of the petition, the ditch was constructed and the lot and land owners assessed therefor. This was a tile ditch and in the lower end thereof very large tile were used. In order to protect the lower end of the improvement and prevent the dirt washing off the tile a concrete head wall was constructed as a part of the improvement. This head wall has since been destroyed and the soil has washed away leaving some of the tile exposed at the lower end. Also at the lower end of the ditch trees and brush have been allowed to grow and the roots therefrom have about filled many of the tile. This condition exists for a distance of several rods. At the time the ditch was originally constructed R. owned the land where the head wall was placed and he also owned the land where the trees and brush now exist. R. recently sold and conveyed these lands to H. and P., who now own the same. At the time of the sale of these lands the ditch was in practically the same condition as above described. With the exception of the headwall and the part of the ditch on the lands of H. and P. the remainder of the ditch is in need of no particular attention at this time.
>
> The township ditch supervisor of the township where the ditch is located, presumably acting under sections 6691 et seq., of the General Code, served notices on the lot and land owners along the line of the ditch, a copy of which notice is herewith enclosed. This is the first attempt made to apportion this ditch since its construction. The township trustees met on the 29th day of June, at which meeting many of the parties interested were present. The trustees took no action whatever in the matter and adjourned without day with the intention of securing advice in the premises.
>
> In the first place I am of opinion that the attempted apportionment is too indefinite and uncertain to be of any effect. It will also be observed that the meeting of the trustees was not fixed in accordance with G. C. 6696. Also since the trustees adjourned without day the question arises as to their right to now modify or confirm the report of the ditch supervisor—at least without some notice to the parties affected.
>
> Some of the land owners on the upper end of the ditch contend that they should not be required to bear any of the burden of putting this ditch in working order on the lands of H. and P.; that H. and P. should be required to do this. H. and P. contend that all of the lot and land owners who receive any benefits from the ditch should be required to assist in this work.
>
> I would appreciate an opinion from you in this matter. Who are the proper officers or board to proceed with this work and how should the burden thereof be divided? If this may be legally accomplished under G. C. 6691 et seq., what is the status of the proceedings already started?"

Your doubts as to the legality of the proceeding and power of the trustees to further entertain the same are well founded, for the reasons you give.

The notification attached to the inquiry is in regular form upon a printed blank, but the description of the portion of the ditch assigned to the land owner to be cleaned out is as follows:

> "All of the portion of the ditch that is on your land and to help repair the concrete wall at the outlet of said ditch, and any other repairs necessary to be made on the lands of R. M. Hughey and R. C. Peddicord, petitioned for by J. C. Wilson."

This is perfectly definite as to the portion of the ditch to be kept clean, but contains an additional element not contemplated by the statute.

Section 6691 referred to by you, begins as follows:

> "For the cleaning and keeping in repair of township, county and joint county ditches, the township ditch supervisor or supervisors of the township or townships through which such ditch runs, shall divide them into working sections and apportion such sections to the land owners, corporate roads, railroads, township and county according to the benefits received * * *."

The power here given clearly does not extend to the action taken by the ditch supervisor, as he is confined to dividing the ditch into working sections and apportioning such definite sections to the different land owners. But even if he had power to add to each section a provision to assist in keeping the head wall in repair, he has left the amount or share thereof to be done by a given proprietor entirely indefinite, and any one of them would comply with his notice by the slightest possible assistance, so that the amount done by all would not constitute any substantial repair.

It is still further rendered indefinite by reference to other repairs necessary without suggesting what they might be. The requirement that it shall be divided into sections, each of which shall constitute a lineal proportion of the ditch is further fortified by section 6695, which is as follows:

> "Each lot and land owner, corporate road, railroad, township and county, so notified, shall clean the portion or section of the ditch or watercourse, as fixed by such apportionment, or if changed by the township trustees, as fixed by them, to its full depth and capacity as originally constructed, and when necessary reclean such portion without further notice. The parties assessed, as provided in the next preceding section, shall mark the terminus of their respective working sections by planting a substantial post or marker, on which shall be cut or painted the number of the section."

The requirement in 6696 that the meeting of the trustees be held at nine o'clock on the second Saturday after the completion of the apportionment, might probably be held directory, so that if a slightly later time be mentioned in the notice, it might not thereby be rendered entirely void. It is unnecessary to decide this, however, as upon the meeting when it did take place, they adjourned without further day. And inasmuch as no further notice is contemplated or provided, the trustees thereby lost whatever jurisdiction they had, so that your conclusion is correct that they cannot now further proceed in the matter.

If the action of the ditch supervisor in making the apportionment were capable of enforcement, a new notice might be served, and the case proceed. However, as the notice itself is defective, or rather illegal, as above pointed out, it would be necessary to begin *de novo* by the making of a new apportionment by the ditch supervisor. There is no doubt of the application of the proceeding provided for to this case, as it is expressly enacted that it shall apply to tile ditches, as section 6709 provides:

> "When a county, joint county or township ditch, or part thereof, has been tiled, it shall be subject to the provisions of this chapter. * * *."

In the making of such apportionment there is no power given to divide up the construction of one costly element of the ditch to be paid for jointly by all or any number of the benefited land owners. Authority is only given to divide the improvement into working sections, and there is no provision in the statute making any exception for such more costly portions of the improvement as this head wall. It would be impracticable to divide it lineally by inches so that one or two or more persons would construct the head wall leaving the residue of the ditch to others.

In the nature of the case it is also impracticable in the present situation to make an apportionment of this ditch that may not operate unjustly in the future, as there is but a small portion of the lower end of the ditch which now requires any attention, and by the terms of this chapter the apportionment for cleaning out creates a permanent condition or burden upon the different land owners. The whole ditch must be divided. If nine-tenths of it requires no work now, somebody or several persons would be let out of doing anything at present upon it, and in a future proceeding those escaping this time might have all to do.

This, however, is not a legal objection to the proceeding, which may be resorted to in exact compliance with the statutes in question.

There is another proceeding, however, provided by statute to which attention is called, which might be found more satisfactory in the present case.

It is provided for by the act of March 12, 1913, and found in the supplement to the code as sections 6726-1 to 4, making provision, in brief, for the appointment of a superintendent of such county ditch, who is given authority to make the necessary repairs and pay for the same, and the process is instituted for taxing the cost back annually upon the persons originally assessed in the proportion of their original assessment.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

1374.

APPROVAL OF BOND ISSUE OF WHITEHOUSE VILLAGE SCHOOL DISTRICT, LUCAS COUNTY—$26,000.00.

COLUMBUS, OHIO, July 30, 1918.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In re bonds of Whitehouse village school district, Lucas county, in the sum of $26,000.00, for the purpose of purchasing a site for and erect-

ing and equipping a school house in said school district and for the purpose of remodeling and equipping the present high school building therein.

I have made a careful examination of the transcript of the proceedings of the board of education and other officers of the Whitehouse village school district of Lucas county, Ohio, relating to the above issue of bonds. Said issue is under the authority of sections 7625 et seq. of the General Code, pursuant to the affirmative vote of the electors of said school district. My examination of said proceedings discloses that the same have been in conformity to the provisions of the General Code of Ohio, and I am therefore of the opinion that bonds properly prepared in accordance with the resolution of the board of education, providing for the same, will, when they are executed and delivered, constitute valid and binding obligations of said school district, to be paid in accordance with the terms thereof.

No bond form of the bonds to be printed covering said issue has been submitted as a part of said transcript, and I am therefore holding said transcript until a proper bond form is submitted and approved by me.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1375.

BOARD OF EDUCATION FUNDS—CUSTODIAN WHEN NO BIDS RECEIVED —INTEREST WHEN DEPOSITED WITH CITY OR COUNTY TREASURER —LIABILITY OF BANKS FOR INTEREST WHEN THEY REFUSE TO BID BUT ACCEPT DEPOSIT.

1. *Where a board of education has advertised and used every effort to obtain bids for deposits, and such board has been unable to secure bids, the city treasurer of the city district, and in a rural and village district the county treasurer, shall be the custodian of the board of education funds.*

2. *If the funds of a city district were left in the custody of a city treasurer and the funds of a rural district were left in the custody of the county treasurer, the boards of education of such districts are legally entitled to receive the depository interest or any profits arising from the deposit of such funds by such officials.*

3. *Banks which accept deposits, even though they refuse to bid, are liable for the interest earned and for the profits arising from the deposit of such funds.*

COLUMBUS, OHIO, August 1, 1918.

The Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—My opinion is requested by you upon the following statement of facts:

"We are respectfully referring you to sections 4782, 7604 et seq. and 4763 of the General Code, also to your opinion No. 1072, rendered under date of March 15, 1918, as well as court decision 96 O. S., 453.

Question 1. Where a board of education has advertised and used every effort to obtain bids for deposits and such board has been unable

to secure any bids, who shall have the custody of the board of education funds thereafter?

Question 2. If the funds of a city district were left in the custody of the city treasurer and the funds of a rural district were left in the custody of the county treasurer, would not such boards of education be legally entitled to receive the depository interest earned from such custodian?

Question 3. Would not banks accepting such deposits, even though they refused to bid, be liable for the interest earned under court decision cited?''

Section 4782 G. C., referred to by you, reads:

''When a depository has been provided for the school moneys of a district, as authorized by law, the board of education of the district, by resolution, adopted by a vote of a majority of its members, shall dispense with a treasurer of the school moneys belonging to such school district. In such case, the clerk of the board of education of a district shall perform all the services, discharge all the duties and be subject to all the obligations required by law of the treasurer of such school districts.''

Sections 7604 et seq. provide how depositories for school funds shall be established. Section 4763 G. C. reads:

''In each city school district, the treasurer of the city funds shall be the treasurer of the school funds. In all village and rural school districts which do not provide legal depositories as provided in sections 7604 to 7608 inclusive, the county treasurer shall be the treasurer of the school funds of such district.''

In Opinion No. 1072 I held that a board which established a depository, but which received no bids for the public funds under its charge, could not be held for the two per cent. penalty as is provided by section 7609 G. C.

In the case of Franklin National Bank vs. the City of Newark, 96 O. S., 453, it is held that a bank which receives money from a city treasurer, knowing it to be public funds, is liable to the city for any profits which arise from the use of said funds.

Let us apply the above, then, to your questions. In the first question you ask: Where a board of education has advertised and used every effort to obtain bids for deposits, and such board has been unable to secure any bids, who shall have the custody of the board of education funds thereafter? The answer to said question is found in section 4763 G. C., above quoted. If the board be a city board of education, then as provided in said section the treasurer of the city funds shall be the treasurer of the school funds, and if the board be a village or rural board, then the county treasurer shall have the custody of such funds. So that, in either case the question is completely answered by the language of said section.

In your second question you say: If funds of a city district were left in the custody of the city treasurer, and the funds of a rural district were left in the custody of the county treasurer, would not such boards of education be legally entitled to receive the depository interest earned from such custodian? This question will be made a little clearer if the latter part of same is changed to read:

Would not such boards of education be legally entitled to receive any profits earned by the use of said funds or interest paid to such custodian thereon?

The city treasurer, in the one instance, and the county treasurer in the other, are made the mere custodians of said funds and when the same are deposited in a bank or banks, which bank or banks should be the depository established for the city or the county funds, whatever earnings arise therefrom, or whatever interest is paid thereon, is as much a part of the fund itself as though it were deposited as such, unless there be a statute to the contrary.

You refer to the case of Franklin Bank vs. Newark, 96 O. S., 453. In that case the city sold a large number of waterworks bonds and when the money was received by the city treasurer he deposited the same in the several banks of his city. The deposit was not authorized by council and no contract was made with the bank that it should pay any interest thereon. The court held, however, that "any bank receiving funds of a municipality, * * * knowing the same to be the funds of the municipality, becomes a trustee and must account to the municipality for the funds so deposited *and all profits arising from such deposit.*" So that, if the above were applied to your case, and the banks receive the public school money, knowing the same to be such public school money, other than under a proper depository contract, they thereby become trustees and must account to the school districts for such funds so deposited and for all profits arising from such deposit.

As to the deposit of school funds by a city treasurer, we are guided in this state by a decision on all fours with the case referred to by you. In Eshelby vs. Board of Education, 66 O. S., 71, the plaintiff in error was treasurer of the city of Cincinnati and, as such was *ex officio* treasurer of the school district of Cincinnati. He received the sum of $2,000.00 and more from the Atlas National Bank and suit was brought by the board of education to recover said interest from said treasurer. In the syllabus of said case the court holds:

> "The treasurer of a school district who, * * * deposits its funds in a bank which allows interest on the average balance of the deposit, is required to account to the school district for such interest."

Shauck, J., delivering the opinion of the court, says on page 73:

> "Counsel for the plaintiff in error has made it quite clear that the liability of the treasurer is absolute, and that it differs in that respect from that of the ordinary trustee or bailee who may be exempt from liability on account of funds lost without his negligence or connivance. But it does not necessarily follow that funds coming into the hands of the treasurer are his, nor that upon the receipt of money in his official capacity the relation of debtor and creditor is established between him and the district. *To the contrary it is quite clear that instead of being the creditor of the district he is its treasurer—the custodian of the funds—and that he acquires custody of the funds without acquiring title to them* * * * *. Since the funds belong to the school district, the ultimate question in the case is answered in favor of the defendant in error by the elementary proposition that in the absence of a statute or stipulation to the contrary the increment follows the principal."

As in that case, so in yours. If the city treasurer is made the custodian of the school funds, any interest which he receives therefor or any profits arising from

the deposit of such funds are the property of the school district and not the city treasurer. What applies to the city treasurer with reference to city funds also applies to the county treasurer in relation to the funds which come into his hands from rural or village boards of education. He is merely the custodian thereof and receives no title whatever to said funds. Whatever interest or profits arise from such deposits are the property of the school district or districts to whom such funds belong. It is urged, however, that inasmuch as no compensation is provided for, the county treasurer, while acting as custodian of the said funds, and in relation thereto, it was intended that the interest thereon should inure to his benefit. But the court decisions of our state are uniformly opposed to said proposition and the Eshelby case is cited with approval and commented upon in Thornily vs. State, 81 O. S., 108, in which case, on page 117, Shauck, J., delivering the opinion of the court, says:

> "From all the cases relating to the subject it appears that all duties imposed upon a public officer without provision for compensation are presumed to be performed in consideration of the general emoluments of his office."

I must advise you then, in answer to your second question, that whatever interest is received by the city treasurer or county treasurer, or whatever profits arise from the deposit of said funds, all inure to the benefit of the district to which such funds belong.

In your third question you ask would not banks accepting such deposits, even though they refuse to bid, be liable for the interest earned upon such funds. There is no question but that under the decisions above referred to the banks which receive such funds, knowing the same to be public moneys, are liable for any interest or profits arising from the use of such funds.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1376.

COUNCIL MAY APPROVE BILLS FOR DETECTIVES EMPLOYED BY MAYOR AND SAFETY DIRECTOR WITHOUT AUTHORITY FROM ORDINANCE OR RESOLUTION.

Where the mayor and director of public safety of a municipal corporation, with the knowledge and assent of the individual members of council, but without specific authority emanating from any ordinance or resolution previously passed by council, employ detectives for the purpose of investigating the conduct of members of the police department of the city, and subsequently the council by resolution approves bills presented by such detectives for services and expenses and orders their payment out of a contingent account appropriated from the general fund, and such bills are paid, the payments are legal, being justified either on the ground of ratification by council of an unauthorized act which it could have authorized by appropriate prior action, or on the ground that council as the repository of the legislative power of the city has the power to recognize and discharge a moral obligation against the city.

COLUMBUS, OHIO, August 1, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—You request my opinion on the following statement of facts:

"The director of safety of a municipality of this state being of the impression that members of the police department were drinking, gambling and neglecting their official duties at such times as they were supposed to be applying themselves to their official duties, engaged, with members of council, private detectives without the knowledge of any other person to investigate the conduct of such officers mentioned, paying them such compensation as the director deemed advisable, together with their expenses while investigating.

Is such investigation and expenditure legal?"

By a subsequent letter your examiner advises that the employment of the detectives in question was agreed upon informally among the mayor, the director of public safety and all the members of council, and that the payment for their services was made from the contingent appropriation in the general fund, the council in each instance approving the bills as rendered and by resolution authorizing them paid from that appropriation. The council did not make any specific appropriation for the payment of these detectives, nor did it fix their compensation in advance.

Section 4367 of the General Code provides that in each city there shall be a department of public safety, which shall be administered by a director of public safety, and that such director of public safety shall be appointed by the mayor of such city.

Section 4246 G. C. provides that the executive power and authority of cities shall be vested in certain officers, which include the director of public safety.

Section 4368 G. C. provides that under the direction of the mayor the director of public safety shall be the executive head of the police department and that he shall have all powers and duties connected with and incident to the appointment, regulation and government of the police department, except as otherwise provided by law.

Section 4369 G. C. provides that the director of public safety shall make all contracts in the name of the city with reference to the management of the police department, subject to the restrictions imposed by law.

Section 4247 G. C. provides that subject to the limitations prescribed, the director of public safety shall have the exclusive right to appoint all officers in the police department and that he shall have the sole power to remove or suspend any officer.

Sections 4373 to 4375, inclusive, and section 4382 of the General Code make detailed provision for the appointment and employment of regular and special officers of the police department, which is under the control of the director of public safety. These sections have in common the requirement that, save in case of riot or other like emergency, positions in the police department shall be created by or under authority of ordinance of council.

Section 4214 of the General Code provides that where not otherwise provided in the municipal code, council "by ordinance or resolution, shall determine the number of officers, clerks and employes in each department of the city government, and shall fix by ordinance or resolution their respective salaries and compensation * *."

I have no difficulty upon consideration of all these sections in advising that the original employment of the detectives was unauthorized. They were either members of the department of public safety or they were not. If they were members of the department their compensation should have been fixed in advance; if not, their employment should have been authorized by council, at least by making

an appropriation for such purposes in advance. Neither of these things was done. The fact that the members of council were cognizant of the enterprise does not change the technical, legal aspect of the transaction; for council must act as a legislative body, and what its members may agree to as individuals is not the action of that body. Therefore, I have no hesitancy in reaching the conclusion that at the outset neither the mayor nor the director of public safety, or both acting together, had any authority to employ the detectives in question.

But the information furnished by the examiner shows that the bills were not paid without some legislative action on the part of council. They were presented to the council, which approved them and ordered them paid from the previously made appropriation for contingencies in the general fund. It does not clearly appear from the examiner's letter whether this "contingent fund" is the one mentioned in section 3800 of the General Code, which provides as follows:

> "In making the semi-annual appropriations and apportionments herein required, council may deduct and set apart from any moneys, not otherwise appropriated, such sum as it deems proper as a contingent fund to provide for any deficiency in any of the detailed appropriations, which may lawfully and by any unforeseen emergency happen. Such contingent fund or any part thereof may be expended for any such emergency only by ordinance passed by two-thirds of all the members elected to council, and approved by the mayor. Any balance remaining in such contingent fund at the end of the fiscal year shall thereupon become a part of the general fund, to be again appropriated as other moneys belonging to the corporation. This section shall not interfere with the provisions of law authorizing the transfer of funds by the court of common pleas."

If so, I would have grave doubt as to whether this contingent fund could be lawfully expended for such a purpose, as it is intended merely to supply deficiencies in the detailed appropriations happening by an unforeseen emergency. The examiner's letter, however, gives rise to the inference that this was not the fund used, but that there was a contingent appropriation in the general fund; that is, a detailed appropriation intended to create an account upon which council might draw for contingencies not contemplated in any of the other detailed appropriations within that fund. I assume that such an appropriation would be subject to expenditure under the direction of council, as not one executive officer of the city could be said to be the head of the whole city government. While the information is a trifle vague on this point, therefore, I assume that payment was made from an account properly appropriated to pay general contingencies constituting proper municipal obligations, but not referable to any of the regular activities of the several departments for which other appropriations had been made.

This assumption leaves the question of law in the case one which may be stated as follows:

> Did the action of council in approving the bills and ordering them paid constitute a legal expenditure of the municipal funds?

This question depends on the principle of ratification. If an executive municipal officer attempts to create an obligation which he is not authorized to create because of the lack of previous authorization emanating from council, may the council by subsequently approving the transaction and ordering the claims

arising from such attempted creation of an obligation to be paid effectually ratify such an act, and make the transaction so far legal as to justify the expenditure of the funds by the direction of council for such a purpose?

Of course, it is to be admitted that the council cannot represent the municipality in ratifying an act which it could not have authorized in the first instance. That is to say, if the creation of the obligation is *ultra vires* the council in its capacity to authorize the incurring of it, then whatever council does by way of subsequent approval of the transacton cannot be an effectual ratification of it as against the municipality. But the rule seems to be that where council could have authorized the creation of the obligation in the first instance but did not do so, its subsequent approval of the claim has full effect as a ratification.

Thus, Dillon on Municipal Corporations, after stating the rule as it obtains in Ohio, to the effect that a contract made without the support of a previous appropriation or a certificate to the effect that there is money in the treasury and available for the payment of the claim, etc., is void and imposes no obligation whatsoever upon the municipality (See sections 790 et seq., 5th Ed.), goes on to lay down the following principle in section 797 of his work:

> "A municipal corporation *may ratify* the unauthorized acts and contracts of its agents or officers, which are *within the scope of the corporate powers, but not otherwise* * * * *. But a subsequent ratification cannot make valid an unlawful act without the scope of corporate authority. An absolute excess of authority by the officers of a corporation, in violation of law, cannot be upheld; and where the officers of such a body fail substantially to pursue the material requirements of a statutory enactment under which they are acting, the corporation is not bound. In such cases the statute must be strictly followed, and a person who deals with a municipal body is obliged to see that its charter has been fully complied with; when it is not done, no subsequent act of the corporation can make an *ultra vires* contract effective."

In view of cases like *Lancaster* vs. *Miller*, 58 O. S. 558, *Comstock* vs. *Nelsonville*, 61 O. S. 288, and *Wellston* vs. *Morgan*, 65 O. S. 219, I feel some hesitancy in applying this doctrine in its entirety to Ohio. I am not sure, for example, that the passage of an ordinance by council expressly ratifying an unauthorized obligation of the kind under consideration would make the obligation enforcible by action against the municipality. But in this case the council has not only attempted to ratify what was done, but has ordered payment to be made, and it has been made, leaving the only question in the case that as to the legality of the payment.

Assuming, for the moment, that the obligation would have been lawfully created if council had authorized it in advance, I am of the opinion that the subsequent action taken is such as to deprive the payment which was made of the taint of illegality. It is not necessary to go so far as to assert that this is an instance of the recognition of a moral obligation, if the legality of the payment can be predicated upon the principle of ratification. But if the principle of ratification has no application, then it seems to me that that of moral obligation can be recognized and applied with peculiar appropriateness in this case. Council would have legislated, says the examiner in his letter, but for the futility of employing a detective in the glare of publicity. He makes it clear that it was understood on all hands that the detectives were to be employed, and that in spirit at least there was no intention to evade any other law than the mere technicality that

council should pass a formal ordinance instead of agreeing to the program as a group of individuals. Certainly there is no suggestion of fraud in what was done.

Under these circumstances it seems to me that—still assuming for the purpose of the argument that the employment of the detectives in question was one which council might have authorized in the first instance—the subsequent allowance of the claim by council and its payment from an appropriation broad enough in its terms to be available for such purposes is not an illegal transaction.

I come, therefore, to the ultimate question in the case, which is as to whether council might have authorized, by appropriate action in advance, the mayor and the director of public safety to employ a detective or detectives for the purpose of acquiring information respecting the conduct of the members of the police department. Of course, there is something repulsive in the idea of espionage; but such notions do not alter the legal aspect of affairs. Very wide legislative power is given to council within the scope of the field of municipal activities. It may require reports from the director of public safety under favor of section 4254 of the General Code. I am clearly of the opinion that the detectives employed in this instance were not a part of the regular police establishment of the city. It is true that section 4374 above abstracted refers to detectives, but such detectives are to be used in investigations in connection with the enforcement of the laws and ordinances of the city by the police department against general malefactors. On the other hand, it is the duty of the director of public safety to keep himself informed as to the fidelity with which those under his command are discharging the duties of their respective positions. The whole spirit of modern public service requires that heads of departments shall be in touch with the efficiency records of their subordinates. And even if council were not authorized to require reports from the director of public safety the provisions of the civil service law, which I do not take time to quote, would be sufficient to authorize the director of public safety to find out as much as he could about the official conduct of the members of the police department. In no other way could he adequately perform the high duty vested in him to manage the police department and provide for its regulation and government.

Now the director of public safety might conceivably adopt the tactics of the caliph Haroun-al-Raschid, and wander about the city at night in disguise for the purpose of seeing how things are going; presumably, however, it is not every director of public safety who has the talents for dissimulation that the celebrated oriental potentate possessed. If, therefore, the director, who is officially responsible for all the misdoings of his subordinates, and the mayor, who is likewise officially responsible for the shortcomings of the director and those under him, come to the conclusion that they require anonymous assistants for the purpose of finding out facts which they ought to know in order to enable them to discharge their several responsibilities, I can imagine no legal reason why the council may not, in the exercise of its legislative power, authorize the employment of such assistants as a temporary expedient, and do so without creating a permanent position in the police department, as such. The function discharged by the detectives would be that of temporary assistant to the director of public safety. It is true that the council should authorize the employment of such assistant as a member of the general department of safety, though not as a member of the police department, by ordinance previously passed—or, what is perhaps more accurate, having regard to the temporary character of the employment—should by ordinance authorize the temporary employment of such an assistant and fix his compensation. Because council did not do this in the case at hand the obligation as

attempted to be created by the mayor and the director of public safety was without legal force. But because council could have authorized the creation of such an obligation by appropriate legislation, and under all the peculiar facts of this case, I am of the opinion that when council did subsequently approve the bills as presented, and order them paid out of the appropriation mentioned by the examiner, such payment was legal.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1377.

BOND ISSUE—NO AUTHORITY FOR MUNICIPAL CORPORATION TO ISSUE BONDS TO CONSTRUCT BRIDGE IN CO-OPERATION WITH COUNTY COMMISSIONERS.

DISAPPROVAL OF BOND ISSUE OF THE CITY OF SIDNEY—$10,000.

There is no authority for the issuance of bonds by a municipal corporation to construct bridges in co-operation with the county commissioners of the county. Legislation which purports to authorize the issuance of such bonds is void and cannot be interpreted as valid by ignoring the provision thereof which relates to co-operation with the commissioners.

COLUMBUS, OHIO, August 1, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In re bonds of the city of Sidney, Ohio, in the sum of $10,000, for the purpose of "paying the city's portion of constructing in co-operation with the commissioners of Shelby county, Ohio, permanent structures or bridges over the Miami and Erie Canal" at points where certain streets of the city cross said canal.

I am unable to advise that the proceedings had by the council of the city of Sidney in the issuance of the above described bonds are legal.

The transcript shows that the council first appointed a committee to confer with the county commissioners with a view to working out a plan of co-operation for the construction of bridges at the points named, none of which it appears is on a state or county road, but all of which are located on city streets; that this committee reported that the terms of said co-operation had been agreed upon; that a resolution declaring it necessary to issue bonds for the purpose of initiating the proposition to be voted upon by the people of the city was passed, in which it was recited that the bonds were to be issued for the purpose I have quoted in the caption of this opinion; that the notice of election recited the purpose thereof in the same words; that after the approval of the proposition by a two-thirds vote of the electors an ordinance to issue bonds was passed, in which the purpose of the issue was recited in the same terms.

There is no authority for the issuance of bonds by a city for the purpose of building bridges in co-operation with the county commissioners of the county. There is no authority indeed for the commissioners and the city to unite or to co-operate in the construction of bridges, regardless of how the funds may be raised to pay the respective shares of the cost of such an enterprise.

It seems that this point has not been entirely overlooked by the officers of the city of Sidney, as I am advised by the city solicitor that the prosecuting attorney had advised the county commissioners that this could not be done, and that the commissioners had informally communicated this advice to the city authorities. Unfortunately, however, the legislation went on in the form which I have indicated.

It is suggested that the phrase "in co-operation with the commissioners of Shelby county," or its equivalent, wherever repeated in the series of measures constituting the legislation under which these bonds are sought to be issued may be disregarded as surplusage under all the circumstances. I cannot accept this view. The purpose for which bonds are to be issued is of the very essence of the legislation for their issuance. It is not merely descriptive matter, nor does it amount to a mere recital which might be rejected as surplusage if not in accordance with the actual facts. The general assembly in limiting the power of municipal corporations to incur indebtedness has seen fit to enumerate the objects for which bonds may be issued. (See section 3939 G. C., under the assumed authortiy of which these proceedings have been had,) Legislation purporting to authorize the issuance of bonds for a purpose other than those enumerated in the statute is simply invalid, and its invalidity cannot be avoided by showing that in point of fact the proceeds of the bonds are intended to be used for a purpose within the catalogue of objects mentioned in the statutes.

To be sure, it might be argued that council cannot be presumed to have deliberately undertaken to pass a void ordinance, and that the people of the city cannot be presumed to have deliberately approved a void proposition, so that by construction the ordinance should be given such meaning as to make it valid. This principle would have to be stretched beyond its natural scope, however, in order to save the ordinance under consideration, because it would require the rejection of essential language in order to apply it.

Under all the circumstances, therefore, I feel compelled to advise that the bonds in question if issued would not be valid obligations of the city of Sidney.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1378.

APPROVAL OF BOND ISSUE OF HARLEM TOWNSHIP RURAL SCHOOL DISTRICT, DELAWARE COUNTY—$2,350.00.

COLUMBUS, OHIO, August 1, 1918.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In re bonds of Harlem township rural school district, Delaware county, Ohio, in the sum of $2,350.00, for the purpose of building and equipping a new school house in said school district.

I have carefully examined the corrected transcript of the proceedings of the board of education of Harlem township rural school district, Delaware county, Ohio, relating to the above issue of bonds. Said issue is one under the authority of section 7629 G. C. I find the proceedings of the board of education of this

school district, relating to this bond issue, to be in conformity to the provisions of the section of the General Code above noted, and to the provisions of all other sections of the General Code touching the question of the validity of the bonds provided for in this issue. I am therefore of the opinion that properly prepared bonds, covering the above issue, will, when the same are executed and delivered, constitute valid and binding obligations of said school district, to be paid in accordance with the terms thereof.

The bond form submitted with and as a part of the corrected transcript, is not entirely satisfactory to me. I am therefore holding said transcript until a proper bond form is submitted and approved.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1379.

APPROVAL OF BOND ISSUE OF LUCAS COUNTY—$60,300.00.

COLUMBUS, OHIO, August 1, 1918.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In re bonds of Lucas county, Ohio, in the sum of $60,300.00, to pay the respective shares of Adams and Springfield townships and of the owners of benefited property assessed for the improvement of the Toledo-Wauseon inter-county highway No. 20.

I have carefully examined the corrected transcript of the proceedings of the board of county commissioners of Lucas county, Ohio, and of other officers relating to said bond issue, and to the improvement for the construction of which said bonds are issued.

I find said proceedings to be in conformity to the provisions of the General Code relating to bond issues of the kind here under consideration, and I am therefore of the opinion that bonds covering the above issue will, when the same are prepared according to the resolution providing for their issue and according to the bond form submitted, and executed and delivered, constitute valid and binding obligations of said county to be paid in accordance with the terms thereof.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1380.

APPROVAL OF SPECIFICATIONS AND CONTRACT BETWEEN FRANK TEJAN AND SUPERINTENDENT OF PUBLIC WORKS.

COLUMBUS, OHIO, August 1, 1918.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of recent date in which you enclose specifications and contract with Frank Tejan for the repair of a concrete spillway

at Station 237, O. & E. Canal, south of Akron, Ohio, and for a concrete spillway at Barberton, Ohio.

I have examined these two specifications and contracts carefully, and find them correct in form and legal, and further find that said Frank Tejan has complied with all the provisions of law relating to public contractors.

I have therefore endorsed my approval upon the same, and am returning them to you.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

1381.

APPROVAL OF BOND ISSUE OF DELAWARE COUNTY—$10,500.00.

COLUMBUS, OHIO, August 5, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In re bonds of Delaware county, Ohio, in the sum of $10,500.00, to pay the respective shares of Berkshire and Kingston townships and of the benefited property assessed of the cost and expense of constructing the road improvement in said county and townships.

I have carefully examined the transcript of the proceedings of the board of county commissioners of Delaware county, Ohio, relating to the above bond issue, and find the same to be in conformity with the provisions of the General Code of Ohio relating to bond issues of this kind.

I am therefore of the opinion that properly prepared bonds covering said issue will, when the same are properly executed and delivered, constitute valid and binding obligations of said county to be paid in accordance with the terms thereof.

No bond form of the bonds to be printed covering said issue has been submitted for my approval. I am retaining said transcript until a proper bond form has been submitted and approved.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1382.

APPROVAL OF BOND ISSUE OF DELAWARE COUNTY—$26,400.00.

COLUMBUS, OHIO, August 5, 1918.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In re bonds of Delaware county, Ohio, in the sum of $26,400.00, to pay the respective shares of Kingston township and of the owners of benefited

property assessed of the cost and expense of constructing the Roseerauz road improvement in said county and township.

I have carefully examined the transcript of the proceedings of the board of county commissioners of Delaware county, Ohio, relating to the above bond issue, and find the same to be in conformity with the provisions of the General Code of Ohio relating to bond issues of this kind.

I am therefore of the opinion that properly prepared bonds covering said issue will, when the same are properly executed and delivered, constitute valid and binding obligations of said county to be paid in accordance with the terms thereof.

No bond form of the bonds to be printed covering said issue has been submitted for my approval. I am retaining said transcript until a proper bond form has been submitted and approved.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1383.

APPROVAL OF BOND ISSUE OF MONCLOVA RURAL SCHOOL DISTRICT, LUCAS COUNTY—$25,000.00.

COLUMBUS, OHIO, August 5, 1918.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In re bonds of Monclova rural school district, Lucas county, Ohio, in the sum of $25,000, for the purpose of enlarging, erecting and furnishing an additional school house in said school district.

I have made a careful examination of the transcript of the proceedings of the board of education and other officers of Monclova township rural school district, Lucas county, Ohio, relating to the above issue of bonds purchased by you by resolution under date of July 31, 1918, and find said proceedings to be in conformity to the provisions of the General Code of Ohio relating to bond issues of this kind. I am therefore of the opinion that properly prepared bonds covering the above issue will, when the same are executed and delivered, constitute valid and binding obligations of said school district, to be paid in accordance with the terms thereof.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1384.

BOND ISSUES OF DELAWARE COUNTY.

COLUMBUS, OHIO, August 5, 1918.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In re Delaware county road bonds.

Under date of May 22, 1918, you adopted a resolution providing for the pur-

chase of seven issues of Delaware county road bonds covering the cost and expense of the same number of road improvements in said county. After some delay completed transcripts of the proceedings relating to these bond issues were furnished to this department and opinions were prepared approving each of said said issues so far as their conformity to laws of this state were concerned. However, the aggregate of these issues exceeded $100,000, and inasmuch as these bonds were authorized since the act of congress providing for the functions of the capital issues committee was enacted, it was found necessary to have the approval of that committee as to the amount of said bond issues in excess of $100,000. I was informed yesterday by Mr. Young, the county auditor, that the necessity of submitting this matter to the capital issues committee would be obviated, inasmuch as there was an accumulation in the county road fund sufficient to permit the county commissioners to withdraw one of these bond issues, and I was informed that the county commissioners would withdraw the bond issue with respect to the Wilson road improvement in the sum of $7,200.00. In order to clear your records, as well as those of this department, with respect to this bond issue, I suppose a resolution should be adopted rescinding the purchase of this bond issue.

I am sending you opinions approving the other six bond issues covered by your resolution.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1385.

BOARD OF EDUCATION HAS NO AUTHORITY TO ISSUE BONDS TO PURCHASE WAGON FOR TRANSPORTATION OF PUPILS.

DISAPPROVAL OF BOND ISSUE OF EDEN TOWNSHIP RURAL SCHOOL DISTRICT, WYANDOT COUNTY.

COLUMBUS, OHIO, August 7, 1918.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

> In re bonds of Eden township rural school district, Wyandot county, Ohio, in the sum of $20,000, for the purpose of equipping and furnishing a newly constructed school house therein and for the purpose of procuring wagons for the conveyance of pupils.

I have carefully examined the transcript of the proceedings of the board of education and other officers of Eden township rural school district, relating to the above bond issue and regret to say I am unable to approve the same.

This proposed issue of bonds is one on the affirmative vote of the electors of the school district and under the assumed authority of section 7625 of the General Code. The purpose of said issue, as disclosed in the resolution of the board of education providing for the submission of the question to the electors, is as follows:

> "*Be it resolved* for the proper accommodation of the schools of said district, it is necessary to furnish said school house by completely equipping the same for school purposes, which equipment shall consist of a sani-

tary toilet system and disposal plant, according to the plans and specifications by the architects, Howard & Merriam, of Columbus, and such school furniture as desks, cupboards, chairs, tables, blackboards, wagons for the conveyance of pupils and a lighting system and a vacuum cleaning system so that said furnishings shall completely equip said school house; that the probable amount of money necessary to accomplish said purposes be, and the same is hereby determined by this board to be the sum of $20,000.''

The notices that were posted of said election stated the purposes of said bond issue in terms quite identical to those contained in the resolution above quoted. In other words, the purposes of this proposed bond issue are to equip and furnish a school house in said school district and to procure wagons for the conveyance of pupils.

The bond issue proposition was submitted to the electors as a single proposition for the issue of bonds in a specified amount covering said stated purposes, and inasmuch as there is nothing in the provisions of section 7625 of the General Code, authorizing the board of education to issue bonds for the purpose of obtaining money to procure wagons for the transportation of pupils, and as no means are available for ascertaining what portion of said proposed bond issue was voted and is to be issued for such unauthorized purpose, it necessarily follows that the whole bond issue proposition is illegal by reason of the inclusion of said unauthorized purpose in the purposes for which the bonds were voted and provided for by the subsequent resolution of the board of education.

You will undoubtedly recall that the question above discussed was involved in consideration of the validity of the bonds of Belle Center village school district, Logan county, Ohio, which were disapproved by this department for the reasons above stated in Opinion 464, under date of July 23, 1917. In the opinion above referred to I followed the decision in the case of Shell vs. Bevier, et al., in the common pleas court of Crawford county, which was decided very shortly before the opinion with respect to the Belle Center village school district bonds was written. You will also recall that the same question was involved in a consideration of the validity of the bonds of Phillipsburg village school district, Montgomery county, Ohio, which were disapproved by this department in Opinion No. 1285, under date of June 17, 1918.

I note some further defects in the transcript of the proceedings relating to the bond issue. These defects are of such a nature that they can probably be cured by further information, but inasmuch as this proposed issue must be held to be invalid for the reasons above stated, it will serve no useful purpose so far as you are concerned, to note the other defects in the transcript.

For the reasons above stated, I am compelled to advise you not to accept said bonds. The transcript submitted to me is enclosed with this opinion.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1386.

APPROVAL OF BOND ISSUE OF MIDDLETOWN—$20,000.00.

COLUMBUS, OHIO, August 8, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

In re bonds of the city of Middletown, Ohio, in the sum of $20,000.00, for the purpose of improving, repairing and securing a more complete enjoyment of the waterworks utility of said city.

GENTLEMEN:—I have made a careful examination of the transcript of the legislative proceedings of the city commission of the city of Middletown, Ohio, relating to the above issue of bonds and find said proceedings to be in conformity to the provisions of the General Code of Ohio, regarding bond issues of this kind, and likewise in conformity to the provisions of the charter of said city.

I am therefore of the opinion that properly prepared bonds covering the above issue will, when the same are executed and delivered, constitute valid and binding obligations of said city, to be paid according to the terms thereof.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1387.

APPROVAL OF BOND ISSUE OF HURON COUNTY—$98,000.00.

COLUMBUS, OHIO, August 8, 1918

Industrial Commission of Ohio, Columbus, Ohio.

In re bonds of Huron county, Ohio, in the sum of $98,000.00, in anticipation of the collection of taxes and assessments to pay the respective shares of Huron county, of Lyme and Ridgefield townships and of the owners of benefited property assessed, of the cost and expense of improving designated section of I. C. H. No. 289 in said county and townships.

GENTLEMEN:—I have carefully examined the corrected transcript of the proceedings of the board of county commissioners of Huron county, Ohio, and of other officers, both federal and state, relating to the above issue of bonds, and finding said proceedings to be in conformity to the provisions of the General Code of Ohio relating to bond issues of this kind, and finding further that the purpose of said issue has been approved by the capital issues committee of the federal reserve board, said issue is hereby approved by this department.

In the consideration of the proceedings relating to this issue of bonds, I find only one matter upon which any question of any kind can be made. The question referred to arises out of the action of the board of county commissioners, by resolution under date of March 25, 1918, providing for the portion of the cost and expense of this improvement to be paid by the owners of benefited property. This resolution, which was adopted under the assumed authority of section 1214 G. C., as amended in the White-Mulcahy act (107 O. L. 129), provides that ten

per cent. of the entire cost of the construction and improvement of that portion of the section to be improved, located in Lyme township, shall be assessed against the real estate within one mile of either side of said improvement, and that twenty-five per cent. of the entire cost of that portion of the improvement located in Ridgefield township shall be assessed against the real estate within one mile of either side of said improvement.

Under the provisions of section 1214 G. C., as amended in the act above referred to, the county commissioners, by unanimous action of all members of the board, have authority to provide for the assessment of a designated portion of the cost and expense of the improvement against property located within one mile of either side of the improvement, as was done in this case, and by like unanimous action the county commissioners have authority to increase the portion of the cost and expense to be borne by benefited property over and above the portion which in the absence of such action is imposed by law.

Inasmuch, however, as this improvement, though located in part in each of the townships above mentioned, is but a single improvement, I doubt whether the county commissioners had any authority to provide for a greater assessment of the cost and expense of such improvement on the benefited property located in one of said townships, than that assessed upon the benefited property located in the other township. I do not find it necessary, however, to express any opinion on this question, for the reason that the same is wholly immaterial to the question of the validity of this issue of bonds by Huron county for the purpose above stated.

Aside from the provisions of sections 5630-1 G. C., which make bonds of this kind full, general obligations of the county, it will be noted that these bonds are for the purpose of paying the aggregate shares of said county and townships and of the owners of benefited property, of the cost and expense of this improvement.

The shares of the cost and expense of this improvement to be paid by Lyme and Ridgefield townships, respectively, are fixed by agreements between the trustees of said townships and the board of county commissioners, and therefore the share of the cost and expense of the improvement to be borne by the owners of benefited property is wholly a question between such owners and the county.

As I see it, the resolution of the board of county commissioners, above noted, apportioning the part of the cost and expense of this improvement to be borne by the benefited property in each of these townships, is either valid or invalid. If the same is invalid, the law, to the extent that such resolution may be invalid, fixes the amount that is to be borne by the benefited property, and to that extent increases the amount to be borne by the county itself. But in any event, it seems clear to me that no question with respect to the validity of these bonds is presented by any question that may arise between the county and the owners of benefited property as to the validity of the resolution of the county commissioners, above noted, either in whole or in part.

This being my view on the only question of any kind presented on a consideration of the proceedings set out in the transcript, I am of the opinion that said issue is in all respects valid and that bonds covering said issue will, when the same are properly prepared, executed and delivered, constitute valid and binding obligations of said county, to be paid in accordance with the terms thereof.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1388.

APPROVAL OF AGREEMENT BETWEEN BOARD OF TRUSTEES OF THE BOWLING GREEN STATE NORMAL COLLEGE AND LOUIS BRANDT.

COLUMBUS, OHIO, August 8, 1918.

HON. H. B. WILLIAMS, *President State Normal College, Bowling Green, Ohio.*

DEAR SIR:—You have submitted to this department supplemental agreement entered into between the board of trustees of the Bowling Green State Normal College and Louis Brandt, landscape architect, calling for the payment of the sum of two hundred dollars for the purpose of furnishing first party a competent engineer in the completion of the contract of The Finch Engineering Co., said Brandt agreeing to furnish a competent engineer at the rate of $150.00 per month, to be paid from the said $200.00.

Having received from the auditor of state a certificate that there is money available for the purpose of said contract, I have this day approved the same and filed the same in the office of the auditor of state.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1389.

APPROVAL OF ABSTRACT OF TITLE OF LOT 85 IN WOOD BROWN PLACE —MARGARET A. GALBRAITH.

COLUMBUS, OHIO, August 8, 1918.

HON. CARL E. STEEB, *Secretary Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—I am in receipt of an abstract of title for the following described real estate, situated in Franklin county, Ohio, and being lot No. 85 of the Wood Brown place as the same is numbered and delineated on the recorded plat thereof, found in Plat Book 5, pages 196 and 197, in the recorder's office, Franklin county, Ohio.

I have carefully examined said abstract and find no defects in the title to said real estate as disclosed thereby. There are no incumbrances against said real estate excepting the taxes for the year 1918 which are a lien and as yet undetermined, and excepting assessment for the Ridgeway improvement on the five-year five per cent. plan, of which three installments remain unpaid amounting in all to thirty cents; the third installment of ten cents will be due in June, 1919.

I am of the opinion that said abstract discloses a good and sufficient title in fee simple in Margaret A. Galbraith to said lot No. 85 above mentioned.

I am returning the abstract herewith.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1390.

APPROVAL OF ABSTRACT OF TITLE—MARGARET A. GALBRAITH.

COLUMBUS, OHIO, August 8, 1918.

HON. CARL E. STEEB, *Secretary Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—I am in receipt of an abstract of title dated July 25, 1918, for certain real estate located in Clinton township, Franklin county, Ohio, of which the following described real estate is a part, to wit:

> "Being a part of Quarter township number three (3), township number one (1), range eighteen (18), United States Military Lands. Beginning at the point of intersection of the center line of Lane avenue and the center line of Fleniken pike, thence with the center line of Lane avenue westerly five hundred fifty-one (551) feet to a stake at the northeast corner of lands of William Salzgaber; thence southerly along the east line of said lands of William Salzgaber and parallel with the center line of Fleniken pike three hundred sixty-nine and seven-tenths (369.7) feet to the north line of lands now owned by said state of Ohio; thence easterly along the north line of said lands last mentioned and parallel with the center line of Lane avenue five hundred fifty-one (551) feet to the center line of Fleniken pike; thence northerly with the center line of Fleniken pike three hundred sixty-nine and seven-tenths (369.7) feet to the point of beginning, containing four and sixty-five hundredths (4.65) acres, more or less."

I have carefully examined said abstract and find no material defects in the title to said real estate as disclosed thereby. No encumbrances are shown against said real estate, excepting the taxes for the year 1918, which are a lien, but are as yet undetermined as to amount, and excepting assessments for the improvement of Ridgeview road, which were for five annual payments, of which two have been paid, leaving the remaining installments, amounting to $8.34 with 5% interest, said next installment with interest being due in June, 1919.

I am therefore of the opinion that said abstract disclosed on July 25, 1918, at eight o'clock a. m., a good and sufficient title in Margaret A. Galbraith to said above mentioned real estate, which is particularly described above.

I am returning herewith the abstract for said property.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

1391.

APPROVAL OF BOND ISSUE OF SENECA COUNTY—$41,000.00.

COLUMBUS, OHIO, August 8, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

In re bonds of Seneca county, Ohio, in the sum of $41,000.00, for the purpose of paying the respective shares of said county, of Loudon town-

ship and of the owners of benefited property assessed, of the cost and expense of improving section B-1 of the Tiffin-Fostoria I. C. H. No. 270 improvement, located in said county and township.

GENTLEMEN:—I have made a careful examination of the proceedings of the board of county commissioners of Seneca county, Ohio, and of other officers relating to the above issue of bonds as disclosed by the corrected transcript of said proceedings submitted to this department. As the result of such investigation I find that said proceedings are in conformity to the provisions of the General Code of Ohio relating to bond issues of this kind, and I am therefore of the opinion that properly prepared bonds covering the above issue will, when the same are executed and delivered, constitute valid and binding obligations of said county, to be paid in accordance with the terms thereof.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1392.

CHIEF CLERK IN ADJUTANT-GENERAL'S OFFICE ENTITLED TO EXTRA COMPENSATION FOR SERVICE PERTAINING TO WAR EMERGENCY.

Where the chief clerk in the adjutant general's department renders services upon the order and request of the governor of the state pertaining to the war emergency, she is entitled to receive compensation for such services rendered, to be paid out of the appropriation for the war emergency.

COLUMBUS, OHIO, August 10, 1918.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—You have submitted to me a claim presented by V. F. N., chief clerk in the department of adjutant-general, and ask my opinion as to whether the same is legal and whether you would be warranted in issuing a warrant in favor of her for the same.

In order to get a correct understanding of this claim, it will be necessary for us to note a few matters connected therewith. On July 5, 1918, the governor of Ohio, Hon. James M. Cox, issued the following special order:

> "V. F. N., adjutant-general's department, in addition to her duties as chief clerk, will take care of extra and additional duties assigned her, as per verbal and written instructions of the governor of Ohio.
> The expense incurred is necessary in the military service."

Attached to the claim of V. F. N. there is a statement as follows:

> "On account of appropriation for War Emergency House Bill 593, amount $89.76."

Also the following certificate of Hon. James M. Cox:

> "I certify that the within account is correct, that the articles or services charged therein were required and furnished on account of the

purpose above mentioned; and the same were necessary therefor, and that the charges were reasonable.

(Signed) JAMES M. COX,
Governor."

Also the following:

"*To the Honorable Auditor of State, Columbus, Ohio.*

The within account is hereby approved. Pay from appropriation for War Emergency House Bill 593.

(Signed) V. F. NANGLE,
Acting Adjutant-General."

I think all the above matters will have to be kept clearly in mind in arriving at a conclusion as to whether you would be authorized in law in issuing your warrant in favor of V. F. N. in the amount of $89.76 for services rendered by her upon the instance and request of the governor of Ohio.

This case must be clearly distinguished from one in which an officer or employe is given certain additional duties by the electing or appointing body, or by the head of the department in which she serves. The courts are almost uniform to the effect that the mere addition of duties to those which an officer or employe has theretofore been performing is no warrant whatever for a claim being made for additional compensation.

It can be noted further that this principle would apply with peculiar force to the matter under consideration. V. F. N. is not a statutory official, she being merely an employe, and has no specific duties outlined in the law; hence, she could not say that she had certain duties to perform and should be required to perform only those duties. Her duties are such as may be assigned to her by the adjutant-general from day to day and from time to time.

But as said in the beginning, this case as presented is not such an one as we have been considering in this opinion. In this case V. F. N. is given additional duties to perform by the governor of the state, to be paid for out of the war emergency appropriation, as found in House Bill No. 593, page 619 of 107 Ohio Laws, and not to be paid from the allowance made to the adjutant-general's department. These duties for which V. F. N. claims compensation were duties performed by her in a sense outside of the department of the adjutant-general, and within the department of the governor of the state. If she had the time and wished to perform said services in accordance with the orders of the governor, I see no reason why she could not have performed them, and why she would not be entitled to pay for the performance of the same. The governor certified that the services were rendered, and that the reasonable value of said services is $89.76, and that the same should be paid from the war emergency appropriation made in said House Bill No. 593.

In view of all the above I would advise that you are authorized in law to issue your warrant in favor of V. F. N. in the amount of $89.76.

In passing, I might suggest that inasmuch as this money is to be paid from the war emergency appropriation for the governor, and inasmuch as there is no such an officer as acting adjutant-general, it would be better if the governor himself would sign the voucher rather than, as it is signed, by V. F. Nangle, acting adjutant-general.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

1393.

ROADS AND HIGHWAYS—FORCE ACCOUNT—STATE HIGHWAY COMMISSIONER ISSUES REQUISITION AGAINST COUNTY'S SHARE OF THE COST UNTIL SUCH FUND IS EXHAUSTED—ADDITIONAL COST OVER CONTRACT PRICE PAID BY HIGHWAY COMMISSION—LIABILTY OF CONTRACTOR AND SURETY.

(1) *In completing an improvement under the provisions of section* 1209 *G. C. the state highway commissioner issues his requisitions against the county only to the point at which the fund is exhausted which the county commissioners in their agreement with the state assumed in reference to said improvement.*

(2) *If the improvement costs more than the original contract price, then the state highway commissioner must make some arrangements to take care of the added cost and expense of the improvement up until the time when the same may be completed.*

(3) *When the improvement is completed, then the difference between the total cost and expense of the improvement and the contract price is recovered from the contractor and his surety.*

COLUMBUS, OHIO, August 10, 1918.

HON. R. A. KERR, *Prosecuting Attorney, Troy, Ohio.*

DEAR SIR:—I have your communication of July 22, 1918, which reads as follows:

> "Acting under authority of General Code, section 1209, the state highway commissioner has taken over the work on one of the inter-county highways and is completing it, or having same done, and there has now been expended almost all of the amount for which the original contract was let, and the county commissioners and auditor wish instructions as to the payment on bills for said road after the above amount has been expended. From an examination of the above section it is evident that the bondsman must make up the difference, but the amount is necessarily undetermined until the road is completed. It appears to me that the only proper way to handle it is to continue the payment of the bills as heretofore and carry it in the form of an overdraft until the road is completed, but as the road is a state proposition, we would like your opinion before proceeding.
>
> Suppose also that for some reason the bondsman could not be held or was not financially responsible, then would the state be required to pay its portion of the excess cost or would the county be required to bear the entire amount?"

In answering your questions set out in your communication, I am going to consider that the improvement is one which would be controlled by the White-Mulcahy law, and the quotations which I make will be made from said law. But the principles involved would be the same whether it is an improvement under the White-Mulcahy law or under the Cass act.

In order to answer your questions intelligently it will be well for us to note the principles which seem to control in the matter of apportioning the cost and expense of an improvement among the state, county, township and abutting poperty owners.

Section 1211 G. C. reads as follows:

> "Upon completion of the improvement the state highway commissioner shall immediately ascertain the cost and expense thereof, and apportion the same to the state, county, township or townships and abutting property. He shall certify the total cost and expense of the improvement and his apportionment thereof either to the county commissioners or to the trustees of the township upon whose application the improvement was made."

The particular thing to which I desire to call attention in reference to this section is that when a road improvement *is completed*, then the state highway commissioner shall immediately ascertain *the cost and expense thereof*, and apportion the same. This section further provides that he shall certify *the total cost and expense* of the improvement.

Section 1214 G. C. provides as follows in reference to the apportionment of that part of the cost and expense of an improvement over and above that which the state shall assume and agree to pay, and is in part as follows:

> "The county shall pay twenty-five per cent. *of all cost and expense of the improvement.* Fifteen per cent. of the cost and expense of such improvement * * * * * shall be apportioned to the township or townships in which such road is located. * * * * * Ten per cent. of the cost and expense of the improvement * * * * * * shall be a charge upon the property abutting on the improvement."

The provisions of section 1213 G. C. are similar in form to the particular matters quoted from sections 1211 and 1214. From all these sections it is to be noted that the total cost and expense of an improvement is apportioned among the state, county, township and abutting property owners; that is, each one of these parties pay a certain proportion of the cost and expense of an improvement.

With this in mind, let us go further and note some provisions in reference to the contractual relations existing between the contractor and the state, and the county interested in the improvement.

Section 1218 provides that:

> "No contract shall be let by the state highway commissioner in a case where the county commissioners or township trustees are to contribute a part of the cost of said improvement, unless the county commissioners of the county in which the improvement is located shall have made a written agreement to assume in the first instance that part of the cost and expense of said improvement over and above the amount to be paid by the state."

This is the only agreement signed by the county commissioners. They are not in any respect a factor in the contract that is made in reference to the improvement itself. And it is further to be noted that this agreement entered into by the county commissioners is based entirely upon only an estimated cost of the improvement. This is quite evident from the fact that it must be made before the state highway commissioner can enter into the contract for the construction of said improvement. After this agreement upon the part of the county commissioners is made, the state highway commissioner then proceeds to enter into a contract for the construction of the improvement.

To be sure, if the improvement is completed by the one who enters into the contract with the state according to the terms of the contract, then in that event, the state, the county, the township and the abutting property owners will be called upon to pay their proportionate share of the contract price.

But supposing that one who enters into the contract fails to complete the improvement according to the plans and specifications. Then in that event, the state highway commissioner, under the provisions of section 1209 G. C. takes the same over and completes it by letting a new contract by force account, or in whatever manner he may deem for the best interests of the public. In this case how is the improvement to be paid for? We find the provisions in section 1209, (1) he paying the full costs and expense thereof from the balance of the contract price unpaid to said contractor, and (2) in the event that there is not a sufficient balance to pay for said work, the state highway commissioner shall require the contractor or the surety on his bond to pay the cost of completing said work.

If the state highway commissioner can complete the contract and keep the cost and expense within the consideration set forth in the contract itself, then the state, county, township and abutting property owners would pay their proportion of said cost and expense. But supposing the state highway commissioner cannot complete the improvement and keep the cost and expense thereof within the consideration mentioned in the contract, then what course will be pursued? This question has caused considerable trouble from the very fact set out in your communication, namely, that the state highway commissioner cannot recover from the contractor and his surety the difference between the total cost and expense of the improvement, and that set out in the contract until after the contract is completed.

But, at all events, in the first instance the state highway commissioner must pay the full cost and expense thereof; that is the provision of the statute. He pays it first up to the limit of the contract price. When the cost and expense goes beyond this, he must make provision for the same. The last session of the legislature made this provision: It created a rotary fund of $50,000 to which the state highway commissioner might resort for the necessary funds to enable him to complete a contract, then when he recovers the difference from the contractor and his surety, this amount is returned to the rotary fund. But whatever arrangements may be made by the state, or by the state highway commissioner to take care of these differences, the county in no event is liable for the same until the improvement is fully completed. In other words, the state highway commissioner issues his requisitions against the county auditor only up until the time that the amount is exhausted for which the county obligated itself in its final resolution or agreement with the state highway commissioner. Of course, the county has made arrangements for this amount and the same is in the treasury, and hence the county will have no difficulty in meeting its obligation up to this point.

After the improvement is fully completed, we have two different conditions confronting us. Suppose the state highway commissioner is able to recover from the contractor and his surety the difference between the total cost and expense of the improvement and the original contract price. If these conditions obtain, of course, no one would suffer. The state, county, township and abutting property owners would simply bear their proportionate share of the contract price of the improvement. That is, even though the road as fully completed costs more than that provided for in the contract, then in that event, the state highway commissioner would recover the difference from the contractor and his surety, and the state, county, township and abutting property owners would not be called upon to pay more than their proportionate parts of the contract price of the improvement.

But, supposing the state highway commissioner is not able to recover the difference from the contractor and his surety, due to the fact that they are insolvent, then what result will follow? Will the county bear the total difference, or will the state bear the total difference? Or will the state and the county share in this added burden?

Inasmuch as this is a question of considerable importance, and inasmuch as it is merely a supposition upon your part, and not an actual state of facts, I have decided not to answer the same at this particular time, but will reserve my opinion to the time when this state of facts actually exists, at which time I shall be pleased to answer your question if you call my attention to the same.

Yours very truly,

JOSEPH MCGHEE,
Attorney-General.

1394.

COUNTY COMMISSIONERS MAY RELEASE CONTRACTOR FROM CONTRACT WHEN ORDERS OF FEDERAL GOVERNMENT MAKE PERFORMANCE IMPOSSIBLE.

In a case where the federal government has made it impossible for a contractor to comply with the terms of his contract with a board of county commissioners for and during the period of the war, the county commissioners, if they deem it for the best interests of the county, may exonerate him from the performance of that part of his contract which is rendered impossible of performance due to the orders of the federal government.

COLUMBUS, OHIO, August 10, 1918.

HON. BENTON G. HAY, *Prosecuting Attorney, Wooster, Ohio.*

DEAR SIR:—I have your communication of July 30, 1918, which reads as follows:

> "The county commissioners some time ago made a contract for the improvement of a county road which improvement was to have been of bituminous macadam. The contractors have done a good part of the work except the construction of a bituminous top, and find that they cannot construct the improvement with a bituminous top for the reason that the United States highway council have refused the contractors' application for the necessary products.
>
> It will be necessary to abandon this improvement during the continuance of the war, unless a change be made from a bituminous top to a water-bound macadam top. The contractors are willing to abandon this part of the work and to allow the commissioners to readvertise for bids for the construction of a water-bound macadam top; the contractors to complete the other part of their work according to agreement."

The answer to your question can possibly be based better upon the following principle of law than upon any other, namely:

> "To the general rule that a party to a contract is not discharged by subsequent impossibility of performance, there is an exception where the

performance becomes impossible by law, either by reason of (1) a change in the law, or (2) by some action by or under the authority of the government. In such cases the promisor is discharged."

This principle is laid down in Cyc. the 9th volume thereof, page 629. This principle seems to be supported by authorities therein cited.

In the question submitted by you it is impossible for the contractor to complete his work according to the terms of the contract, in that the contract calls for a bituminous top dressing to the highway under construction, and the federal government has refused the use of tar products in the building of roads, excepting under certain circumstances and conditions, which do not apply to your case. Further, you state this condition will obtain until the close of the war, which, of course, is indefinite in time.

In Cordes vs. Miller, 39 Mich. 581, the court was deciding a question of this nature. Cordes leased to Miller for a term of ten years a wooden building in Grand Rapids at a specified annual rent. The lease contained a covenant on the part of Cordes that "if said building burns down during the lease, said Cordes agrees to rebuild the same in a suitable time for said Miller." The building burned, but in the meantime the council of the city of Grand Rapids had enacted an ordinance forbidding the erection of wooden buildings. The court held that Cordes was not compelled to rebuild for the reason that he was forbidden so to do by said action of council, that he was not compelled to put up a new building of some more substantial material than wood and turn same over to Miller for the same rental. That he was released from the obligations of his contract. In the syllabus the court say:

"A covenant in the lease of a wooden building, binding the landlord to rebuild in case it burns, is released by the passage of a valid municipal ordinance forbidding the erection of wooden buildings."

It will be noted that this case is very similar in facts to the case under consideration.

In Leopold vs. Salkey, 89 Ill. 412, we find the following principle:

"Where the failure to perform a contract is in respect to matters which would render the performance of the residue a thing different in substance from what was contracted for, the party not in default may abandon the contract."

In Hughes vs. Wamsutta Mills, 11 Allen, 201, this principle is stated:

"An arrest, conviction and imprisonment for crime will exonerate a workman from the duty of giving to his employers two weeks' notice before leaving their service, under a contract by the terms of which he has agreed to give such notice, or not claim any wages due."

In People vs. The State Mutual Life Ins. Co. 91 N. Y. 174, the court lays down the following principle:

"When a registered policy life insurance company is restrained by an order of the court from further prosecuting its business and a receiver is appointed, a contract entered into by it with a general agent for his services for a specified term, is thereby annulled by the action of the state

and he has no cause of action for non-performance by the company thereafter. A liability to such dissolution must be deemed to have been an unexpressed condition of the contract."

In the opinion on page 176 the court uses the following language:

"What had happened was a dissolution of the contract by the sovereign power of the state, rendering performance on either side impossible."

Other cases might be quoted to establish the principle herein being considered, but it is probably not necessary so to do.

There is one condition attached to the above principle which ought to be noted at this time, and that is that a mere temporary disability to perform the obligations of the contract, due to the fact of some law, or due to the enforcement of a law already enacted, will not permit a party to a contract to refuse to perform his obligations.

In Baylies vs. Fettyplace, 7 Mass. 325, the court laid down this principle:

"The laws of the United States, laying an embargo for an unlimited time, and afterwards repealed, did not extinguish a promise to deliver debentures, but operated a suspension only during the continuance of those laws."

On page 338 in the opinion the court say:

"Now it is clearly settled, by innumerable authorities, that whenever a contract, which was *possible* and *legal* at the time it was made, becomes *impossible* by the act of God, or illegal by an order of the state, the obligation to perform it is discharged; or if such ordinance be temporary, the obligation is suspended during its continuance."

In Hadley vs. Clarke, 8 T. R. 259, the court say:

"The defendants contracted to carry the plaintiff's goods from Liverpool to Leghorn. On the vessel's arriving at Falmouth in the course of her voyage, an embargo was laid on her 'until the further order of council.' Held that such an embargo only suspended, but did not dissolve the contract between the parties, and that even after two years, when the embargo was taken off, the defendants were answerable to the plaintiff in damages for the non-performance of their contract."

In view of the above principles, what answer can be given to the question submitted by you? In the first place, let me say it is my opinion that the contractor in your case could not demand as against the wishes of the county commissioners that he be released from the obligations which he has assumed. The order made by the federal government is from the very necessity of the case merely temporary in nature, and while the county commissioners could not compel the contractor to place upon the road a bituminous top covering during the period of the war, yet after the war closes the county commissioners, if they so desire, undoubtedly could hold the contractor to the obligations entered into by him in his contract with the county.

But, suppose the county commissioners do not desire to hold in abeyance the performance of this contract until the time that the war ceases and the order of

the federal government is removed. What then are their rights? It seems to me clear that from the principle first above laid down that if the county commissioners and the contractor both agree that it would be for the best interests of all parties concerned that the obligation in reference to a bituminous top dressing should be waived, and if the county commissioners and the contractor can agree as to the amount that should be paid to the contractor for the work performed by him under the contract other than for the top dressing, then the county commissioners would have authority in law to release said contractor from this obligation and could enter into a new contract either with the same contractor or with another on due advertising to place upon the said improvement a water-bound covering instead of a bituminous covering.

That the county commissioners have authority in law to enter into such an arrangement with the contractor seems clear from the decision of the court in State ex rel. Jewett vs. Sayre, Auditor, 91 O. S. 85, and I would particularly refer you to the principles laid down in said case when your county commissioners come to make an arrangement with the present contractor along the lines herein suggested, if they should so decide to contract with him.

There is another matter to which I desire to call attention in reference to these changes of plans with the present contractor, and that is, that the surety company ought to agree to the modification of the plans as covered by the original contract. To be sure, the surety company could object to any such an arrangement being made, and hence it would be advisable for you to get their consent before such a change as your county contemplates, is made; or, if you do not desire to do this, your county commissioners could wait until the present contractor has fully performed the work other than the placing upon the highway the top dressing, and then exonerate the present contractor from placing thereon a bituminous top dressing, upon the county commissioners paying him the amount agreed upon. In the event that this course is followed the contractor would be released at any rate, and the surety would no longer be held at any event.

In arriving at the conclusion herein reached, I am basing it entirely upon the facts stated in your communication, and am considering that it is absolutely impossible for the contractor to place upon said road a bituminous covering. The following principle is well established:

> "A contract is not invalid, nor is the promisor discharged, merely because it turns out to be difficult, unreasonable, dangerous or burdensome."
>
> 9 Cyc. 625.

If the contractor could secure the tar products necessary to place a bituminous covering upon said road, he would be compelled to do this, even though it is difficult to secure the same, and even though the cost of said products is much higher now than when the contract was entered into; and under those circumstances the county commissioners would have no authority to release the contractor from the obligations of his contract in reference to the covering of said road.

In Baker et al. vs. Johnson, et al., 42 N. Y. 126, the court say:

> "The fact that performance of a contract is rendered more burdensome and expensive by a law enacted after it is entered into, has never been held to exonerate a party from its obligations."

Hence I am holding herein that the county commissioners may, if they deem it for the best interests of the county, exonerate the contractor from the placing

upon the road under consideration a bituminous top dressing only in the event that it is impossible for said contractor to secure the necessary products to place such a covering thereon.

Yours very truly,

JOSEPH McGHEE,
Attorney-General.

1395.

CONTRACTOR ENTITLED TO FULL COMPENSATION WHEN CONTRACT COMPLETED ACCORDING TO PLANS AND SPECIFICATIONS, ALTHOUGH HE DOES NOT USE ESTIMATED AMOUNT OF MATERIALS.

Where a contractor submits a unit bid price and the contract entered into is upon the basis of said bid, a road contractor is entitled to the full consideration set forth in the contract, if he completes the improvement according to the plans and specifications, even though he does not use the estimated amount of material.

COLUMBUS, OHIO, August 10, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio,*

DEAR SIR:—I have your communication of August 2, 1918, which reads in part as follows:

> "Permit me to direct your attention to the contract between this department and Bean & Co., for the construction of section 'a,' I. C. H. 254, Wilmington-Hillsboro road, in Clinton county.
>
> This improvement has been built in co-operation with the trustees of Green township, Clinton county, pursuant to resolution of said township trustees, copy of which I am attaching hereto.
>
> The contractor is claiming a final estimate for this work on the ground that his contract has been completed, and this department is not allowing same for the reason that 9,500 cu. yds. of crushed limestone and screenings have not been rolled and water-bound in place in the road.
>
> I am attaching hereto a copy of this contract with the request that you kindly advise me whether in your opinion its terms require the rolling and water-binding in place of 9,500 cu. yds. crushed limestone and screenings, or whether the completion of the road according to the plans, profile and specifications is sufficient to warrant a payment of a final estimate as for the completion of the work."

Briefly stated, the facts are as follows: Bean & Co. entered into a contract for the construction of section "a," I. C. H. No. 254, Wilmington-Hillsboro road in Clinton county, for the sum of $20,949.00. The road was constructed in accordance with the plans and specifications, there being no question whatever raised as to this. But the proposal made and signed by Bean & Co. estimated that it would require 9,500 cu. yds. of crushed limestone and screenings for the construction of the road in accordance with the plans and specifications made by the state highway commissioner. This estimate of 9,500 cu. yds. was made by the highway department.

In completing the road according to the plans and specifications, it was found that about 1,500 cu. yds. less than was estimated by the state highway commissioner was required; that is, instead of Bean & Co. using 9,500 cu. yds. of crushed limestone and screenings, it used about 8,000 cu. yds.

The question now is as to whether Bean & Co. is entitled to the full consideration set out in the contract, or whether there should be a reduction made in said contract price, due to the fact that the estimated quantity of crushed limestone and screenings was not used by the contractor.

In order to arrive at an understanding as to what principles control in reference to this matter, it will be necessary for us to turn to the proposal and more especially to the contract itself.

The proposal made by Bean & Co. and signed by it reads in part as follows:

"*To the State Highway Commissioner*:

> The undersigned, having full knowledge of the site, plans and attached specifications for the above improvement, hereby agrees to furnish all services, labor, materials and equipment required to complete the same by November 1, 1917, according to the plans and specifications and to accept in full compensation therefor the sum of twenty thousand nine hundred forty-nine dollars ($20,949.00)."

The proposal is to the point that Bean & Co. was to receive $20,949.00 in consideration that it should furnish all services, labor, *materials* and equipment required to complete the highway *according to the plans and specifications.* With this provision of the proposal in mind, let us turn to the contract itself and ascertain its provisions, inasmuch as they have a bearing upon the question.

A provision of the agreement is as follows:

> "That for and in consideration of payments hereinafter mentioned, to be made by the party of the first part (State of Ohio), party of the second part (Bean & Co.) agrees to furnish all materials, appliances, tools and labor and perform all the work required for roadway and pavement of section 'A' of Wilmington-Hillsboro road, I. C. H. No. 254, Green township, Clinton county, Petition No. 2186-T, state of Ohio, according to the plans and specifications and to the satisfaction and acceptance of the party of the first part."

Here again we find the provision made that Bean & Co. was to furnish *all materials* to enable it to perform the work of improving said highway *according to the plans and specifications.*

When we turn to the bond that was entered into by and between Bean & Co. and its sureties, in favor of the state of Ohio, we find this condition:

> "and will perform the work embraced therein, upon the terms proposed and within the time prescribed, and in accordance with the plans and specifications furnished therefor."

Hence we find that the proposal itself, the contract entered into by and between Bean & Co. and the state of Ohio and the contract of suretyship, all were based upon the plans and specifications; that is, the work was to be done in accordance with the plans and specifications. As said before, there is no question raised as to the work being performed in accordance with said plans and specifications.

However, the question in the mind of the state highway commissioner arises from the fact that the contract itself provided that the "approximate estimate and proposal," as well as the plans and specifications, agreement, proposal and contract bond should be an essential part of the contract. When we turn to the

"approximate estimate and proposal" we find not only the provision above quoted, but also the following:

"9,500 cu. yds. crushed limestone and screenings, rolled and water-bound in place ---------- $2.00 (Est. unit cost)----$19,000 00
(Total) ----------$18,949.00."

The question to be determined is whether Bean & Co. bound itself to put on said road 9,500 cu. yds. of crushed limestone and screenings. If it did, it is not entitled to the full consideration mentioned in the contract, because it is admitted that Bean & Co. did not use 9,500 cu. yds. of crushed limestone and screenings. This was merely an approximate estimate of the amount required.

We will consider further what this part of the proposal was intended to provide. We find this provision:

"The undersigned further agrees to accept the following 'Unit Bid Prices' in compensation for any small additions or deductions caused by any changes or alterations in the plans or specifications of the work.

(The bidder is required to fill in under 'Unit Bid Price,' a unit price for additions and deductions opposite each item for which there is a quantity given in the 'Approximate Estimate.' The 'Gross Sum' of the totals in the 'Total' column shall equal the sum (given above) bid for the work.)"

That is, Bean & Co. agreed that it would furnish any extra quantities of limestone and screenings that might be needed, due to small additions or deductions caused by any changes or alterations in the plans, at the same rate as is set out in the proposal, viz., $2.00 per cu. yd. I am of the opinion that this is the only force and effect that can be given to the provision above quoted.

Bean & Co. did not agree to use any particular amount of material, but did agree to furnish sufficient material to complete the work according to the plans and specifications and to accept in full compensation therefor the sum of money set out in the contract, viz., $20,949.00. If it had required more material to do this, than was estimated by the state highway commissioner, Bean & Co. would have been compelled to furnish it, and if it required less material than was estimated by the state highway commissioner, the contractor was not compelled to furnish it and no deductions could be made from the contract price, due to this fact.

In considering this question it must be kept in mind that 9,500 cu. yds. were merely an estimate. If the state highway commissioner had desired that the full amount of 9,500 cu. yds. of limestone screenings should be used, even though to do this it would make a depth thicker than provided for in the plans and specifications, such provision would have to be made in the contract.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1396.

APPROVAL OF ABSTRACT OF TITLE FOR LOT NUMBER 14 OF THE WOOD-BROWN PLACE, FRANKLIN COUNTY, OHIO.

COLUMBUS, OHIO, August 10, 1918.

HON. CARL E. STEEB, *Secretary Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—I am in receipt of an abstract of title for the following described

lot of land, situated in Franklin county, Ohio, and known as Lot Number Fourteen (14) of the Wood-Brown place, as shown by plat of said addition recorded in Plat Book 5, pages 196-197, recorder's office, Franklin county, Ohio, being a part of the following premises, to wit:

> "Being a part of Quarter township number three (3), township number one (1), range number eighteen (18), United States Military Lands. Beginning at a point in the center of Lane avenue, where it intersects the west line of the right of way of The Columbus, Hocking Valley and Toledo Railroad, thence running in a southerly direction with and along said west line of the right of way of said railroad to the point where it intersects the north line of the land owned by Jerry O. Lisle, thence running in a westerly direction with said Jerry O. Lisle's north line 905 feet, more or less, to a point in the center of the Scioto River and Olentangy free turnpike, thence running in a northerly direction along the center of said Olentangy and Scioto River free turnpike 1,348 feet, more or less, to the center of Lane avenue, thence running in an easterly direction with the center of Lane avenue 515 feet, more or less, to the point of beginning—containing twenty-four (24) acres of land, more or less."

I have carefully examined said abstract and find no defects in the title as disclosed thereby.

There are no encumbrances or liens upon said premises except the taxes for the last half of the year 1917, in the sum of 38 cents, and the taxes for the year 1918, which are undetermined and unpaid; also a special assessment on said premises for road improvements, amounting to 50 cents, payable in five installments. Two installments in the sum of 10 cents each are now due and unpaid together with interest amounting to the sum of 28 cents.

I am therefore of the opinion that said abstract disclosed on August 6, 1918, a good title in Rachael F. Orr to the premises hereinbefore described.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1397.

OFFICES COMPATIBLE—TOWNSHIP CLERK AND TOWNSHIP HEALTH OFFICER.

The positions of township clerk and township health officer are compatible and one man may be paid compensation for both positions.

COLUMBUS, OHIO, August 12, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your request for my official opinion upon the following question:

> "Are the positions of township clerk and township health officer compatible, and may one man be paid compensation for both positions?"

An examination of the statutes pertaining to township clerks and township health officers does not disclose any statutory prohibition against one person hold-

ing both of said offices. Neither does the constitution contain any such prohibition. In the absence of statutory or constitutional prohibition, we are relegated to the common law to discover whether or not there is any incompatibility in said offices.

Offices are considered incompatible, under the common law rule as laid down in this state, when one is subordinate to or in any manner a check upon the other, or when it is physically impossible for one person to perform the duties of both offices. The laws pertaining to these two offices do not disclose any inconsistency between them, and I am unable to see how one could in any way be a check upon the other. Therefore, I advise you that the offices of township clerk and township health officer are not incompatible and may be held by one person.

Very truly yours,

JOSEPH MCGHEE,
Attorney-General.

1398.

GOVERNOR'S DEED—WHEN ONLY ERROR OCCURRING IN DEED FOR STATE LANDS IS THE OMISSION OF CERTAIN LANDS, CORRECTION IS MADE BY MAKING DEED FOR LANDS OMITTED—NOT NECESSARY TO SECURE ANY QUIT CLAIM DEEDS.

1. *In a case wherein the state, in making a deed for certain school lands, failed to include therein certain lands for which a deed should have been made, it is necessary for the state, in correcting this error, to make a deed for only the lands which were omitted from the former deed, to the one entitled to said deed.*

2. *Where the only error in making a deed for school lands is that certain lands were omitted from the deed which should have been included therein, there is no necessity for securing quit claim deeds from any persons.*

COLUMBUS, OHIO, August 12, 1918.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I have communication from your department under date of July 15, 1918, and signed by E. L. Hyneman, deputy state supervisor of school lands, in which my opinion is requested as follows:

> "We are transmitting to you the following papers:
>
> Correspondence with Andrews & Andrews of Hamilton, Ohio; an abstract of title to the lands under consideration; a copy of a final certificate on file in this office to the lands under consideration; a copy of a deed from the state of Ohio to William Jones covering the lands under consideration, namely, Lots Nos. 1 and 8 and a roadway running between Lots Nos. 2 and 6 which connects Lots Nos. 1 and 8.
>
> Andrews & Andrews assert that the description of the deed executed by the state does not clearly describe Lots Nos. 1 and 8 and the roadway connecting them. While we differed in this construction of the deed, nevertheless we expressed a willingness to issue a new deed to correct a presumed error in the first deed; but Andrews & Andrews are seeking a deed from the state describing only Lot No. 8, while our contention has been that under the statute section 8528 requires us, in executing a deed, to follow the correct description of the entire tract conveyed as shown by the final certificate.

We desire your opinion upon this controversy, namely:

1. Can we, upon application of the present owner of a part of the tract originally sold, execute a corrective deed for the entire tract?

2. Will it be necessary, if the corrective deed is issued, to have a quit claim from all of the present owners of the entire tract originally sold?

3. Can we execute a corrective deed for a part of the tract originally sold, namely, Lot No. 8?''

These questions arise under and by virtue of the laws of the state having to do with the sale of school and ministerial lands by the state of Ohio, carried into section 3233 G. C.

Section 3233 G. C., as it originally stood, read as follows:

''When the purchaser or lessee, his heirs or assigns, has made payment in full, the auditor shall give such person a final certificate, containing, in addition to the former one, the fact of the payment in full and that such person is entitled to receive from the state a deed in fee simple for such premises, on presentation of this certificate to the proper officer or officers.''

In conformity to the provisions of this section, the auditor of Butler county, on March 26, 1832, issued a certificate to William Jones, assignee of Jonathan Staggs, to the effect that full payment had been made for certain parts of section No. 16. The description set out in the certificate read in part as follows:

''Being a part of school section sixteen * * and known and designated as lot number one, including a road of one rod, to lot number eight, of said section, which said lot number eight is attached to said lot number one, and containing nineteen acres and eight-tenths of an acre, the same two lots taken together are described as follows, to wit:'' (Here is description of these two lots in metes and bounds, together with the road that connected the two lots, and ends with the statement that the lands described aggregated one hundred acres and twenty-six hundredths of an acre.)

The certificate without doubt set forth the fact that payment had been made in full for both Lots Nos. 1 and 8, together with the road connecting the two lots. Under the provisions of section 3233 G. C. this would have entitled William Jones, as assignee, to a deed for these two lots.

On January 2, 1833, the state of Ohio made a deed to said William Jones, assignee, under and by virtue of the certificate of the auditor of Butler county. The deed contains the following description:

''Eighty (80) acres and 46/100, being part of the section number sixteen, * * and designated as Lot Number One, including a road of one rod to Lot Number Eight of said section, which said Lot Number Eight is attached to said Lot Number One, be the same more or less.'

The habendum clause in said deed reads as follows:

''to have and to hold the said eighty and 46/100 acres of land, with the appurtenances thereto, unto the said William Jones, agent of Jonathan Staggs, and his heirs and assigns forever.''

It is clear from the granting clause of this deed that Lot No. 8 was not deeded at all. Lot No. 1 was clearly granted, as well as the road between the two lots. The habendum clause shows that not even the road is included in this part of the deed, but merely the 80-46/100ths acres of land forming what is known as Lot No. 1.

The abstract of title attached to your communication shows that William Jones, as assignee, transferred Lot No. 8, containing 19 8/10ths of an acre, and that through a direct chain of title this Lot No. 8 has come into the possession of Lillian Kenworthy.

Lillian Kenworthy now desires to have the error in the original deed corrected, so as to clearly show that her grantor in chain of title had title not only to Lot No. 1, but also Lot No. 8. In other words, she wishes the state to make her a deed for Lot No. 8. There is no question raised as to the title to Lot No. 1 and the roadway between Lots Nos. 1 and 8, in so far as Lillian Kenworthy is concerned, she being the grantee for only Lot No. 8, and this, therefore, is the only lot in which she is at all interested.

Under this state of facts the following questions arise:

1. Can the proper authorities make a deed for the entire tract, including both lots and the road between them, upon the application of the present owner of Lot No. 8?

2. Will it be necessary, if the corrective deed is made, to have a quit-claim deed from all the present owners of the entire tract originally sold to William Jones, assignee?

3. Can a deed be made by the state of Ohio at the present time, for Lot No. 8 only, leaving out of the deed Lot No. 1 and the road between the two lots, which had been originally paid for by William Jones, assignee?

It is necessary that we consider sections 8527 and 8528 G. C., which read as follows:

"Sec. 8527. When the purchaser has died before deed made, and the lands have passed to another, by descent or devise, and the title still remains in him, or when the person to whom the lands have so passed, has conveyed them, or his interest therein, to another person, by deed of general warranty or quit-claim, upon the proof of such facts being made to him and the attorney-general, the governor shall execute the deed directly to the person entitled to the lands, according to the true intent and meaning of this chapter, although he derives his title thereto through one or more successive conveyances from the person to whom the lands passed by descent or devise."

"Sec. 8528. When, by satisfactory evidence, it appears to the governor and attorney-general, that an error has occurred in a deed executed and delivered in the name of the state, under the laws thereof, or in the certificate of any public officer, upon which, if correct, a conveyance would be properly required from the state, the governor shall correct such error by the execution of a correct and proper title deed, according to the intent and object of the original purchase or conveyance, to the party entitled to it, his heirs, or legal assigns, as the case may require, and take from such party a release in due form, to the state, of the property erroneously conveyed."

It will be noted from the provisions of section 8528 G. C. that whenever satisfactory evidence is presented to the governor and the attorney-general, that an error has occurred in a deed executed and delivered in the name of the state, the governor shall correct such error by the execution of a correct and proper title deed. From this section it is evident that the application is not a vital matter. The question is as to whether the governor of the state and the attorney-general are satisfied that an error has occurred. If so, the governor is authorized in law to make the correction. Hence an application filed by an owner of a part of these lands in question would be sufficient to authorize the governor of the state to make a deed for the entire tract in question, provided he and the attorney-general are satisfied that an error has occurred; that is, if it would be necessary for a deed to be made covering the entire tract. This answers your first question.

In answer to your second question I will say there is no need of any quit-claim deeds by any party, in the matter submitted by you. The state in this case deeded Lot No. 1, including the road between Lots Nos. 1 and 8, to William Jones, assignee. This the state was obligated to do because of the fact that said Jones had paid the full price for said lot and road. Neither is it necessary for the owner of Lot No. 8 to make a quit-claim deed to the state, for the reason that she is entitled to a deed from the state because her grantor in chain of title, William Jones, as assignee, is entitled to such a deed.

Your question arises under this provision found in section 8528 G. C.:

> "and take from such party a release in due form, to the state, of the property erroneously conveyed."

However, in the case you submit there was no property erroneously conveyed. The state was under obligation to convey not only the land it did convey, to William Jones, assignee, but the intent was that it should also convey Lot No. 8 of school section No. 16. The above quoted provision covers only those cases in which the state makes a deed covering lands which ought not to have been included in the deed.

Therefore, in answer to your second question I will say there is no necessity for any quit-claims being made to the state for the lands in question or any part of the same. Of course, the parties now having title to Lot No. 1 and the road between the two lots would not be under obligation—neither would they desire so to do—to make a quit-claim deed to the state for this land, for the reason that they are the rightful owners of the same; and it would be a rather strange proceeding to have the present owner of Lot No. 8 make a quit-claim deed to the state for this lot, and the state in turn make a deed to the present owner for the same. This is not the meaning which should be given to the provisions of this section.

We come now to your third question. It is my opinion that the state of Ohio can make a deed for Lot No. 8, which is the only part of the premises in question at the present time. In fact, under the provisions of section 8528 G. C. it is my view that this is about the only course you can pursue. This section provides that the governor shall make a deed to the party entitled to it, as the case may require. The owners of Lot No. 1 and the roadway are not entitled to a deed because the state has already made a deed for this property. The only party entitled to a deed is the owner of Lot No. 8, namely, Lillian Kenworthy.

In rendering this opinion I am considering Lillian Kenworthy the owner of only Lot No. 8, and that this is the only part of the premises in question in which she is interested.

In conclusion I will say I am satisfied, from the record as presented to me, that an error has occurred upon the part of the state in the making of the original deed to William Jones, assignee, and that the same should be corrected along the lines herein set out.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1399.

APPROVAL OF BOND ISSUE OF WEST PARK—$2,458.50.

COLUMBUS, OHIO, August 12, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

In re bonds of the village of West Park, Ohio, in the sum of $2,458.50, in anticipation of the collection of special assessments heretofore levied and made for the improvement of Brown road from Triskett road to Fisher road by grading and draining.

GENTLEMEN:—I have carefully examined the transcript of the proceedings of the council of the village of West Park and of other officers of said village relating to the above issue of bonds and find said proceedings to be in conformity to the provisions of the General Code of Ohio relating to bond issues of this kind and to the improvement to make which said bonds are issued.

I am therefore of the opinion that properly prepared bonds covering said issue will, when the same are properly executed and delivered, constitute valid and subsisting obligations of said village to be paid in accordance with the terms thereof.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1400.

STREET IMPROVEMENT—ORDINANCE, PROVIDING FOR LEVYING ASSESSMENTS THEREFOR AND ALSO PROVIDING FOR BOND ISSUE, IS OF A GENERAL NATURE AND MUST BE PUBLISHED AS REQ' I BY SECTIONS 4228 ET SEQ.

DISAPPROVAL OF BOND ISSUE OF CUYAHOGA FALLS—$13,500.00.

Where the ordinance passed by the council of a municipality in addition to making provision for the levy of assessments to pay the cost and expense of a street improvement, other than that borne by the municipality itself, likewise makes provision for the issue of bonds of such municipality in anticipation of the collection of such assessments, such ordinance is one of a general nature which, under the provisions of section 4227 G. C., is required to be published in the manner provided

in sections 4228 et seq. G .C. and such municipality is not authorized to issue and sell the bonds thus provided for until said ordinance is published in the manner provided by law.

COLUMBUS, OHIO, August 12, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

In re bonds of Cuyahoga Falls, Ohio, in the sum of $13,500.00, in anticipation of the collection of special assessments for the improvement of Sackett St. from Front St. to Allen St.; Second St. from Chestnut St. to Falls St.; Third St. from Sackett St. to a point 350 feet southerly therefrom; and Fourth St. from Sackett St. to a point 350 feet southerly therefrom, by constructing sanitary sewers with manholes, laterals for house connections and all other necessary appurtenances.

GENTLEMEN:—I have carefully considered the transcript of the proceedings of the council of the village of Cuyahoga Falls and of other officers of said village, relating to the above issue of bonds, and regret to say that I am unable to approve said issue of bonds for the specific reason that the ordinance passed by the council of the village under date of June 5, 1918, levying assessments to pay the cost and expense of said improvement and providing for the above issue of bonds in anticipation of the collection of such assessments, was not published as required by section 4227 G. C., which provides that ordinances of a general nature or providing for improvements shall be published in the manner provided by sections 4228 et seq. G. C.

My predecessor Hon. T. S. Hogan, in an opinion under date of April 24, 1912 (Vol. II, Annual Report of the Attorney-General for 1912, p. 1693), following the decision of the circuit court of Lucas county in the case of Kohler Brick Co. vs. City of Toledo, 10 C. C. (N. S.) 137, held that an assessment ordinance does not require publication. Other than to observe that there are considerations and statutory provisions touching this question, which neither my predecessor nor the court in the case above cited took into consideration in arriving at the conclusion that an assessment ordinance does not require publication, I do not feel that there is any necessary occasion for me to consider and determine this particular question, so far as the matter before me is concerned. As above noted, the ordinance here in question not only provides for the levying of assessments to pay the cost and expense of said improvement, but it also provides for this issue of bonds in anticipation of the collection thereof.

Without considering the legal propriety of providing for both matters in one ordinance, it is certain that there is no such necessary relation between the two matters as requires both to be provided for in the same ordinance. That it is not necessary to combine both matters in one ordinance, is a proposition that was to my mind quite convincingly sustained by a later opinion of Attorney-General Hogan under date of May 20, 1914 (Vol. I, Annual Report of the Attorney-General for 1914, p. 682). In any event, however, this ordinance, providing as it does for the issue of the bonds of the municipality, is subject to the same rule with respect to the necessity of publication applicable to all other ordinances of the municipality, providing for the issue of municipal bonds.

By the provisions of section 3914-1 G. C., if not otherwise, the bonds here in question, if valid at all, are full, general obligations of the municipal corporation, and this being so, the ordinance providing for the issue of said bonds is one of a general nature within the provisions of section 4227 G. C., even if in an exact

sense it is not to be considered as an ordinance providing for an improvement within the meaning of said section.

John vs. Elyria, 6 N. P. 372.
Knauss vs. Columbus, 13 O. D. 200.
Electric & Gas Co. vs. Village of Orrville, 26 O. C. D. 43 (See Dravo-Doyle Co. vs. Orrville, 93 O. S. 236).

Under the provisions of section 4227 G. C. an ordinance requiring publication does not take effect until the expiration of ten days after the first publication thereof, and it follows from this, on the conclusion here reached by me, with respect to the necessity of publishing the ordinance here under consideration, that there is no effective ordinance of the village of Cuyahoga Falls providing for this issue of bonds. The village has therefore no authority to issue bonds until publication of such ordinance is made in the manner required by law, and of course you have no authority to purchase the same until this is done.

Two other questions are presented on a consideration of this transcript, upon which, in view of my conclusion on the question above considered, I do not find it necessary to express any opinion.

With respect to the first of these questions, it may be noted that in the ordinance to proceed, passed by the village council, it was determined to pay the cost and expense of the improvements, other than that to be borne by the village itself, by the levy and collection of assessments on the benefit plan authorized and provided for by section 3812 G. C., rather than on the foot front plan likewise authorized and provided for in said section of the General Code.

The report of the estimating board appointed by council in carrying out this plan of assessment does not appear in the transcript, but looking to the assessment ordinance so-called, which expressly adopted the estimated assessments made by the estimating board, it appears that said assessments were laid at a flat rate of $2.014 per front foot on the lots and lands fronting and abutting on said improvements. In other words, the proceeding in question seems to be an assessment by the front foot made under the guise of an assessment on the benefit plan, contrary to the intent and spirit of the assessment statutes which contemplate that any plan of assessment adopted must be pursued in accordance with the statute and that the two plans cannot be commingled.

Kelley vs. Cleveland, 34 O. S. 468.
Kelley vs. Cincinnati, 28 O. C. A. 376.

As to this, however, sufficient facts do not appear in the transcript to permit me to express any opinion with respect to the question suggested, even were it necessary for me to arrive at a final conclusion regarding this matter; and neither in any event would I feel authorized to approve of said bonds, so far as this question is concerned, without additional facts showing how said estimates were made and apportioned.

The second question in connection with the consideration of this transcript arises from the fact that apparently proceedings for the improvement of four separate streets, by the construction of sanitary sewers therein, have been combined in one proceeding. As to this I am informed by a statement of fact made in the transcript that the improvements on Second St., Third St. and Fourth St. are lateral sewers running into the Sackett St. sewer for the purpose of disposing of the sewerage from that portion of the various parts of said streets.

Inasmuch as the proceedings here in question are predicated upon the powers

granted in section 3812 and related sections of the General Code, with respect to the improvement of streets as such, and not upon the statutory provisions in regard to the construction of sewers on the district plan, it may be doubted whether the fact that the sewers in the other streets named are to connect with and empty into a larger main sewer in Sackett St., has the effect of making this a single improvement within the purview of the statutory provisions under which these improvements have been projected.

In an opinion to the bureau of inspection and supervision of public offices under date of November 20, 1917 (Vol. III, Opinions of the Attorney-General for 1917, p. 2155), after a careful consideration of the question involved, I arrived at the conclusion that with respect to the street improvement procedure on the assessment plan there should be a separate resolution of necessity and ordinance to proceed, for the improvement of each street or of each combination of two or more streets which in reality form one street or thoroughfare, and that there should not be a combination of two or more separate and distinct improvements in one assessment proceeding, so far as the resolution of necessity and the ordinance to proceed are concerned.

However, for reasons before suggested, I do not deem it necessary for me to express any opinion with respect to the concrete question here presented, and resting my opinion wholly upon the question presented by the circumstance that the ordinance providing for this issue of bonds was not published as required by the provisions of section 4227 G. C., I am compelled to advise that you have no authority to purchase the bonds provided for in said proposed issue and that you should reject the same.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1401.

MUNICIPALITY MAY NOT ISSUE BONDS TO PROVIDE A FUND OUT OF WHICH TO PAY COST OF STREET IMPROVEMENTS AND REPAIRS AS MAY THEREAFTER BE DETERMINED.

DISAPPROVAL OF BOND ISSUE OF MIDDLETOWN—$9,000.00.

Under section 3939 of the General Code a municipal corporation is authorized to issue bonds for the purpose of improving or repairing specifically determined streets or parts thereof, but said section does not authorize a municipality to issue bonds for the purpose of providing a fund out of which to pay the cost and expense of such street improvements and repairs as may thereafter be determined from time to time.

COLUMBUS, OHIO, August 13, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

In re bonds of the city of Middletown, Ohio, in the sum of $9,000.00, for the stated purpose of resurfacing, repairing and improving existing streets of said city.

GENTLEMEN:—I have given careful consideration to the proceedings of the city commission of the city of Middletown, Ohio, relating to the above issue of

bonds as exhibited in the transcript submitted to me and as the result of such consideration I find myself unable to approve said issue of bonds.

This issue is provided for by ordinance of the city commission of said city in legislative session under the assumed authority of article XII of the charter of said city and of section 3939 G. C. Section 2 of article XII of said charter provides that "the city may issue bonds from time to time for such purposes as are now or may hereafter be authorized by the general assembly of the state of Ohio."

Section 3939 G. C. grants authority to municipal corporations to issue bonds, among others for the following purposes:

> "22. For resurfacing, repairing or improving any existing street or streets as well as other public highways, whether such resurfacing, repairing or improving is done directly by the municipal corporation, or contracted by it, or by the county commissioners under an agreement with the municipal corporation by which it agreed to assume and pay any part of the cost thereof."
>
> "23. For opening, widening and extending any street or public highway."
>
> "24. For purchasing or condemning any land necessary for street or highway purposes, and for improving it or paying any portion of the cost of such improvement."

Other than section 3914 G. C. authorizing municipal corporations to issue bonds in anticipation of the collection of special assessments for street improvements, and other than section 3821 G. C. authorizing a municipal corporation to issue bonds for the purpose of paying its share of the cost and expense of a street improvement to be paid for in part by assessments, section 3939 G. C. contains the only statutory provision authorizing a municipal corporation to issue bonds for the purpose of street improvement or repairs. This section confers like authority upon a municipal corporation to issue bonds to pay its share of the cost and expense of a street improvement to be paid for in part by assessments on benefited property, as well as authority to issue bonds to pay the cost and expense of a street improvement where the whole of such cost and expense is to be borne by the municipality.

I do not see that the authority of the municipal corporation is broader in one case than in the other, and whether such issue of bonds be for the purpose of paying a share only of the cost and expense of the improvement or for the purpose of paying the whole of such cost and expense, the authority of the provisions of section 3939 above quoted is limited to the issue of bonds to pay the cost and expense, whether in whole or in part of specific street improvements to be determined by the legislative authority of the city at the time the issue of such bonds is provided for and in neither case is the municipality authorized to issue bonds to provide a fund from which to pay the cost of improvements that may from time to time be made as thereafter determined by the municipality. See Heffner vs. City of Toledo, 75 O. S., 413.

It is evident from the stated purpose of this bond issue that the same is not for the improvement or repair of any specific streets and that the purpose of said issue is to provide funds out of which to resurface, repair and improve such of the existing streets of the city of Middletown as may in the judgment of the city authorities require improvement or repair.

I am in receipt of a letter from the city attorney of the city of Middletown, touching the question of the purpose of this proposed bond issue, in which, among other things, he says:

"I submit that, in the event any of said funds were to be used in any improvement where any part of the cost were to be assessed back against abutting property, the method of legislation would be lacking in not specifying the street to be improved. But the funds derived from this or similar bond issues in the past, is placed in a street repair fund and used only in cases strictly of repair. It would be impossible to specify the particular streets where this fund is to be used for the reason that it is used on gravel streets as the exigencies of travel require repair; a load of gravel here, a dozen loads there, a hundred loads of cinders on another, a sunken manhole on a paved street which requires only several yards of repaving or replacing of paving, but in no case where any part of the cost is assessed back against abutting property.

It is possible and probable that this fund would be used on almost every street in the city in the above designated manner. I have in mind a recent instance where the temporary diversion of traffic from a paved street over a gravel street for two blocks required the rooting up, rolling and hauling of probably fifty loads of gravel to keep the street passable. It is instances of this character for which this fund is created. The whole cost thereof is carried by the city."

It is evident that the street repairs that are contemplated from the proceeds of this bond issue are such as are ordinarily made by the municipal corporation out of the service fund and that the real purpose of this bond issue, if not to replenish this fund, is by way of aid thereto. I know of no authority for any procedure of this kind other than the authority granted by section 3939 G. C. to issue bonds to pay the cost in whole or in part of specific street improvements.

For the reasons above stated I am compelled with considerable regret to come to the conclusion that the above issue of bonds is unauthorized and that you should not purchase the same.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

1402.

APPROVAL OF AMENDED ARTICLES OF INCORPORATION OF THE MUTUAL PLATE GLASS INSURANCE COMPANY.

COLUMBUS, OHIO, August 13, 1918.

HON. W. D. FULTON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have carefully examined the amended articles of incorporation of The Mutual Plate Glass Insurance Company, of Shelby, Ohio, and find said articles to be in conformity to the provisions of section 9607-2 et seq. of the General Code authorizing the incorporation of insurance companies for the transaction of business of the kind covered by these articles. I further find that said amended articles are not in conflict with the constitution and laws of the state of Ohio or of the United States and the same are hereby accordingly approved.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1403.

APPROVAL OF BOND ISSUE OF SPRINGFIELD TOWNSHIP RURAL SCHOOL DISTRICT, SUMMIT COUNTY.

COLUMBUS, OHIO, August 14, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

In re bonds of Springfield township rural school district, Summit county, Ohio, in the sum of $10,000 for the construction, equipment, improvement and repair of certain school buildings in said district.

GENTLEMEN:—I have carefully examined the transcript of the proceedings of the board of education and other officers of Springfield township rural school district relating to the above issue of bonds. The issue of these bonds is provided for under the authority of sections 7625 to 7628 inclusive of the General Code, and on the affirmative vote of more than a majority of the electors of said school district at an election held on the proposition of said bond issue.

I find the proceedings set out in the transcript submitted to me to be in conformity to the provisions of the General Code of Ohio relating to bond issues of this kind, and I am therefore of the opinion that properly prepared bonds covering said issue will, when the same are executed and delivered, constitute valid and binding obligations of said school district.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1404.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN COSHOCTON, HURON AND SENECA COUNTIES.

COLUMBUS, OHIO, August 16, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of August 14, 1918, in which you enclose, for my approval, final resolutions for the following named improvements:

Newark-Coshocton Road—I. C. H. No. 347, Sec. C-1, Coshocton county.

Cambridge-Coshocton Road—I. C. H. No. 349, Sec. A, Coshocton county.

Newcomerstown-Coshocton Road—I. C. H. No. 407, Sec. D, Coshocton county.

Bellevue-Norwalk Road—I. C. H. No. 289, Sec. K, Huron county.

Tiffin-Fostoria Road—I. C. H. No. 270, Sec. B-1, Seneca county, types A and B.

I have carefully examined said resolutions, find them correct in form and legal, and am therefore returning the same to you, with my approval endorsed thereon in accordance with the provisions of section 1218 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1405.

TUBERCULOSIS HOSPITAL—WHEN A NUMBER OF COUNTIES ORGANIZE AND ERECT SAME THERE IS NO AUTHORITY FOR THE DISSOLUTION THEREOF.

Where a number of counties have formed themselves into a district for the purpose of erecting and maintaining a tuberculosis hospital, there is no authority in law for a dissolution of said organization, or for discontinuing the activities for which the district was organized.

COLUMBUS, OHIO, August 16, 1918

State Department of Health, Columbus, Ohio.

GENTLEMEN:—I have your communication of July 31, 1918, which reads as follows:

> "Under the authority of section 3148 G. C. any two or more counties, not to exceed ten, may form themselves into a district hospital for the treatment of tuberculosis subject to the provision that there is no municipal tuberculosis hospital within the counties. Provision is also made that where a number of counties have already constructed and are operating a district tuberculosis hospital, other counties may join in such enterprise for the enlargement and use of such hospital.
>
> No direct provision is made for the dissolution of such a district. In one instance which has been brought to our attention dissension has arisen among the commissioners of the various counties as to policy, and it seems to be impossible to harmonize the conflicting interests and a desire has been expressed to dissolve the district.
>
> I shall be glad to have your opinion as to whether or not such a district may be dissolved, and if so, how this is to be brought about."

There is no provision made in the act which has to do with the establishing and maintaining of a district hospital, for a dissolution of the district or the discontinuance of the hospital after the same has once been erected.

Section 3148 G. C. (107 O. L. 497) provides that:

> "The commissioners of any two or more counties not to exceed ten, may form themselves into a joint board for the purpose of establishing and maintaining a district hospital, * * and may provide the necessary funds for the purchase of a site, * *."

Section 3150 G. C. provides that:

> "As soon as possible after organization, the joint board shall appoint a board of trustees to consist of one member from each county represented * *."

Section 3153 G. C. (107 O. L. 498) sets out the powers and duties of this board of trustees, which powers and duties have to do mainly with the detail work of operating said tuberculosis hospital.

We find the following provision in section 3152 G. C., in the matter of providing the necessary funds with which the institution may be maintained and operated:

"Sec. 3152. * * * The boards of commissioners of counties jointly maintaining a district hospital for tuberculosis shall make annual assessments of taxes sufficient to support and defray the necessary expense of maintenance of such hospital."

It will be noted that this duty of levying taxes is mandatory upon the boards of commissioners and undoubtedly mandamus would lie if any of the boards should refuse or fail to make such annual levy of taxes.

Said section further provides:

"The first cost of the hospital, and the cost of all betterments and additions thereto, shall be paid by the counties comprising the district, in proportion to the taxable property of each county outside of a municipality having a tuberculosis hospital as shown by their respective duplicates * * *."

Here again we find the provision mandatory in reference to the duty placed upon the various counties in providing the first cost of the hospital and the cost of all betterments and additions thereto.

It may further be said that the provisions of this act are in the main mandatory, and they all have to do with the establishing of a hospital and the maintenance and operation of the same, and, as said before, there is no provision made for the dissolution of the district when once established, or for the discontinuance of the hospital when once constructed.

The question then of course is, when the statutes make no provision for the discontinuance of a matter such as that which is provided for in the statutes, may the governing body or bodies nevertheless take legal action to dissolve and discontinue the same? It is my opinion that they could not so do. There are obligations to be satisfied, property to be disposed of and the interest of those treated in the same is to be considered, for all of which there is no provision made in the statutes. Neither do I believe that a court of equity could take jurisdiction of a matter of this kind and work out the rights of the parties interested in the same, without having some foundation in the law upon which to base its action. The courts have generally been averse to the idea that a corporation or quasi corporation may dissolve and discontinue in any other way than that provided for by statute.

In School District No. 1 vs. School District No. 4, 7 S. W. Rep. 285, in the opinion on p. 286 the court say:

"Each organized school district in the state is a body corporate, whose corporate life is of unlimited duration, and no power has been vested by law, either in the voters of such district or of all the districts in the township or in the boards of directors of such districts, or in the school commissioner of the county, to deprive them of their corporate existence, and in their stead create new districts."

In State of Oregon ex rel. vs. Hulin, 2 Ore. 306, the court uses the following language in the opinion:

"School districts are public corporations, and their corporate existence cannot be annulled except as provided in section 352, page 237 of the code, and the action for that purpose must be directed by the governor of the state."

In Bowen vs. King, 34 Vt. 156, it is stated in the syllabus:

"When such union district (school district) is once legally formed, it can only be dissolved by application to the county court under the statutes; neither of the towns out of which it is created can destroy it."

In the opinion on p. 165 the court say:

"The case then is left to stand upon the proper presumption to be raised from this long period of connected and harmonious action together, as a school district, and we are all of the opinion that it points to a fixed and permanent union district, indissoluble except in the mode pointed out by statute, rather than to the mere temporary arrangement provided for by the twenty-first section, which either party may dissolve at pleasure."

State vs. Henderson, 46 S. W. 1076, is a case which discusses at considerable length the question we have under consideration and the court arrives at the following conclusion:

"When once organized their corporate lives are unlimited and remain unchanged until they are changed in the manner prescribed by the legislature."

In this case the court was considering union school districts.

From all the above cases and others that might be cited, it seems clearly evident that an organization once formed in conformity to acts of the legislature cannot be dissolved and its operation discontinued, excepting in the manner provided for by law.

Hence, answering your question specifically, it is my opinion that there is no authority either in the joint board of county commissioners of the counties which make up this tuberculosis district, nor in the board of trustees, to dissolve the said union or to discontinue the work for which it was formed. The relief, if any, must be sought at the hands of the legislature itself.

While it has nothing to do with the answer to your question, yet I desire to call your attention to the fact that undoubtedly section 3153 G. C. (107 O. L. 498) is incorrectly numbered. This should be numbered 3151, instead of 3153, as is evident from the act itself.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1406.

DISAPPROVAL OF BOND ISSUE OF DELAWARE COUNTY—$40,000.00

COLUMBUS, OHIO, August 17, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

In re bonds of Delaware county, Ohio, in the sum of $40,000.00, for the stated purpose of meeting outstanding indebtedness payable from the bridge fund of said county.

GENTLEMEN:—Under date of November 13, 1917, you adopted a resolution poviding for the purchase of the above issue of bonds subject to the approval of this department. Shortly after this resolution was adopted by you a transcript of the proceedings relating to said issue of bonds was submitted to this department, which transcript consisted only of the resolution providing for said issue. Under date of November 27, 1917, I returned said transcript to the county auditor with the information that the resolution was defective in a number of particulars, and advising him that before this department could further consider the matter, a new resolution providing for said issue of bonds would have to be adopted by the board of county commissioners in conformity to suggestions made in my letter, in which I further suggested that with the new resolution, further information should be given as a part of the transcript showing affirmatively that the items of indebtedness sought to be funded by said issue of bonds were in law and in fact legal and binding obligations of said county, which it was authorized to fund under the provisions of section 5656 G. C. No other or further transcript of the proceedings relating to said bond issue has been submitted to this department, and so far as I know, no further resolution has ever been adopted by the board of county commissioners of Delaware county providing for said issue of bonds. Under the circumstances, without any further statement in the premises, it seems clear that the only thing for you to do is to rescind your resolution providing for the purchase of this issue of bonds.

I might add, however, that from information gained by this department in conversation with present and former officials of Delaware county, it appears that a part of the indebtedness sought to be funded by this issue is of such a nature that as not to constitute a legal predicate for this issue of bonds. A part of said indebtedness is represented by claims of the Pennsylvania and Big Four Railroad Companies against Delaware county, as said county's share of the cost and expense of grade crossing elimination improvements at points where the tracks of said companies cross the Flint road on the line between Delaware and Franklin counties. By agreement between said counties and the railroad companies, these improvements were conducted to completion by the respective railroad companies, and so far as I know on information thus obtained by me, the claims of said railroad companies represent valid, binding and legal obligations against Delaware county, which it would be authorized to refund under section 5656 G. C., if from its limits of taxation it is unable to pay the same at maturity. Other items of indebtedness which the county seeks to fund by the above issue of bonds are represented by a number of promissory notes aggregating the sum of $30,000.00 held by certain banks in the city of Delaware, Ohio, and which were executed and delivered to said banks by the board of county commissioners of said county some years ago for the purpose of obtaining money to pay estimates presented

by contractors from time to time for work done and material furnished in the construction and repair of a number of small bridges in said county.

In this connection it appears that at the time the county commissioners entered into contracts for the construction and repair of said bridges, there was but a small amount of money in the bridge fund of the county, which was wholly insufficient to pay the cost and expense of such bridge construction and repair. As I understand, no certificate was filed by the county auditor under section 5660 G. C., but notwithstanding this fact, the contractors entered into said contracts and proceeded with the work of such bridge construction and repair, and the contractors presented estimates from time to time on their respective contracts. There being no money in the bridge fund wherewith to pay the same, the county commissioners borrowed the money necessary from local banks as the same was needed and executed and delivered their promissory notes therefor. It is to repay said promissory notes that the above issue of bonds was provided for by the resolution above mentioned.

Under the circumstances it is more than doubtful whether the claims represented by said promissory notes are legal, valid and binding obligations of Delaware county such as may be refunded under section 5656 G. C.

I am therefore of opinion that said issue of bonds should be rejected, and your former resolution providing for the purchase of this issue of bonds rescinded.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1407.

BOND ISSUE—RESOLUTION PROVIDING FOR SAME MUST MAKE PROVISION FOR AN ANNUAL LEVY OF TAXES FOR INTEREST AND SINKING FUND PURPOSES.

DISAPPROVAL OF BOND ISSUE OF VERONA VILLAGE SCHOOL DISTRICT —$20,000.00.

COLUMBUS, OHIO, August 17, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

In re bonds of Verona Village School District in the sum of $20,000.00, for the purpose of completing the construction of a partially built school house in said district.

GENTLEMEN:—I have carefully examined the corrected transcript submitted to me of the proceedings of the board of education and other officers of Verona Village School District relating to the above issue of bonds, and regret to say that I am unable to approve said issue for the specific reason that the resolution providing for the issue of said bonds does not make provision for an annual levy of taxes for both interest and sinking fund purposes during the life of said bonds as required by section 11 of article XII of the state constitution.

The resolution providing for this issue of bonds provides that the bonds covering said issue shall be forty in number, of the denomination of $500.00 each, and numbered from 65 to 104 inclusive. The first two of these bonds, to wit: Numbers 65 and 66, are made payable April 1, 1938, and thereafter two of said bonds are to become due and payable at each recurring period of six months.

With respect to the matter of tax levies to meet the principal interest on these bonds, the resolution provides for a levy of taxes in each of the years 1917 to 1936 inclusive in the sum of $1,100.00, which is just the amount necessary to pay the annual interest on said bond issue. By said resolution no provision is made for any levy of taxes for the purpose of meeting the principal of said bonds until 1937, when the sum of $2,000.00 is to be levied for principal and $1,100.00 for interest, and thereafter a tax levy of $2,000.00 for principal, and the required amount for interest is to be levied annually up to and including the year 1946.

In a carefully considered opinion under date of September 12, 1914 (Annual Report of the Attorney-General, Vol. 2, page 1224), my predecessor, Hon. Timothy S. Hogan, held that in the case of the issue of serial bonds the provisions of section 11 of article XII of the state constitution makes the requirement that in the legislation providing for the issue of such bonds, provision should be made for an annual levy of taxes between the incurring of the indebtedness and the date of maturity of the last of the series for both interest and sinking fund purposes, and that such annual levies for sinking fund purposes should be substantially equal in amount and distributed over the entire number of years during the life of said bonds.

It is obvious that the provision made for interest and sinking fund levies in the resolution here under consideration falls far short of the requirements of said constitutional provision as same has been construed by my predecessor. I have no disposition to depart from the views expressed by Mr. Hogan in the opinion above referred to, and you will recall that I have heretofore disapproved bond issues, for the reason that the provision made for tax levies for interest and sinking fund purposes in the resolution providing for the issue of such bonds, required levies for sinking fund purposes to be deferred for a considerable period of time after the date of the bonds. In some of such cases the violations of the constitutional provision were not nearly so flagrant as that presented in this case. As an instance of this kind I cite to you the case of the proposed bond issue of Bellefontaine City School District in the sum of $25,000.00, which was disapproved by me by opinion of recent date solely on the point here involved.

In conclusion I may say that the provisions of section 11 of article XII of the state constitution do not require the authority issuing bonds to set out in the legislation providing for the issue of such bonds, the specific amounts to be levied for interest and sinking fund purposes in each of the years during the life of said bonds, but if such specific amounts are set out as the amounts required to be levied for such purposes annually, they must not be such as if observed will require the tax levying authority to violate the intent and spirit of said constitutional provision.

There are some other circumstances and matters relating to this issue of bonds which are not entirely satisfactory to me, but inasmuch as I feel compelled to disapprove said bond issue for the reason above stated, it will serve no useful purpose for me to discuss the other matters which I have in mind, and which were suggested by a consideration of the transcript submitted.

For the reasons above stated it is my opinion that you should not purchase said bonds, and that your resolution providing for the purchase of said bonds conditional on the approval of this department should be rescinded.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1408.

APPROVAL OF AGREEMENT BETWEEN THE STATE OF OHIO AND THE B. F. GOODRICH CO.

COLUMBUS, OHIO, August 17, 1918.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of August 8, 1918, in which you enclose agreement (in triplicate) from the state to The B. F. Goodrich Company of Akron, Ohio, for the use of water by said company from the Ohio canal, and you ask my approval on said agreement.

I have carefully examined the agreement, find the same correct in form and legal, and have therefore endorsed my approval thereon and am forwarding the same to the governor of Ohio for his consideration.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1409.

APPROVAL OF LEASES OF CANAL LANDS TO JOHN R. ALLEN, LAKE ST. MARYS; ROBERT L. JOHNSON, BUCKEYE LAKE; WM. H. WERT, AKRON, AND JOHN R. BEATLEY, INDIAN LAKE.

COLUMBUS, OHIO, August 17, 1918.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of August 7, 1918, in which you enclose the following described leases (in triplicate) for canal lands, and ask my approval on the same:

	Valuation.
To John R. Allen, of Bradford, Ohio, lease of lands for agricultural and residence purposes at Lake St. Marys	$1,666 66
To Robert L. Johnson, lease of 50 feet of the outer slope of the north embankment at Buckeye Lake for cottage and landing purposes	200 00
To Wm. H. Wert, lease of 31 feet of the berme embankment of the Ohio Canal in the city of Akron	333 33⅓
To John R. Beatley, lease of reservoir embankment near Russell's Point at Indian Lake	3,066 66

I have carefully examined these leases, find them correct in form and legal, and have therefore endorsed my approval thereon, and am forwarding them to the governor of Ohio for his consideration.

However, I desire to call attention to two irregularities. There are no witnesses to the signature of the lessee, in the lease made to John R. Allen. While it would be advisable to have witnesses as to his signature, the omission of the same is possibly not vital.

In the lease made to John R. Beatley, the lands leased were appraised at $3,066.66, while the consideration set forth in the lease is $182.00. Section 13966 G. C., found in the supplement to the General Code, provides that lands shall not be leased at a lower rental than the amount which would be the equivalent of six per cent. of the appraised value of the land leased. Six per cent. of $3,066.66 is $184.00. Therefore the annual rental of this land should be $184.00, instead of $182.00. However, inasmuch as this amount is for all practical purposes equivalent to six per cent. of the appraised value, I approved the lease.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

1410.

WORKMAN'S COMPENSATION—EMPLOYERS CARRYING THEIR OWN INSURANCE REQUIRED TO PAY PREMIUM INTO SURPLUS FUND OF STATE INSURANCE FUND—INDUSTRIAL COMMISSION HAS NO AUTHORITY TO WAIVE SUCH PREMIUM.

The payment of the premium into the surplus fund of the state insurance fund, provided for by section 1465-54, *paragraph* 2, *is required from every employer who desires to carry his own insurance under section* 1465-69.

The industrial commission has no discretion to waive the payment of this premium, nor can it allow an employer to carry his own insurance under 1465-69, *without the payment of such premium.*

COLUMBUS, OHIO, August 17, 1918.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—You have made the following request for my opinion:

"The Air Nitrates Corporation, Agent of Ordnance Department, U. S. A., for the manufacture of ammonium nitrate by the cyanid processes, is desirous of operating in Ohio at Toledo and Cincinnati, under the provisions of section 22 of the workmen's compensation law. It wishes to enjoy the privileges of the act without complying with the provisions requiring the payment of the 5% premium, and asks that in this instance

an exception be made. Therefore, we would like to have you determine the following questions:

First—Can this corporation operate under the act and avoid the 5% premium assessment?

Second—Has the industrial commission any right to waive the payment of the 5% premium?''

Section 22 of the workmen's compensation act (section 1465-69 General Code), provides in substance that such employers who will abide by the rules of the commission and are found to be of sufficient financial ability to render certain the payment of compensation to injured employes or to dependents of killed employes, and the furnishing of medical, surgical, nursing and hospital attention and services and medicine, funeral expenses, equal to, or greater than provided for by the act, and who do not desire to insure the payment thereof, or indemnify themselves against loss sustained by the direct payment thereof, may, upon a finding of such facts, by your commission, elect to carry their own insurance; that is, to pay individually, such compensation and furnish such medical services, etc., directly to injured employes or the dependents of such killed employe. This section further provides the furnishing of a bond by employers who elect to operate under this section, and then this section further provides:

''And said commission shall make and publish rules and regulations governing the mode and manner of making application and the nature and extent of the proof required to justify such finding of fact by said commission, as to permit such election, by such employers, *which rules and regulations shall be general in their application*, one of which rules shall provide that all employers electing directly to compensate their injured, and the dependents of their killed employes, as hereinbefore provided, shall pay into the state insurance fund, such amount, or amounts, as are required to be credited to the surplus in paragraph 2 of section 1465-54 General Code * * * * *.''

Paragraph 2 of section 1465-54 provides:

''2. Ten per cent. of the money that has heretofore been paid into the state insurance fund and ten per cent. of all that may hereafter be paid into such fund, shall be set aside for the creation of a surplus until such surplus shall amount to the sum of one hundred thousand dollars ($100,000), after which time the sum of five per cent. of all the money paid into the state insurance fund shall be credited to such surplus fund, until such time, as, in the judgment of said commission, such surplus shall be sufficiently large to guarantee a solvent state insurance fund.''

It is apparent from the above quoted provisions of the compensation law, that there is no discretion whatever given to you in the matter of the amount required to be paid by employers who desire to carry their own insurance into the surplus fund, provided for by section 1465-54. The amount is fixed by law and the law requires this payment as a necessary incident to the granting of authority to any employer to carry his own insurance. I am compelled, therefore, to answer

each of your questions in the negative. You cannot, under the law, allow any employer to operate under this section without paying the 5% premium provided and you have no authority whatever to waive payment of this premium.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

1411.

APPROVAL OF BOND ISSUES OF WEST PARK—$1,677.00 AND $832.00.

COLUMBUS, OHIO, August 19, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

In re bonds of the village of West Park, Ohio, in the sum of $1,677.00, in anticipation of the collection of special assessments heretofore levied and made for the improvement of Bennington avenue from Settlement road to the right of way of the Cleveland, Cincinnati, Chicago and St. Louis R. R. Co.

In re bonds of the village of West Park, Ohio, in the sum of $832.00, in anticipation of the collection of special assessments heretofore levied and made for the improvement of Carrington avenue from Settlement road to the right of way of the Cleveland, Cincinnati, Chicago and St. Louis R. R. Co. by grading and draining.

GENTLEMEN:—I have examined the transcripts of the proceedings of the council of the village of West Park relating to the above described bond issues, and find the same have been in all respects legal and regular. I am therefore of the opinion that properly prepared bonds of said village, duly executed, will constitute valid, legal and binding obligations of said village.

The bonds have not yet been delivered and no opinion is expressed as to the form thereof.

I am retaining the transcripts for use in connection with the examination of the bonds.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1412.

COUNTY DITCHES—MUST BE CONSTRUCTED UNDER EXPRESS CONTRACT—BID AND CONTRACTS MUST BE IN ACCORDANCE WITH SPECIFICATIONS—EFFECT OF VIOLATION OF INJUNCTION—ASSESSMENTS.

The construction of county ditches must in all cases be under express contract, and the commissioners have no power to incur liability for such construction otherwise than by such express contract.

The county commissioners have no authority to incur a liability by verbal promise to pay an extra amount for the removal of boulders in a sum to be ascertained after the construction of the work, and then be the subject of further agreement. All bids and contracts must be in accordance with the specifications of the engineer.

An act is not rendered void by reason of the fact that the party committing it was at the time enjoined therefrom by order of a court, the consequences of violating such injunction being the liability for a proceeding for contempt of court.

The Burns law, so-called, has no application to contracts for the construction of public improvements to be paid for by assessment upon the benefited parties.

COLUMBUS, OHIO, August 19, 1918.

HON. GEORGE F. CRAWFORD, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR.—On June 21, 1918, you requested an opinion from this department in the following communication:

"I desire your opinion as to whether or not the county auditor should issue a warrant for the sum of $1,100, being an estimate allowed by the commissioners, on a ditch contract for the removal of boulders. The facts are as follows:

Prior to June 3, 1916, specifications for the improvement of Stillwater creek in this county, had been prepared by the county engineer, in which specifications it was provided that the contractor should remove the earth and all other material to a certain depth and width. On June 2, 1916, an abutting owner, whose lands were affected by the proposed improvement, brought an action in the common pleas court of this county, enjoining the commissioners from proceeding with the sale and construction of said ditch. On June 3, 1916, the day set for the sale of the ditch, the work was sold to one Ed Bodette, for the sum of $42,900.00; that immediately thereafter, a written contract was entered into by the said county commissioners and the said Ed Bodette whereby it was provided that the work was to be done according to the specifications as above stated, which said specifications were made a part of the contract by stipulation in the contract, and with a verbal understanding, as I am informed, that the contract was not to be effective until the injunction suit had been disposed of and the bonds sold.

The contract, as entered into on that date, provided among other things that the contractor was to be paid for the removal of all boulders measuring more than three quarters of a cubic yard, and same to be adjusted on an equitable basis between the contractor and the commissioners of the county, to the satisfaction and acceptance of the commissioners. Estimates were made for the completion of the ditch, including the sale

price and engineer's expenses, etc., but not including the removal of boulders. At the time of entering into this contract on June 3, 1916, the auditor did not make a certificate that there were funds available for the payment of the same, and in truth and in fact there were no funds available for the payment of the same.

On August 7, 1916, the injunction was dissolved, and thereafter bonds sold for the construction of the improvement. The fund is exhausted and the contractor is now asking payment for $1,100, which was allowed by the commissioners, but refused by the auditor on the grounds:

1. That the commissioners had no right to vary the terms of the specifications in their contract and add the item of payment for removal of boulders.

2. That at the time of entering into said pretended contract, the board of county commissioners had been enjoined from entering into the same.

3. That at the time of entering into said contract, there were no funds in the treasury to pay for same.

4. That at the time of entering into said contract, the auditor made no certificate that there were funds in the treasury to pay the same, and in truth and in fact there were no funds in the treasury to pay for the same, as provided in section 5660 of the General Code.

I desire your opinion as to whether, under these conditions, the county auditor should issue a warrant on the treasurer for the amount. I am of the opinion that he will not be compelled to do so, by reason of the absence of the auditor's certificate."

This request is accompanied by a copy of a contract, and has been supplemented by further information contained in a letter from you, and also in a letter from counsel for the contractor, dated July 27, 1918, to the effect that at the sale of the work it was announced that the contractor would be paid upon an equitable basis for the removal of boulders. This was confined to those larger than three-quarter cubic yards in size, and this provision is carried into the written contract. This answer has been delayed by correspondence including that above and other communications, among which are arguments on behalf of the contractor by his counsel in which his position is fully set out, and arguments made and authorities cited upon the different questions involved.

The first question presented by you is in my judgment the one of prime importance and involving the most difficulty. I shall therefore briefly discuss the others, leaving this till the last.

The second objection made to issuing the warrant is that at the time of entering into the contract there was an injunction in the court of common pleas preventing the same. This was afterwards dissolved, leaving the commissioners free to carry out the contract. It is not understood generally that an injunction preventing the performance of an act in and of itself renders that act void, but rather that it places the party performing the act in contempt of court and liable to punishment therefor. This is especially true when it afterwards transpires that the injunction should not have been issued. It seems the commissioners made this contract conditional upon the dissolution of the injunction. Under the above state of facts, it cannot be said that the contract was illegal upon that ground.

The third and fourth questions may be considered together. This applies to the operation of the so-called Burns law, G. C. 5660. It is frequently, if not generally true, that at the time of entering into the contract for the construction of

a county ditch the funds are not in the treasury to pay for the same. This fund is almost always raised by the sale of bonds, and it is frequently and generally true that the bonds are not sold at the time of selling the work, or not issued and in process of sale. It has been decided that the Burns law has no application to contracts of this character for public improvements to be paid for by funds raised by assessment or apportionment.

Cincinnati vs. Holmes, 56 O. S. 104; State vs. Gibson, 14 O. D. 513-520; Emmert vs. Elyria, 74 O. S. 185.

Therefore, the objection of the auditor upon this ground could not be sustained.

The first objection above stated, however, presents greater difficulty, and I am forced to conclude, an insurmountable obstacle to compelling the auditor to issue this voucher. It involves the very essential nature of the authority of the commissioners in reference to these improvements. The reading of the statutes providing for the manner of making these improvements, or rather the official authority in making them, unquestionably conveys the idea that all work done in connection with the same is the subject of express contract. The argument in favor of the contractor must claim, and does claim, that there is authority in the commissioners to become obligated by implied contract. Section 6454 which includes the provisions for specifications, is as follows:

"If the county commissioners find for the improvement, they shall cause to be entered on their journal an order directing the county surveyor to go upon the line described in the petition, or as changed by them as provided in this chapter, and survey and level it, and set a stake at every hundred feet, numbering down stream, note the intersections of lines and boundaries of lands, townships and county lines, landmarks, bench-marks and road crossings, and make a report, profile and plat thereof, and estimate the number of cubic yards of earth or other substance to be removed, and the cost per cubic yard for each working section as hereinafter provided, and of each section of one hundred feet."

It must be noted that the estimate mentioned is of the number of cubic yards of earth or other substance to be removed, and the cost per cubic yard must be given for *each* working section. The general practice, I believe, is to estimate the removal of earth at a uniform figure, and this, no doubt, is usually correct, or as nearly so as is practicable. However, as different parts of this work may be sold to different contractors, it is possible, and in some instances would necessarily happen, that the estimated cost per cubic yard would be different in different sections.

Section 6481 is as follows:

"When an appeal has been taken, after the transcript of the proceedings before the probate judge and the other papers in the case are returned to the auditor's office, the county commissioners shall cause such entry to be made on their journal as will give effect to the verdict and findings of the jury. In such cases and in cases where no appeals have been taken, they shall fix a time for the public sale of the construction of the improvement in sections not less than one hundred feet nor more than sixteen thousand feet in length, or it may be sold as an entirety in the discretion of the county commissioners and county surveyor or engineer."

A single section might have no earth at all to remove, and might consist entirely of blasting rock, while other sections might he nothing but soft earth and easily removed. So that each particular section whether sold alone or in connection with others must necessarily be sold not to exceed its estimated cost, under the provisions of section 6482, which is as follows:

> "The commissioners shall cause notice to be given of the time and place of sale, and direct the county surveyor to attend and superintend and conduct it. He shall receive all bids for the construction of the improvement, make contracts with the lowest responsible bidder, and take good and sufficient bonds for the labor of the construction of the improvement, conditioned for the faithful performance of the contract so made, and for the completion of the work within the time fixed in the contract in a sum not less than the estimated value of the part bid off, and contracted to be performed by each. He shall furnish each contractor with specifications of the part bid off by him. No bid shall be entertained which exceeds the estimated cost of construction."

What becomes of the application of these sections requiring an express contract for the letting of this work, and that it be in accordance with the specifications, and that it be within a maximum cost of a certain number of dollars and cents ascertained beforehand, if the commissioners may leave some portion of the work afterwards to be paid for upon the principle of *quantum meruit?* It is true, the facts in this case present a strong argument as to the desirability of such authority. The parties about to contract did not, and could not know exactly the composition of the subject matter of the contract. If no boulders be found larger than may be picked up and removed readily by the dredge, commingled with the earth and other substance removed, the parties, of course, should not be called on to pay a price in excess of the value of the construction in that manner; while if it turn out that the boulders are so large that they cannot be so removed, and that no one will take the contract, except for an advance of a material amount over what the mere removal of earth would cost, then, of course, such contractor ought not, and could not be required to do the work at a loss.

This difficulty, however, was as well known to the legislature in passing these acts as it is to us now, and they did not see fit to make provision for it, it being evidently considered more important that the public should be protected from the possibility of peculations or unfair dealings in the letting of such contracts than that they might in all instances be entitled to make the same for the less amount.

If the commissioners could leave the performance of any part of the work to be settled afterwards upon the principles of implied contract, then necessarily they are the judges of what proportion of the work they may so let; and if they can let any of it in that manner, they can do the whole, and it would be at their option whether to comply with these statutes or proceed independently of them.

Counsel argue that what was done amounted to a change of the specifications, and authorities are cited to the effect that where the specifications and the contract differ, the latter is to govern. These authorities have been examined, and all found to be cases of private contract. That is, cases in which the parties had full capacity without any restraint to contract as far as they wished and proceed independently of express contract when they desired.

It is not disputed that private parties not bound to act in a particular manner in accordance with the statutes, may change their contract at will, and the specifications upon which work is done, or may entirely release contractors from complying with specifications, or either party release the other from any of the terms of the contract.

But we have here a matter of express statutory authority. Admitting that the commissioners might consent to a change in the specifications upon the date of sale, if the same were publicly done to the knowledge of all bidders, and all bids alike made upon such changed specifications, let us see whether what was done in this instance is a change of the specifications.

Upon examination it appears to be something else. It is really a waiver or express contradiction of one of the specifications, for the latter, undoubtedly, must have provided what the statute required—an estimate of the cost of the removal of earth *or other material* upon which an estimate was made, which was to be a maximum limit of each bid; but aside from this consideration, that is, the contradiction, which of course might be indulged if there were authority to modify the estimate, it seems not a change of the specifications, but a waiver of it.

We understand by "specification" something having exact definiteness. The very essential meaning of the word involves exact certainty. Specification is defined in the Century dictionary as,

> "An article, item or particular specified; a special plan, detail or reckoning upon which a claim, an accusation, an estimate, a plan or assertion is based; as the specifications of an architect, an engineer or an indictment," etc.

This argument seems to admit the necessity of specifications which must be exactly complied with when the claim is made that such specifications can be changed. To this claim I am inclined to assent, but cannot find that it is a change of the specification to drop it entirely. What has become of the estimate per cubic yard which is a part of these specifications? It was exact and certain, it was measured in quantity and ascertained as to price. Now you have discarded the estimate of quantity by withdrawing an unascertained part, and you have left the price entirely unspecified, not only as to this unascertained quantity, which is to consist of such boulders as the chances of nature have concealed from the sight of man, but thereby incidentally all the remainder, which is earth at an ascertained price.

Contractor's counsel, answering the suggestion as to the requirement of section 6482, state that the contract was let for the exact amount of the estimate. An answer to that might be, the contracor has been paid the exact amount of the estimate, the contract was not let for the amount of the amended estimate, and could not be, for the amount was not ascertained, and this is the very difficulty of the situation. The statutes require it to be ascertained. If you assume that the commissioners could and did change this estimate, if we may so call it, or waive a part of the terms of the estimate in the manner attempted, then logically you must say that the contract was not let in accordance with any estimate at all. According to the old familiar illustration of the chain, one link being broken is the same as if all were. The estimate being unsettled in an unascertained amount, is no longer an estimate of the entire cost.

I am solicitous to be right in this matter because of the gravity of a situation where the commissioners have made an express written contract, and wish to carry it out, as they are insisting on doing in this case, especially where fairness is in favor of its being carried out, as is stated in the present case.

The case of this contractor is singularly unfortunate. He entered into his contract at a time when prices were continually advancing. He was not enjoined himself or desisted from his contract because of the injunction against the other party to it. Fair treatment would have required that he be made a party so that he might avail himself of the injunction bond, but he was left out, and left to wait the law's delay, by which he is said to have lost a large amount, and would still be

the loser if he were paid according to this additional agreement. He has been paid a portion of the extra compensation given him by the agreement, but much the smaller portion of it, and remains still a heavy loser.

The legislative department of the state, however, alone has the power to take such matters into consideration. This department is concluded by the law as it finds it to be.

Without assuming to volunteer opinions or advice to one who is already represented by eminent and able counsel, it may be said that the plaintiff in this injunction case ought to be liable for damages to this contractor; that is, ought not to be allowed to escape liability by leaving the contractor out of the suit, who so far as the injunction is concerned, might have gone ahead with the work. He ought not in this manner to be allowed to escape liability by turning his back on it. No opinion, however, is ventured as to such liability and no impropriety intended by the suggestion of the consideration of it.

The first question must be answered that the commissioners had no right to do what they did attempt to do—incur a liability upon an implied contract in the face of these statutes prohibiting the same.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General

1413.

INTEREST AND SINKING FUND LEVIES—REDUCTION—LIMITATION. PREFERENCE—BUDGET COMMISSION, DUTY RELATIVE TO TAX LIMITATION — BONDS ISSUED PRIOR TO JANUARY 1, 1914, FOR LAWFUL PURPOSE ARE VALID—BONDS ISSUED AFTER JANUARY 1, 1914, FOR WHICH INTEREST AND SINKING FUND LEVIES CANNOT BE MADE WITHIN THE SMITH ONE PER CENT LAW ARE INVALID—WHEN TAX LIMITATION MAY BE EXCEEDED.

The interest and sinking fund levies are subject to reduction by the budget commission if in themselves, and without any levies for current expenses, they would cause any of the applicable limitations of the Smith 1 per cent law to be exceeded.

All interest and sinking fund levies of a municipal corporation, on account of bonds issued since June 2, 1911, without a vote of the people, must be limited to five mills, and further limited to such an amount as together with the levies of the state and other taxing districts applicable to the same territory will produce an aggregate of not more than ten mills.

Sinking fund levies of one taxing district are not preferred to the current expense levies of another taxing district.

The budget commission in enforcing the ten mill limitation must first bring down all estimates separately to such point as to conform to the five, three and two mill limitations, of section 5649-3a G. C., and then, exercising reasonable discretion, further reduce the budgets of such districts as require reduction, having regard to the proportions indicated by section 5649-3a G. C.

All bonds issued prior to February 14, 1914, for a lawful purpose, and sold for not less than par and accrued interest, are valid, regardless of their original infirmities.

Bonds issued after February 14, 1914, upon a tax duplicate of such amount and in the face of previous valid bond issues of such sinking fund requirements as that

by calculations based upon the then current duplicate it might have been demonstrated that the annual interest and sinking fund levies required to be made by Article XII, section 11 *of the Constitution could not be made within the applicable limitations of the Smith* 1 *per cent law, are, for that reason alone and to the extent of the excess, invalid.*

All municipal sinking fund levies are preferred levies, including items for accumulated deficiencies in the bond accounts and items to pay final judgments; but if the municipality asks for levies to pay the interest and principal of invalid bonds, the budget commission may disallow such levies, and if possible, within the limits of the Smith law, allow levies for current expenses in their stead.

Sinking fund levies on account of bonds issued prior to June 2, 1911, *and those thereafter issued without a vote of the people are subject to reduction by the budget commission only when necessary to enforce the fifteen mill limitation of section* 5649-5b *G. C.*

Under favor of sections 5649-5, *et seq., G. C., the taxing district within which the five and ten mill limitations of sections* 5649-3a *and* 5649-2 *G. C., respectively, are insufficient to provide necessary revenue, may submit the question of extra tax levies to a vote of the people, but the approval of the electors given to the taxing authorities of one or more taxing districts levying within the same territory can not authorize a combined maximum rate in excess of fifteen mills; so that if the number of mills approved by the people, together with other levies, exceeds fifteen mills, the budget commission must reduce the special levy with other levies, so that the fifteen mill limitation will not be exceeded; and so that further, if the electors of a given territory approve levies by different authorities within that territory, which in combination will cause the fifteen mill limitation to be exceeded, the margin within the fifteen mill limitation must be apportioned by the budget commission between the two taxing districts which have been authorized to make additional levies.*

COLUMBUS, OHIO, August 19, 1918.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN.—I am in receipt of communication from the prosecuting attorney of Lucas county, who encloses a letter addressed to him by the county auditor of that county, in which certain facts relating to the tax levies in the village of Maumee are set forth. Both the auditor and the prosecuting attorney speak in their letters of consulting the tax commission with respect to the questions submitted and this fact, together with the very great importance of those questions, has impelled me to address this opinion to the commission.

I quote the following from the letter of the auditor to the prosecuting attorney:

> "The village of Maumee has submitted its budget to the county auditor to be acted upon by the budget commission at its annual meeting on the first Monday of August. This budget requests a levy for village purposes amounting to $54,632.33 of which
>
> $16,541.14 is for current expenses, $23,678.63 for interest and sinking fund for debt incurred after June 2, 1911, without a vote of the people, $11,612.56 for debt incurred prior to June 2, 1911, and $2,800.00 for debt incurred after June 2, 1911, by a vote of the people.
>
> The first two items come under that provision of the Smith law which provides a maximum levy of 5 mills. The estimated valuation of the village for 1918 is $3,428,410.00. Five mills on this valuation would produce $17,142.05, which is not sufficient to even take care of debts, leaving nothing for operating expenses.

The state and county levy will be about 2.044 mills and as this levy must be uniform in all taxing districts, leaves 7.956 for other purposes. The road levy under section 6949, amounting to 0.523 mills, must be taken care of, leaving 7.433 mills to be divided between the village and schools.

The board of education requests a maximum levy of 5 mills and they must have that levy to provide enough money to run the schools.

Now the question that I want to ask is whether the budget commission is compelled to allow the village its maximum levy of 5 mills, or whether a greater levy may be allowed for village purposes within the 10 mills, which would leave the schools less than one-half of the levy required, or whether the budget commission, under the circumstances, may allow the schools the amount necessary, thus cutting the amount necessary for village debts?"

The astonishing conditions disclosed by this letter raise questions which require consideration of the following statutes:

Section 5649-1.—"In any taxing district, the taxing authority shall, within the limitations now prescribed by law, levy a tax sufficient to provide for sinking fund and interest purposes for all bonds issued by any political subdivision, which tax shall be placed before and in preference to all other items, and for the full amount thereof."

Section 5649-1a.—"All bonds heretofore issued by any political subdivision for a lawful purpose which have been sold for not less than par and accrued interest and the proceeds thereof paid into the treasury, shall be held to be legal, valid and binding obligations of the political subdivision issuing the same."

(104 O. L. 12.)

Section 5649-2.—"Except as otherwise provided in section 5649-4 and section 5649-5 of the General Code, the aggregate amount of taxes that may be levied on the taxable property in any county, township, city, village, school district or other taxing district, shall not in any one year exceed ten mills on each dollar of the tax valuation of the taxable property of such county, township, city, village, school district or other taxing district for that year, and such levies in addition thereto for sinking fund and interest purposes as may be necessary to provide for any indebtedness heretofore incurred or any indebtedness that may hereafter be incurred by a vote of the people."

Section 5649-3a.—"* * * The aggregate of all taxes that may be levied by a county, for county purposes, on the taxable property in the county on the tax list, shall not exceed in any one year three mills. The aggregate of all taxes that may be levied by a municipal corporation on the taxable property in the corporation, for corporation purposes, on the tax list, shall not exceed in any one year five mills. The aggregate of all taxes that may be levied by a township, for township purposes, on the taxable property in the township on the tax list, shall not exceed in any one year two mills. The local tax levy for all school purposes shall not exceed in any one year five mills on the dollar of valuation of taxable property in any school district. Such limits for county, township, municipal and school levies shall be exclusive of any special levy, provided for by a vote of the electors, special assessments, levies for road taxes that may

be worked out by the taxpayers, and levies and assessments in special districts created for road or ditch improvements, over which the budget commissioners shall have no control. * * *."

Section 5649-3c.—"The auditor shall lay before the budget commissioners the annual budgets submitted to him by the boards and officers named in section 5649-3a of this act, together with an estimate to be prepared by the auditor of the amount of money to be raised for state purposes in each taxing district in the county, * * *. The budget commissioner shall examine such budgets and estimates prepared by the county auditor, and ascertain the total amount proposed to be raised in each taxing district for state, county, township, city, village, school district, or other taxing district purposes. * * * If such total is found to exceed such authorized amount in any township, city, village, school district, or other taxing district in the county, the budget commissioners shall adjust the various amounts to be raised so that the total amount thereof shall not exceed in any taxing district the sum authorized to be levied therein. In making such adjustment the budget commissioners may revise and change the annual estimates contained in such budgets, and may reduce any or all the items in any such budget, but shall not increase the total of any such budget, or any item therein. The budget commissioners shall reduce the estimates contained in any or all such budgets by such amount or amounts as will bring the total for each township, city, village, school district, or other taxing district, within the limits provided by law. * * *."

Section 5649-4.—"For the emergencies mentioned in sections forty-four hundred and fifty, forty-four hundred and fifty-one, fifty-six hundred and twenty-nine, seventy-four hundred and nineteen and 7630-1 of the General Code, the taxing authorities of any district may levy a tax sufficient to provide therefor irrespective of any of the limitations of this act."

Section 5649-5.—"The county commissioners of any county, the council of any municipal corporation, the trustees of any township, or any board of education may, at any time, by a majority vote of all the members elected or appointed thereto, declare by resolution that the amount of taxes that may be raised by the levy of taxes at the maximum rate authorized by sections 5649-2 and 5649-3 of the General Code as herein enacted within its taxing district, will be insufficient and that it is expedient to levy taxes at a rate, in excess of such rate and cause a copy of such resolution to be certified to the deputy state supervisors of the proper county. Such resolution shall specify the amount of such proposed increase of rate above the maximum rate of taxation and the number of years not exceeding five during which such increased rate may be continued to be levied."

Section 5649-5a.—"Such proposition shall be submitted to the electors of such taxing district at the November election that occurs more than twenty days after the adoption of such resolution. * * *."

Section 5649-5b.—"If a majority of the electors voting thereon at such election vote in favor thereof, it shall be lawful to levy taxes within such taxing district at a rate not to exceed such increased rate for and during the period provided for in such resolution, but in no case shall the combined maximum rate for all taxes levied in any year in any county, city, village, school district, or other taxing district, under the provisions of this and the two preceding sections and sections 5649-1, 5649-2 and 5649-3 of the General Code as herein enacted, exceed fifteen mills."

Article XII, section 11 of the Constitution reads as follows:

> "No bonded indebtedness of the state, or any political subdivisions thereof, shall be incurred or renewed, unless, in the legislation under which such indebtedness is incurred or renewed, provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds, and to provide a sinking fund for their final redemption at maturity."

One question presented by the auditor's communication, respecting the amount of $16,541.14, asked by the village of Maumee for current expenses, can be at least partially answered without going very far in the discussion of these sections of the statutes and the constitution, upon the reasoning contained in the dictum of Donahue J., in Rabe et al. vs. Board of Education, etc., et al., 88 O. S. 403, at p. 422, as follows:

> "At this time, under the amendment to the Constitution (section 11, Article XII) which provides that no bonded indebtedness of the state or any political subdivision thereof shall be incurred or renewed, unless in the legislation under which such indebtedness is incurred or renewed provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds and provide for a sinking fund for their final redemption at maturity, it is of the utmost importance that at the time of the incurring of such indebtedness the other needs of the political subdivision proposing to issue the bonds should be taken into account, for this levy must continue during the term of the bonds in an amount sufficient to pay the interest and provide a sinking fund for their final redemption, even though the amount should exhaust the entire income available from taxation and without regard to the current expenses. In other words, under this provision of the constitution, the payment of interest and the retirement of bonds are to be provided for first, and the current expenses become a secondary consideration. This amendment, however, has no application to this case."

Since this dictum was uttered in 1913, the General Assembly has passed section 5649-1 G. C., above quoted, which, read in connection with the remainder of the sections constituting the Smith 1 per cent law, carries out the full import of Judge Donahue's analysis of the intent of Article XII, section 11 of the Constitution, and declares rather unequivocally that levies for interest and sinking fund shall have precedence over all other levies and shall be put on the duplicate for the full amount thereof, at least as against any levies for current expenses.

To the extent then that proper levies for interest and sinking fund purposes exhaust the levying power of the municipality under any of the limitations of the Smith 1 per cent law, it is obvious that such exhaustion must be at the expense of levies for other current purposes.

There is, therefore, no escape from the conclusion that if the levies which may be made for the village of Maumee, on account of interest and sinking fund purposes, go to the full extent of the power of that village to levy on the grand duplicate of taxable property therein, the village can have no levy whatsoever for current expenses and must find some other means of raising money for such expenses, than the levy of taxes on the duplicate.

The next question which arises is that respecting the power of the village of Maumee to levy for interest and sinking fund purposes on account of bonds issued

since June 2, 1911, without a vote of the people. Levies for such purposes are not expressly exempted from any of the limitations of the Smith 1 per cent law. So far as the sections imposing such limitations are concerned, they appear to be subject to the ten mill limitation prescribed by section 5649-2 supra, and the five mill limitation prescribed by section 5649-3a, and of course the fifteen mill limitation prescribed by section 5649-5b, above quoted.

I should remark, of course, that it would be inconceivable to me, if not otherwise explained, how a village with a tax duplicate of less than three and one-half million dollars could have needed for a normal interest and sinking fund a levy of $23,678.63 for interest and sinking fund purposes, on account of debts incurred within a space of seven years, without a vote of the people.

I am informed by the Bureau of Inspection and Supervision of Public Offices that the debt limitations applicable to municipal corporations and provided for by sections 3939, et seq., G. C., have been grossly violated in the village of Maumee. How the village has managed to dispose of its securities, I can not imagine; but in so far as bonds issued prior to the passage of section 5649-1a G. C. are concerned, they would appear to be validated by that section, though issued in violation of the debt limitation prescribed by the municipal code. But if any of the bonds at present outstanding were issued prior to the passage of the act of 1914, and if their existence alone would exhaust the debt limitation of, for example, sections 3941 and 3952 G. C., then it is apparent that all bonds issued subsequently to the passage of section 5649-1a, without a vote of the people, must have been invalid. At any rate, it is not my present purpose to go into the question of the validity of any of the bonds of this class as dependent upon the observance of the Longworth act so-called, but as the basis for further discussion I shall assume the validity of all outstanding bonds of this class as against objections that might be raised under the Longworth act and in the face of section 5649-1a G. C.

I think it is obvious that the main question now under consideration, which is as to the extent, in amount or rate, to which the village of Maumee may lawfully levy taxes on the general duplicate for interest and sinking fund purposes on account of bonds issued since June 2, 1911, without a vote of the people, really divides itself into three parts, as follows:

1. Its power to make such levies on account of bonds issued under these circumstances between June 2, 1911 and January 1, 1913, when Article XII, section 11 of the Constitution went into effect and before section 5649-1 was amended and supplemented .

2. The right of the village to levy taxes on account of bonds issued between January 1, 1913, and February 14, 1914, when the act amending and supplementing section 5649-1 G. C., which was an emergency law, was approved and went into effect.

3. The right of the village to levy such taxes on account of bonds issued between February 14, 1914 and the present time, within which period there has been no change in the statutory law of the state, nor in the constitution, respecting the subject under consideration.

With respect to the first question, it will be noted that section 5649-1 G. C., as in force from and after June 2, 1911, to February 14, 1914, read as follows:

> Section 5649-1.—"In any taxing district, the taxing authority shall levy a tax sufficient to provide for sinking fund and interest purposes."

Of similar import to this statute were numerous provisions in the municipal code, as for instance, in section 3953 G. C., to the effect expressed in that section, which reads as follows:

Section 3953.—"For the payment of all bonds herein authorized, unless the interest thereon and redemption thereof is otherwise provided for, council shall levy each year during the periods the bonds have to run, a tax in addition to all levies authorized by law, sufficient to pay the interest thereon as it matures, and provide a sinking fund for their redemption at maturity."

I might say, with respect to this section, that " a tax in addition to all levies authorized by law" is not to be so construed as to authorize the levy of taxes for interest and sinking fund purposes in excess of the Smith law limitations. The Smith law, which is of course inconsistent with this provision, if interpreted as permitting levies without limit, went into force at a date later than did section 3953 G. C. in its present form (see 103 O. L. 262), and the whole legislative history of the relation between the Longworth act and the Smith law shows that no such result was contemplated (see the Smith-Alsdorf act, 101 O. L. 430).

At the time the Smith law was adopted in its original form, there were repeated sections, both in that law itself and elsewhere in the General Code, to the effect that interest and sinking fund levies, on account of bonds lawfully issued, should be made by the taxing authorities.

The question which now arises is as to whether or not section 5649-1 G. C. in its original form constituted an implied exception to the remaining provisions of the same act, so that interest and sinking fund levies on account of bonds lawfully issued would by force of its provisions have to be made regardless of any of the limitations of the law. I think a negative answer to this question is compelled by an examination of the original Smith law; that is to say, so far as that law was concerned interest and sinking fund levies, though preferred in the sense that it was the mandatory duty of the taxing authorities to make them to the extent that the limitations of the law would permit, were not exempt from the appropriate limitations thereof. To hold otherwise, would render nonsensical section 5649-2 G. C. as it was originally enacted. I do not quote that section in its original form, as it was not radically different, in the respect under consideration, from that in which it is now found. It is unquestionable, however, that this section by a necessary inference limited the taxes that might be levied to provide for future indebtedness incurred without a vote of the people.

The same inference is irresistible as applied to section 5649-3a G. C. and I can come to no other conclusion than that under the original Smith law levies for bonds issued after it went into effect, without a vote of the people, were subject to the five and ten mill limitations when made by a village.

I have not been unmindful of the phraseology of section 5649-5b G. C. as it was originally enacted. It then read:

"Section 5649-5b.—If a majority of the electors voting thereon at such election vote in favor thereof it shall be lawful to levy taxes within such taxing district at a rate not to exceed such increased rate for and during the period provided for in such resolution, but in no case shall the combined maximum rate for all taxes levied in any year in any county, city, village, school district or other taxing district, under the provisions of this and the two preceding sections and sections 5649-2 and 5649-3 of the General Code as herein enacted, exceed fifteen mills."

This section, it will be noted, does not mention section 5649-1 G. C. and it might be argued that on that account sinking fund levies were not subject to the fifteen mill limitation. I think it is clear, however, that any levy subject to section

5649-2 G. C. was likewise subject to section 5649-5b G. C., and without further discussion of this point I repeat the conclusion above expressed, that interest and sinking fund levies on account of bonds issued after the Smith 1 per cent law went into effect were under the law in its original form subject to the five mill and ten mill limitations thereof. In so holding I am in accord with numerous previous opinions of this office which I shall not take time to mention.

The effect of this holding of course is to read into sections like section 3953 G. C. the implied provision resulting from the subsequent adoption of the Smith law, that the sinking fund levies shall be subject to the limitations of the last named act. It follows that no holder of bonds issued while the law was in this state could complain if by the operation of the limitations applicable to tax levies the levies necessary to meet the sinking fund and interest requirements of his issue could not be made in any given year. It might even follow, on reasoning similar to that which I shall have occasion hereafter to employ, and particularly on the authority of Rabe vs. Board of Education, supra, though not that portion of the opinion which has been quoted, that bonds issued during the period now under discussion, as to which it could be foreseen with certainty that the necessary interest and sinking fund levies could not be made within the applicable limitations of the Smith law, the calculations being based upon the duplicate for the year of the issue, would be wholly illegal and void.

This question, however, is of no present moment, for the reason above mentioned, in dealing with the possible invalidity of the bonds, because of the direct limitations of the Longworth act. That is to say, by force of section 5649-1a G. C., which I have quoted, all bonds issued for a lawful purpose and sold for not less than par and accrued interest were validated. I can not, therefore, go so far as to say that any bonds of the village of Maumee issued prior to February 14, 1914, are illegal, in the absence of information to the effect that they were not issued for a lawful purpose, or that if issued for a lawful purpose they were, in addition to having been issued without regard to the ability of the municipality to levy taxes, also sold for less than par and accrued interest.

Let it be then, that bonds of this class are valid obligations of the village. It would follow that by force of section 5649-1 in its present form, interest and sinking fund levies referable to those bonds must be made unless they of themselves would cause the five and ten mill limitations to be exceeded. But it may be that enough of the total of such $23,700.00 which is asked for on account of the interest and sinking fund requirements of bonds issued after June 2, 1911, represents the requirements of bonds issued prior to February 14, 1914, to make it necessary for me to consider whether and to what extent levies on account of such requirements are now subject to the limitations of the Smith 1 per cent law.

As we have seen, the last amendment of this law consisted in the changes made in 1914 in the phraseology of section 5649-1 thereof and the enactment of the curative section 5649-1a. The latter has been sufficiently dealt with and I shall now consider whether or not the amendments made in section 5649-1 were such as to affect the application to sinking fund levies of sections 5649-2 and 5649-3a G. C.

The particular language of the amendment made in 1914 of section 5649-1, which requires examination in this question is the phrase "and for the whole amount thereof." Bearing in mind that this language was inserted in this section by the legislature subsequently to the last amendment of section 5649-2 and to the enactment of section 5649-3a (which has not been changed), does such subsequent amendment of section 5649-1 have the effect of requiring interest and sinking fund levies to be placed on the duplicate "for the full amount thereof," regardless of the limitations imposed by these other sections? If the amendment does have this effect, it must be on the principle that as between two inconsistent legislative enact-

ments the later in point of time must prevail. This process is sometimes spoken of somewhat inaccurately as "implied amendment" or "implied repeal." Before the principle can operate, it must appear that the later and the earlier statutes are irreconcilably inconsistent with each other, so that both can not stand and one must necessarily yield.

It becomes necessary, therefore, to inquire whether, having regard to the whole framework of the Smith 1 per cent law and the fact that section 5649-1 G. C. is a part of that law, i. e., is a section *in pari materia* with the remaining sections of the law, there is such irreconcilable inconsistency between it in its present form and sections 5649-2 and 5649-3a G. C. Of course such inconsistency as might possibly exist could only relate to sinking fund and interest levies and whatever effect the subsequent amendment of section 5649-1, which deals with such levies exclusively, might have upon the other two sections named, would be limited to the application of the latter to such sinking fund and interest levies.

The answer to this question is furnished by the qualifying phrase found in section 5649-1, as amended, viz., "within the limitations now prescribed by law." In other words, the levy sufficient to provide for interest and sinking fund purposes which is to be "placed before and in preference to all other items and for the full amount thereof" is such levy only as can be made "within the limitations now prescribed by law." The legislature could scarcely, without mentioning the other sections of the Smith 1 per cent law by number, have indicated more clearly its intention to keep interest and sinking fund levies subject to the limitations applicable to them at the time section 5649-1 was amended, than by the use of this phrase. I have no hesitancy, therefore, in answering the question which I have just raised, by the statement that sections 5649-2 and 5649-3a G. C. impose limitations which continue to apply to the interest and sinking fund levies, to which they applied when section 5649-1 was amended, to the same extent as they applied to such levies before that section was amended. So that, as I have stated, it is only such interest and sinking fund levies as can be made without violating any of the applicable limitations of the Smith law that are entitled to be placed on the duplicate "for the full amount thereof," under favor of section 5649-1 G. C.

It follows, therefore, that despite the validating clause found in section 5649-1a G. C., the interest and sinking fund levies on account of bonds issued without a vote of the people since June 2, 1911, continue to be and now are subject to the five mill limitation of section 5649-3a and the ten mill limitation of section 5649-2 G. C.

To hold such levies subject to the limitation of section 5649-3a, is to say that no village can levy for the interest and sinking fund purposes of such bonds in any year more than five mills which, as applied to the village of Maumee, means $17,142.05. But it does not therefore follow that this rate in mills and this amount in dollars can be levied for such purposes by the village of Maumee, for these figures represent the result of the application of but one of two applicable limitations of the law. We have still to account for the result of the application of section 5649-2 G .C ., which is to the effect that the aggregate levies made upon any taxable property anywhere, for this and other purposes, subject to the limitations of that section, shall not exceed ten mills.

This section of itself is of course unenforceable. It requires the machinery of the budget commission to put it into complete effect. The sections above quoted show that it is the duty of the budget commission to scale down levies made in a given taxing district, so that the aggregate shall not exceed the ten mill limitation. In so doing the budget commission is bound to respect not only the needs of the political subdivisions levying within any taxing district, but also the proportions in which they are authorized to levy taxes as indicated by section 5649-3a.

State ex rel. Sanzenbacher, 84 O. S. 506. Rabe vs. Board of Education, supra. State ex rel. vs. Patterson, 93 O. S. 25.

It is obvious that if the property in a given territory is subject to the levies of the state and all four of the taxing districts mentioned in section 5649-3a G. C., the enforcement of the limitation now under discussion, through the medium of the budget commission, requires something to give way; for the aggregate rate of the levies as limited by section 5649-3a is fifteen mills, to which must of course be added the state levies (other than that for the state highway improvement fund) which are subject to the limitation of section 5649-2 G. C. If all the four taxing districts mentioned in section 5649-3a G. C. ask for levies up to the limits therein mentioned, it is obvious that in order to enforce the limitation of section 5649-2 an aggregate rate of fifteen and a fraction mills must be reduced to ten mills. Despite the fact that discretion is indubitably lodged in the budget commission when acting in this way, it would be a gross abuse of that discretion to make the reduction at the expense of one taxing district or in favor of another. So that while no strict mathematical formula need be worked out by the budget commission, all districts, however great their needs, must share in the necessary reductions.

In the case at hand it is stated that the rate of the state and the county levies can be estimated at this time at 2.044 mills. As this rate involves a county levy of considerably less in mills than the county might ask for under section 5649-3a G. C., and it is impossible in practice to reduce the county levy which must be uniform throughout the county, to meet the various situations arising in the numerous taxing districts of the county; and as finally the state levy is not subject to reduction by the budget commission at all, it is clear that, as the auditor intimates, it is useless to think about reducing this levy. The deputy auditor, who furnishes the figures which I have before me, does not make any statement respecting township levies applicable in the territory of the village of Maumee. I assume, however, that such township levies as would be subject to the two and ten mill limitations are neglible in amount and that such reductions as might be made in them by the budget commission would not materially affect the problem. Therefore, while pointing out that these levies, together with those hereinafter to be considered, must share in the necessary reductions, substantially in the proper proportions, I pass to the consideration of the respective claims of the village and the school district, which levy over common territory and come most sharply into competition with each other under the circumstances of this case.

Now, such levies as the school district must make within the limitations now under consideration are all for current expenses, such as tuition fund and contingent fund purposes; while it is obvious that the great bulk at least of the levies which the village may make, subject to these limitations, are, by reason of the requirements of section 5649-1 G. C., interest and sinking fund levies.

The question now is as to whether the current expense levies of the school district must yield preference to the sinking fund levies of the village or *vice versa.* Indeed, I shall consider the further question as to whether the budget commission may lawfully, in the proper discharge of its duties, afford preference to the levies of either district over those of the other.

I insert here again the statement that I am considering thus far only so much of the sinking fund levies asked for by the village of Maumee as represent the requirements of bonds issued between June 2, 1911, and February 14, 1914; all of which bonds must be considered as valid and legal obligations of the village of Maumee, because of the curative provisions of section 5649-1a G. C., enacted on the last named date. The commission will remember likewise that in the absence of specific facts on the point, I am assuming that of the total of $23,678.63 asked by

the village for interest and sinking fund levies on account of bonds issued since June 2, 1911, without a vote of the people, a large enough proportion represents bonds issued prior to February 14, 1914, to raise the question now under consideration.

The first problem encountered in considering this question is again one respecting the meaning and application of section 5649-1 G. C. in its present form. It will be remembered that that section declares that interest and sinking fund levies made within the limitations applicable to them shall be placed upon the duplicate "before and in preference to all other items." Does this language have the effect of making the sinking fund levies of one district, made within the limitations of section 5649-3a G. C., applicable to such district, preferred over the current expense levies of another district levying in the same territory for the purpose of the enforcement by the budget commission of the limitation of section 5649-2 G. C.? The answer to this question is in the negative. As I have pointed out, section 5649-1 G. C. does not give preference to any sinking fund levies until "the limitations now prescribed by law" have been satisfied.

The ten mill limitation of section 5649-2 G. C. is just as much one of the "limitations now prescribed by law" as is, for example, the five mill limitation of section 5649-3a. One can not say that a sinking fund levy has been made "within the limitations now prescribed by law," when the single limitation of section 5649-3a G. C. has alone been satisfied; that prescribed by section 5649-2 must be enforced before this condition is satisfied.

If the General Assembly had intended the result now under consideration, it would have used the phrase "within the limitations now prescribed by section 5649-3a G. C.," instead of the phrase which it did use, viz., "within the limitations now prescribed by law." This reasoning will of itself yield the result that as between two taxing districts competing for the right to levy upon the property within a common territory, no levies of one district, whether sinking fund levies or other levies, are *as a matter of law* preferred to particular kinds of levies of another district. However, the consequences of the contrary interpretation would be so dire that, even if the sections which I have considered were on their face susceptible of the other interpretation, such a meaning would have to be rejected.

The case now under consideration illustrates what these consequences would be. If the village of Maumee is entitled to exhaust the five mill limitation of section 5649-3a G. C., on account of its sinking fund levies, regardless of the limitation of section 5649-2 G. C., then in the case at hand the practical result would be to throw upon the school district the negative burden of practically the entire reduction which would have to be made in order to enforce the ten mill limitation of the latter section. In other words, the result would be that the school district would be deprived of money needed to run its schools because the village had an abnormal bonded indebtedness. The legislature never intended any such result, partial though it was to sinking fund levies, when it amended section 5649-1 G. C.

While Rabe vs. Board of Education, supra, does not decide the question, the following language from the opinion of Donahue, J., in that case may well be applied to this question (pp. 417-419).

> "The taxing authorities are authorized to certify to the budget commissioners levies aggregating fifteen mills on the dollar of the tax valuation, and in case that is done it is the positive duty of the budget commissioners to reduce that amount to ten mills on the dollar. The only reasonable basis on which to estimate the amount of income that may be anticipated by an issue of bonds is the proportion of the maximum levy the taxing authority proposing to issue the bonds may certify to the budget

commissioners to the total maximum levies that may be certified by all the taxing authorities in that district. The total maximum rate that can be certified by a board of education * * * is five mills, which is just one-third of the total maximum that can be certified * * * by all the taxing authorities in any taxing district. This court has held in the case of *The State, ex rel. City of Toledo, vs. Sanzenbacher,* 84 Ohio St., 506-507, that the budget commissioners are not required to reduce the levies certified to them in proportion to the amount that each taxing authority is anthorized to levy, but that in making such reduction they should give due regard to this proportion. * * *.

If all the taxing authorities within any one taxing district were to issue bonds in anticipation of taxes to be levied at the maximum rate that they are authorized to certify to the budget commissioners, without reference to the fact that it is the duty of the budget commissioners to reduce the total amount of the tax levy certified to them to ten mills on the dollar of the tax valuation, it would follow that bonds would be issued largely in excess of the income to be anticipated from taxes levied or to be levied, for it is not possible that all of these taxing authorities may levy the maximum rate they are authorized to certify to the budget commissioners."

Judge Donahue was talking about levies to pay the interest and retire the principal of bonds when he made these remarks, though he did not have before him, of course, section 5649-1 G. C. in its present form.

For all the foregoing reasons, then, I am of the opinion that not only must the levies of the village of Maumee, on account of bonds issued between June 2, 1911, and February 14, 1914, be limited in rate to five mills, but that it is the duty of the budget commissioners of Lucas county further to reduce such levies, if necessary, in order to enforce the ten mill limitation of section 5649-2 G. C.

In this same connection I advise that while I have no doubt of the truth of the representation that the village school district is in need of the full levy of five mills, in order to run its schools properly during the fiscal year for which the levy is now being made, it is no more entitled to such full levy of five mills for these purposes than is the village entitled to such full levy for its sinking fund purposes. The two districts stand on a perfect legal equality before the budget commission, when that body is engaged in scaling down levies in order to enforce the ten mill limitation. It is true, as I have said, that the budget commission possesses discretion in this matter and need not scale down the two districts with perfect arithmetical equality. It may afford some preference to the one or the other taxing district, and, provided it does not abuse this discretion, its administrative determination is not open to judicial review.

State ex rel. vs. Patterson, supra.

However, the budget commissioners can not shut their eyes to the legal equality of the two districts as I have defined it, and some reduction, at least approximating a pro rata scaling down, must be made in the levies of both districts, in so far as such reduction is necessary, in order to bring the combined levies of the municipality, on account of the particular bonds now under discussion, together with the levies of the school district which are subject to the limitations under discussion, within the limitation of section 5649-2 G. C.

I should say here, however, that so far as section 5649-1 G. C. is concerned, the levies to which it gives preference and requires that they be made in full if

within the limitations, are *interest and sinking fund levies for bonds.* It is not every levy that may be called a "sinking fund levy," that comes within the words of the statute. If—as the figures incline me strongly to suspect—the village of Maumee has in the past neglected to make proper sinking fund levies and has now accumulated a deficiency in the sinking fund, which it is seeking to make up in a single year, I am not at all certain that a levy for this purpose would be as a whole subject to the preference given by the section which I have quoted.

Properly understood, a sinking fund levy is an annual apportionment of such part of an entire bonded indebtedness as represents an aliquot part of the entire indebtedness, divided by the number of years which it has to run. Levies measured in amount by this rule of amortization are indeed entitled to preference as against the other levies of the district; but I doubt whether a levy of more than this amount in any one year, though made necessary, perhaps, in a sense, by the omission of the proper authorities to make such levies in previous years, is to the extent of the excess a preferred levy within the intendment of the section. This question is not very important in considering the relative claims of the school district and the village in the enforcement of the ten mill limitation, though it may properly influence the budget commissioners in exercising their discretion. I mention it here, however, as a starting point for further discussion in which I shall indulge when I come to deal with the distribution of the total levies which may be allowed the village as such.

It will be observed that although I divided the bonds of the class the interest and sinking fund requirements of which are the alleged foundation of the village's request for a levy of $23,678.63, into three classes, viz., those issued between June 2, 1911, and January 1, 1913, those issued between January 1, 1913, and February 14, 1914, and those issued between February 14, 1914, and the present time, I have discussed the first two classes together. Indeed, the conclusions at which I have arrived thus far in this opinion apply to both of the first two classes of bonds, for the reason that the difference, if any, between the first two classes would have to be predicated upon considerations going to their validity, arising out of the fact that from January 1, 1913, section 11 of Article XII of the Constitution, as I have quoted it, was in effect. However, the principal force of this section is exerted upon conditions present at the time of the issuance of the bonds and reflects itself in their validity, whereas, as we have seen, section 5649-1a G. C., enacted in 1914, has the effect of removing all such questions from present consideration.

There is just one point that ought to be considered and disposed of, however, before dismissing the thought of any possible distinction between the first two classes of bonds above described; that is, as to whether or not the constitutional requirement, that in the legislation under which any bonded indebtedness is incurred provision shall be made for levying and collecting annually by taxation an amount sufficient to meet the interest on the bonds and to provide a sinking fund for their redemption at maturity, is of such force as to authorize and require the making of sinking fund levies for and on account of bonds issued by public bodies having general authority to issue them, regardless of any statutory limitation upon tax levies; that is to say, suppose it be conceded that council of the village of Maumee, for example, in January, 1913, had general power, so far as the Longworth act or other statutes limiting the incurring of indebtedness as such is concerned, to issue bonds for a specific purpose; and suppose that the council did issue such bonds, including in the ordinance under which they were issued a formal provision to the effect that there should be levied and collected annually by taxation an amount sufficient to pay the interest on the bonds and to provide a sinking fund to retire them at maturity; would the result of such action be that the sinking fund levies thus provided for would have to be made in each year of the life of the

bonds, though at the time of issuing them it may have been capable of demonstration that the available revenues from general property levies, which could reasonably be anticipated during the life of the bonds, would be insufficient for the interest and sinking fund purposes thereof in connection with those of bonds previously issued, the interest and sinking fund requirements of which would constitute burdens upon some or all of the years involved?

This question, in so far as authority is concerned, is an open one in Ohio. The nearest approach to a determination of this question is afforded by cases from states which have provisions like Article XII, section 11 in their constitutions, along with constitutional provisions limiting tax levies. Thus in the Texas constitution of 1876 was a provision to the effect that no debt should ever be created unless at the same time provision be made for levying and collecting a sufficient tax to pay the interest thereon and provide at least two per cent as a sinking fund. By amendments to this constitution it was provided that cities of certain classes might levy an annual tax to defray all their expenses at not to exceed a certain rate.

Under this state of the constitution it has been held, in the language of Dillon on Municipal Corporations, section 212, that:

> "* * * The direct requirement is that the tax shall be 'sufficient' to pay the debt, and this requirement carries with it a correlative prohibition against incurring any debt greater than such amount as may be satisfied and paid by the levy of a tax within the limit of the Constitution. In other words, the Constitution requires not only that no debt shall ever be created above such a sum as the levy directed will pay, but also that when and before the debt is created it shall be ascertained whether the maximum amount of the tax permitted by the Constitution will annually pay the interest and provide for the principal or for the sinking fund required by the constitution. The debt is not to go beyond what a tax can be levied to pay. If at the time when the debt is incurred a tax is levied which is not sufficient in amount to pay the interest and to create the prescribed sinking fund, the debt will be sustained up to the amount which is justified by the tax directed to be levied and will be held to be invalid as to the excess. The law contemplates that the provision should appear to be sufficient, based on existing valuations when made, and unless it is so the issue of bonds or the debt incurred would not be authorized. * *."

Of course this statement is applicable to the joint effect of two constitutional provisions and is not authority for what would be the result under the Ohio law, where we have to determine what the effect would be as between a constitutional provision and a statutory one. If the statute were in any wise in conflict with the constitution, it would of course yield and therefore it might be argued that in so far as the Smith law attempts to limit any sinking fund levies, it would be unconstitutional as a violation of Article XII, section 11.

However, this view in my judgment would be superficial and erroneous. While the Smith law is not a constitutional provision, it was enacted not only in the exercise of the general legislative power, but also in direct obedience to a constitutional command. I refer to Article XIII, section 6 of the Constitution which was in force when the Smith law was originally enacted. It provides that:

> "The general assembly shall provide for the organization of cities, and incorporated villages, by general laws, and *restrict their power of taxation,* * * *, borrowing money, contracting debts and loaning their credit, so as to prevent the abuse of such power."

To be sure, this section of the constitution is no longer in full force, because of the subsequent adoption of the so-called home rule amendment, which is Article XVIII of the present constitution. However, in section 13 of this article, there is expressly reserved the power in the General Assembly to pass laws "to limit the power of municipalities to levy taxes and incur debts for local purposes."

So that although the Smith law no longer stands upon the foundation of a constitutional *command,* it still rests upon the basis of special constitutional authority. Article XVIII, section 13 was adopted by the people at the same time that Article XII, section 11 was approved by them. The two must be read together. The one commands that provision shall be made for levying taxes to pay the interest and retire the principal of all bonds subsequently issued by any subdivision, including municipal corporations. The other expressly authorizes the General Assembly to pass laws limiting the power of municipal corporations to incur indebtedness and to levy taxes. The former does not purport to confer by its own force power to levy taxes, but merely prohibits the issuance of bonds unless provision is made for levying taxes. The other expressly authorizes limitations to be imposed upon the levying power of municipalities.

It follows that so far as municipal corporations are concerned, there can be no question as to the authority of the General Assembly to place limitations upon the power of municipalities to levy taxes for any purpose and that the Smith law, being a law of this character, can not be held to be unconstitutional. Putting it in another way, Article XII, section 11, grants no authority to incur any bonded indebtedness. It prohibits the incurring of such indebtedness except upon compliance with certain conditions. It does not of its own force authorize the officers of a taxing district to comply with those conditions; but another provision of the constitution specifically authorized the legislature to limit the capacity of municipal officers, at least, to comply with those conditions.

On the whole, then, I reach the conclusion that there is no inconsistency between Article XII, section 11 of the Constitution and the Smith law, nor between the joint effect of these and statutes like the Longworth law, which on their face purport to authorize the issuance of bonds for specific purposes within certain limits which have but an indirect relation to the levying power.

I am further of the opinion that the decisions in Texas, the effect of which is described in the above quoted paragraph from Dillon on Municipal Corporations, furnish authorities which may safely be applied to the situation in Ohio under the Smith law, the Longworth law and Article XII, section 11 of the Constitution.

I call attention to the remarkable similarity of the reasoning abstracted in the above quotation to that of Judge Donahue as quoted from his opinion in Rabe vs. Board of Education, supra. True, Judge Donahue had before him a statute which limited the issuance of bonds of the particular character there involved, to such as could be provided for and paid within a given period of time by means of the levies authorized by law; but this is exactly the effect which the courts of Texas give to the constitutional provisions of that state.

In other words, when there is a constitutional requirement that no bonded indebtedness of a municipality shall be incurred unless in the legislation under which it is incurred provision is made for levying and collecting annually, by taxation, an amount sufficient to pay the interest on the bonds and to provide a sinking fund for their retirement at maturity and at the same time a law passed in pursuance of constitutional authority, limiting the amount of taxes that may be levied in any year by a municipality, the result is that an attempt on the part of a municipality to issue bonds at a time when calculations based upon the then existing tax duplicate show that the interest and sinking fund levies required by the constitution can not be made within the limits of taxation, is void.

When bonds are actually issued, they do not constitute legal obligations of the municipality, at least to the extent that the implied limitation thus arising—which is a limitation in addition to a direct debt limitation like that imposed by our Longworth act—is exceeded.

So it appears that instead of the issuance of bonds by the village of Maumee after January 1, 1913, in an amount so large that the necessary sinking fund levies added to those required by bonds previously issued would violate the limitations of the Smith law, being a present ground for violating those limitations under color of authority of Article XII, section 11 of the Constitution, such issuance in the first instance was illegal and invalidated the bonds. But, as already pointed out, bonds so issued prior to February 14, 1914, were expressly cured and validated by section 5649-1a G. C.

As to bonds of the third class issued after February 14, 1914, and up to the present time, however, the principles which I have just discussed apply in their entirety. No legislative act has been passed under the reserved power of the legislature to pass curative laws, for the purpose of making them valid, if for the reasons hereinbefore stated, it should turn out that any of them were invalid. I can not of course say that any of such bonds of the third class were invalid *ab initio,* for the reasons which I have just discussed.

In order to determine the question of their validity, it will be necessary to examine the circumstances as they existed at the time each issue was made. Suppose that in the year 1917, for example, the village of Maumee issued general tax bonds by action of its council, without a vote of the people. The validity of these bonds, so far as dependent upon the limitations of the Longworth act, would depend upon whether or not in amount they exceeded, with other bonds issued during the year 1917, an amount equal to one per cent of the tax duplicate of the village; and whether or not, together with the net amount of other bonds then outstanding and issued without authority of a vote of the people, they would in amount exceed two and one-half per centum of the then existing duplicate.

As regards the implied limitation resulting from the joint effect of Article XII, section 11 of the Constitution and section 5649-2 and the other applicable sections of the Smith 1 per cent law in question, its operation would depend upon whether or not a levy of approximately 5-15ths of nine and a fraction mills upon the grand duplicate of the village of Maumee, as then in force, would afford enough revenue to provide for the interest and sinking fund requirements of the issue, in addition to providing for the interest and sinking fund requirements of all bonds then outstanding during all of the years affected by the issue.

If, by examination of the records in the office of the county auditor of Lucas county and the clerk of the village of Maumee, it should appear that the bonds were issued by the village of Maumee after January 1, 1913, to the present time, under such circumstances as that a negative answer would have to be given to either or both of these questions, then such bonds are invalid, at least as the predicate of the levy of taxes at the present time, except that such bonds so issued prior to February 14, 1914 have been validated as against either of these objections, by section 5649-1a G. C.

It follows from what I have said that there is at least a very strong possibility that some, if not all, of the bonds of the class now under discussion, viz., those issued without a vote of the people since February 14, 1914, are invalid. If they are, then of course there need be no concern over the inability of the village to levy taxes to meet principal and interest thereon. If they are not invalid for the second of the above suggested reasons, viz., because of the joint operation and effect of Article XII, section 11 of the Constitution and the Smith law, then the amount of $23,678.63 must be excessive or else there must have been a considerable shrinkage

of the tax duplicate of the village since the bonds were issued; if the former, then of course the budget commission would have an additional reason for reducing this item; if the latter, then because of the effect of compliance with Article XII, section 11 of the Constitution it might be argued that the levies for such bonds would take precedence over those bonds previously issued, i. e., issued before January 1, 1913; for as to the latter, the purchasers of them had no assurance that provision had been made for levying and collecting annually, by taxation, a sufficient amount to meet the principal and interest thereof; but on the contrary, they knew that they had bought bonds, behind which was not the entire duplicate of the village of Maumee, but merely a levy on that duplicate under all the applicable limitations of the Smith law, with the possibility that insufficient revenues might at any time be produced because of the shrinkage of the duplicate.

It would seem, however, that such an argument could not be sustained, because to do so would impair the obligation of the contracts of the prior bonds, the holders of which might indeed anticipate a shrinkage of the duplicate but would not be required to anticipate the issuance of later bonds under a constitutional provision subsequently adopted, which would take precedence over them in the distribution of the limited levies. This interesting question need not be determined at this stage of the proceeding.

,From what I have said it follows, I think, that the interest and sinking fund levies asked for the purpose of meeting the interest and sinking fund requirements of bonds of the third class above described, issued by the village of Maumee, stand in no better situation, as regards the powers and duties of the budget commission, in enforcing the five and ten mill limitations of the Smith law, than the levies on account of bonds of the other two classes. Indeed, they may stand, for reasons which I have pointed out, in even a worse situation, in that the effect of Article XII, section 11 of the Constitution may have been to make the bonds invalid from the beginning.

I am of the opinion, therefore, that the budget item of $23,678.63, asked by the village of Maumee for interest and sinking fund, for bonded debt incurred after June 2, 1911 without a vote of the people, must be reduced by the budget commission to such an amount as will be produced on the estimated duplicate for this year by a rate which together with the rates levied by the state, the county, the township and the school district, and subject to section 5649-2 G. C., will not exceed ten mills in the aggregate.

In making this reduction, the budget commission should first reduce the amount to such a figure as would require a levy of five mills before making any reduction in the budget of the board of education.

State ex rel. vs. Sanzenbacher, supra.

Thereupon they should reduce the budgets of the board of education and the village (and the township, if need be,) until the aggregate of all the levies, including the county and state levy within the village of Maumee, is within the ten mill limitation of section 5649-2 G. C.

As above suggested, this process need not be worked out with mathematical precision. Neither the village nor the board of education can complain if the scaling down to the amounts which will produce a five mill levy is not made exactly pro rata.

State ex rel. vs. Patterson, supra.

The figure which will remain, which will be something less than the $17,142.05

which represents a tax on the duplicate of the village at the rate of five mills, will be the amount that the budget commission can allow the village under the law for all purposes, subject to the five and ten mill limitations.

It is obvious that if this amount is necessary to meet a *single year's* interest and sinking fund requirements on account of *valid bonds* of the village of Maumee, now outstanding, no allowance at all can be made to the village for current expenses; but if a lesser amount than this figure will suffice for this purpose, the remainder asked for sinking fund purposes, being either on account of bonds which are invalid for one reason or another, or on account of the accumulated deficiency in the sinking fund arising from failure to make proper levies in past years for these purposes or for the purpose of meeting final judgments, would invoke a question which has been referred to but not passed upon previously in this opinion.

So far as levies on account of the invalid bonds are concerned, I am clearly of the opinion that if there are any such and if the amount thereof is so great as to bring the total sinking fund levy within the limits which must be allotted to the levies of the village, subject to the five and ten mill limitations, the difference, if any, between those limits and the amount of the sinking fund levies may be levied for current expenses.

This statement leaves open for further consideration the question as to the status, as preferred levies, of levies for accumulated deficiencies in the sinking fund and so-called "sinking fund" levies made for the purpose of meeting final judgments. As I have intimated, such levies are not within the exact words of section 5649-1 G. C.

However, in view of the decision of the Supreme Court in State ex rel. vs. Zangerle, 94 O. S. 447, I feel unable to advise that any of these levies are not preferred levies. In that case the relator sought mandamus to compel the budget commissioners to place on the duplicate, as preferred levies, the amount computed to be necessary for sinking fund and interest purposes, *including the payment of final judgments and the expenses incident to the management of the sinking fund* (See statements of facts, page 449). Though the question may not have been discussed, the court did in fact award the mandamus as prayed for by the relator.

If that part of the so-called "sinking fund" levy of a municipal corporation, which is accumulated for the payment of final judgments, is preferred under section 5649-1 G. C., I can think of no reason on which to predicate a holding that levies for accumulated deficiencies in the bond accounts are not to be likewise treated.

It is therefore my opinion that the entire sinking fund levy asked for by the village of Maumee, and allowable under the five and ten mill limitations applicable to said village, must be made, except that deductions may be made therefrom by the budget commission on account of any levies asked for to supply the interest and sinking fund requirements of invalid bonds; so that unless the deduction of such levies for invalid bonds will entitle the village to levy for current expenses, no such current expense levies may be allowed.

So much for the powers and duties of the budget commission under the facts as they may now be imagined to exist. I shall now undertake to mention such steps as may be taken by the village of Maumee or the board of education of the school district, to obtain relief.

In the first place any *valid* bonds at present outstanding and necessitating the abnormal sinking fund levies mentioned, may be refunded by the council of the village of Maumee under authority of section 3916 G. C., which provides that:

> "Section 3916.—For the purpose of extending the time of payment of any indebtedness, which from its limits of taxation the corporation is unable to pay at maturity, or when it appears to the council for the best in-

terest of the corporation, the council thereof may isue bonds of the corporation or borrow money so as to change but not to increase the indebtedness, in such amounts, for such length of time and at such rate of interest as the council deems proper, not to exceed six per cent per annum, payable annually or semi-annually."

In the second place there may be recourse to the procedure outlined in sections 5649-5 et seq. G. C., which I have not quoted. I question very much whether these sections, which authorize any taxing district to submit to the electors the proposition of increasing the tax levy for purposes otherwise subject to the limitations of sections 5649-2 and 5649-3a G. C. during a period of five years, will be of much practical value, for such vote of the electors does not authorize the fifteen mill limitation prescribed by section 5649-5b G. C. to be exceeded.

It appears that about $14,500.00 is asked for by the village of Maumee for purposes outside of the five and ten mill limitations, but within the fifteen mill limitation. I assume that the school district, the county and the township may have requested levies for similar purposes.

Inasmuch as the municipal levies asked for will require about four mills, it would appear that they would have to be reduced in order to enforce the fifteen mill limitation, and of course for reasons already pointed out they are subject to reduction for that purpose. I do not need to repeat these reasons. They are applicable to the levies outside of the ten and five mill limitations, but subject to the fifteen mill limitation of the Smith law, though in making them so an interpretation of section 5649-5b G. C. would be required. That section, however, is so unmistakably clear in its terms that I do not feel it necessary to repeat, as to its relation to section 5649-1 G. C., what I have previously said with regard to the relation of the latter section to sections 5649-2 and 5649-3a G. C.

Of course I have no facts upon which to base any conclusion whatsoever as to the necessity for reducing the levies for debt incurred prior to June 2, 1911, and for debt incurred after June 2, 1911, by a vote of the people. As I have said however, it seems very likely that these levies will have to be reduced because of the practical certainty that like levies will be required by the county, the school district and the township. If, however, it is true that no such other levies will be required, then there is a small margin within which the village or the board of education, or both, may acquire authority to make additional levies by submitting the question of such levies to a vote of the electors of the municipality or the district, under section 5649-5 G. C. No matter what the result of the vote may be as an expression respecting the number of mills of additional taxes which may be levied, the actual levy for any year may not be such as to go beyond the fifteen mill limitation; and if two districts, such as the school district and the village, should both secure the approval of the electors to additional levies which in the aggregate would cause the fifteen mill limitation to be exceeded, they must share pro rata in the margin which actually exists between the aggregate amount of other levies in the territory affected and fifteen mills. Such question may be submitted this year and the budget commission, if necessary, may reconvene after the November election for the purpose of seeing that the fifteen mill limitation is enforced. The additional levies may then go on the duplicate for this year.

As to the school district, it may, if the enforcement of the tax limitations precludes it from operating its schools according to the minimum requirements of the law, receive aid as a weak school district under favor of sections 7595 et seq. G. C., upon complying with the terms of those sections, and particularly section 7595-1 G. C.

I can think of no other suggestions of means for relief which are available to the village of Maumee and the village school district of the village of Maumee, within the scope of the law.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1414.

DISTRICT SUPERINTENDENT—HOW ELECTED—RIGHT OF COUNTY SUPERINTENDENT TO NOMINATE.

1. *The county superintendent has a right to nominate a person who shall be considered by the electing body as district superintendent, when such electing body meets to elect a district superintendent of a supervision district.*

2. *If a majority of the board, that is, the electing body, concur, they may elect a person as district superintendent who was not so nominated by the county superintendent.*

COLUMBUS, OHIO, August 21, 1918.

HON. FRANK CARPENTER, *Prosecuting Attorney, Norwalk, Ohio.*

DEAR SIR:—Your request for my opinion reads:

"O. C. Minnich, county superintendent of Huron county, Ohio, submitted to me a letter for an opinion as to whether or not the presidents of the boards of education constituting a supervision district in this county acted in accordance with law in the employment of a district superintendent. The following is a copy of said letter:

'NORWALK, OHIO, July 17, 1918.

HON. FRANK CARPENTER, Prosecuting Attorney of Huron County, Norwalk, Ohio.

DEAR SIR:—Would you please submit an early opinion upon the following:

A call is issued in accordance with section 4742 General Code of Ohio, for a meeting of the presidents of the boards of education of a legally constituted rural school supervision district, for the purpose of electing a district superintendent. The presidents meet at the designated place, twenty minutes after the specified time. The county superintendent of schools, two candidates for the position to be filled, and some interested spectators, also assemble with the presidents. The chairman takes his place at the desk in the front of the room and says: 'The election of a secretary is in order.' The president of one of the boards of education is nominated for this position, it is seconded, the motion is put and carried. The secretary-elect takes his place at the desk with the chairman in the front of the room. The chairman then says, addressing himself to the audience in general: 'Are there any nominations for superintendent?' A silence of from five to ten seconds follows. One of the presidents then moves that the meeting go into executive session, it is seconded and carried without the chairman asking for remarks before putting the motion. The

spectators and the candidates for the position withdraw from the room. The county superintendent of schools remains with the presidents of the boards of education. The maker of the motion 'to go into executive session' declares the intention of his motion to have been to exclude the county superintendent from the meeting, also, the second of the motion declares this to have been his intention as well. The county superintendent of schools states he has come in person to make his nomination for a district superintendent in accordance with section 4739 G. C. of Ohio, and as has been his custom for the past four years, and that he is ready to make his nomination and desirous of conforming with the statutes. The maker of the motion 'to go into executive session' declares the county superintendent now has no legal right nor privilege in the meeting and cannot therefore make any nomination whatsoever, nor are we willing to have him leave the room and later return to make his nomination; he should leave the room immediately as we have so voted. The chairman orders the clerk to call the roll as to the intention of the presidents of the board of education when voting upon the motion 'to go into executive session,' instructing those whose intentions were to bar the county superintendent from the meeting to vote *yes,* those whose intentions were to have him remain in the room to vote *no.* Five answer *yes,* two answer *no.* The county superintendent leaves the room. The presidents of the boards of education proceed and elect a district superintendent. Is the election legal?

Thanking you in advance for giving this matter your immediate attention, as I feel these boards of education should be given a fair opportunity to know the law and to elect a superintendent in conformance therewith, I am,

Very truly yours,
O. C. MINNICH,
County Superintendent.'

"Will you kindly advise me at once as to what your opinion is as to the legality of the action of the presidents of the boards of education in electing a district superintendent as detailed in the letter submitted to me by Mr. Minnich."

Section 4738 of the General Code provides how the supervision districts of a county school district are formed and section 4739 provides:

"Each supervision district shall be under the direction of a district superintendent. Such district superintendent shall be elected by the presidents of the village and rural boards of education within such district. * * *. The district superintendent shall be employed upon the nomination of the county superintendent but the board electing such district superintendent may by a majority vote elect a district superintendent not so nominated."

Pursuant to the above quoted section the presidents of the various boards of education of a supervision district of your county met, and I am taking it, as is provided by section 4742 G. C., that the president of the board in the village or rural district having the largest number of teachers acted as the chairman of such meeting. While there is nothing in the statute which provides that a secretary of said body should be elected, it was perfectly proper, in order that the proceedings

might be recorded and the results of such meetings certified to the county board, that a secretary of the meeting be elected; the same was accordingly done in your case.

After the organization of said electing body was perfected as above mentioned, the chairman of the meeting called for nominations for a district superintendent. That act on his part was proper and it was then the right and the duty of the county superintendent to nominate a person, so that the electing body would have such nominee for consideration.

If the county superintendent does nominate a person for such district superintendent, the person so nominated must be considered by the electing body, but such electing body may also consider others than the nominee of the county superintendent; and if, when a vote is taken, a majority of the "board," which board means the electing body, vote to elect a person as such district superintendent, other than the person nominated by the county superintendent, then such person, who so receives said majority vote, must be considered the duly elected superintendent for such district.

In the case under consideration the county superintendent was present when nominations were called for district superintendent and if he had a nomination to make it was not only his right but his duty to make it at that time. True he was asked to leave the room when the board went into executive session, but his nomination, if he had one, should have been left with the electing body before leaving.

I can hardly conceive what could have been in the minds of the members of the electing body in your case, that would cause them to exclude a county superintendent from their meeting. Their body is a public body and there should be no occasion when their actions will not bear public view. In fact it seems to me that the intention of the legislature in just such a matter is that their actions shall be public, for in section 4752 G. C., after a motion or resolution is made to employ a teacher or superintendent, it is provided that:

> "The clerk shall call the roll and record the names of those voting 'aye' and those voting 'no'."

The clerk's record is a public record, open to inspection at all reasonable times, and if the record be a public one and the board a public body, there can be little reason for secret or star chamber sessions.

I am assuming, of course, that the election in your case was had by a majority of the members of the electing body. There is nothing before me to indicate otherwise, and applying the principle that all duties performed by a public board or body are presumed to be done in accordance with law, I must take it that a majority or more of the members of such electing body concurred in the selection of the district superintendent.

Holding these views, then, I must advise you, in answer to your question, that the election of said district superintendent was perfectly legal and in accordance with law.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1415.

TOWNSHIP TREASURER OF TOWNSHIP IN WHICH PART OF A CITY FORMS PART OF SAID TOWNSHIP—SALARY.

A township treasurer of a township in which a part of a city is located and forms a part of the township, is not entitled to receive a salary in excess of one hundred and fifty dollars in any one year.

COLUMBUS, OHIO, August 21 ,1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I have your communication of August 5, 1918, in which you request my opinion on the following question:

> "In a township in which a portion of a city is located, is the township treasurer entitled to receive not more than $300.00 in any one year?"

It will be necessary for us to place an interpretation upon the provisions of section 3318 G. C. (107 O. L. 652), which section reads as follows:

> "Section 3318.—The treasurer shall be allowed and may retain as his fees for receiving, safe keeping and paying out moneys belonging to the township treasury, two per cent of all moneys paid out by him upon the order of the township trustees, but in no one year shall he be entitled to receive from the township treasury more than one hundred and fifty dollars, except that in a township wherein a city is located and such city is a part of such township, a township treasurer shall be entitled to receive from the township treasury not more than three hundred dollars in one year."

It will be noted that the basic part of this section is that which provides that the township treasurer shall in no one year be entitled to receive from the township treasury more than one hundred and fifty dollars. The other part of the section contains an exception to the fundamental principle laid down in the main part of the section. This exception is to the effect that when a city is located within a township and is a part of the township, the treasurer shall be entitled to receive not more than three hundred dollars in any one year.

The question now is, would this exception include a township in which a part of a city is located? I am of the opinion that the exception to the general proposition, laid down in this section, could not be made to include a township which has only a part of a city located therein. The statute does not say, when a township has within it a city or a portion of a city, but merely provides that when a township has a city located within it the salary shall be not to exceed three hundred dollars.

Hence, from the reading of the statute I am of the opinion that your question must be answered in the negative; that is, that the township treasurer of a township having within its confines a part of a city is entitled to receive not more than one hundred and fifty dollars in any one year. This seems evident from the principle of law generally followed by the courts, that when the provisions of a statute, having to do with the salary of an officer, are ambiguous, the doubt must be resolved in favor of the state or the governing body fixing the salary.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1416.

CHILDREN'S HOME—MATRON—DUTIES—SALARY.

Under the provisions of section 3085 G. C., the trustees of a county children's home have authority in law to assign duties other than those provided for in said section, to the matron and other employes of the home, and to pay such compensation for the services to be rendered, as they may, in their judgment, consider to be fair and just. Such assignment of duties and fixing of compensation should be done by resolution or by-laws.

COLUMBUS, OHIO, August 21, 1918.

HON. CHARLES M. CALDWELL, *Prosecuting Attorney, Waverly, Ohio.*

DEAR SIR:—I have your communication of August 5, 1918, which reads as follows:

> "The trustees of our county children's home employed Mrs. Lightle, wife of the superintendent, as matron for the home, and her contract will not expire until March 1, 1919.
>
> Recently a little girl, inmate of the home, was operated upon for a disease of the hip, necessitating the keeping of the hip in a plaster cast, and requiring a great deal of extra service in the way of nursing, etc., the little girl being practically helpless.
>
> Mrs. Lightle is willing to render the extra service, but thinks she should receive extra pay, and the trustees wish to give her extra pay during the time the little girl requires this care. Can they legally do so? That is, can the trustees, at this time, while her contract is still in force, increase her salary as matron? Or, can they pay the matron an extra amount for services as nurse?"

The answer to your question can be based upon the provisions of section 3085 G. C. as found in 107 Ohio Laws, page 60. This section reads as follows:

> "Subject to such rules and regulations as the trustees prescribe, the superintendent shall have entire charge and control of such home and the inmates therein. Upon the approval of the trustees the superintendent may appoint a matron, assistant matrons, and other necessary employes whose duties shall be the care of the inmates of the home, and to direct their employment, giving suitable physical, mental and moral training to them. Under the direction of the superintendent, the matron shall have the control, general management and supervision of the household duties of the home, and the matron, assistant matrons, and other employes shall perform such other duties and receive for their services such compensation as the trustees may by by-laws from time to time direct. They may be removed by the superintendent or at the pleasure of a majority of the trustees."

This section was amended in 1917, yet the provisions of the section as they stood prior to this amendment in so far as they would apply to your particular question were not materially changed.

(1) I note from your communication that the matron of the county children's home is under a contract of employment, the terms of which do not expire until March 1, 1919. Undoubtedly, a contract entered into by and between the matron

and the proper authority was based upon the provisions of this section. That is, in the contract of hire there were no particular duties assigned to the matron, but her duties were to be such as those set out in this section. At least, I am considering this to be the case for the purpose of this opinion.

(2) Under the provisions of this section, the trustees of the home undoubtedly could require the matron to perform the services mentioned without additional compensation. It is to be noted that the matron is merely an employe along with the assistant matrons and other necessary employes, and that her duties "shall be the care of the inmates of the home" and "shall perform such other duties * * * as the trustees may by by-laws from time to time direct."

Hence, when the matron was employed and her compensation fixed, it was fixed with a view to the provisions of this section, and undoubtedly the care of the inmates of the home would include such services as would have to be rendered in the case mentioned by you. The home in reality stands in *loco parentis* and the duties which you suggest in your communication would, of course, be assumed by the parents of a child, and hence in case of those children committed to the county children's home, the duty would devolve upon the matron or some other employe in the institution.

Further, when the matron was employed for a term to expire on March 1, 1919, she took her employment in view of the provisions of this statute, and would be bound, therefore, to perform such other duties as might be assigned to her from time to time by the trustees. This section virtually became a part of the contract of hire.

(3) If the services mentioned in your communication had been rendered by the matron without any extra agreement between her and the trustees of the home, then in that event it would be quite clear that she could not in law claim extra compensation from the trustees for the services rendered. The courts are uniform upon a proposition of this nature.

In Carey vs. Hallack, 9 Cal. 198, the court say:

> "Where a party employed receives a regular specific monthly salary for his service, the presumption of law is that all services rendered by him for his employer during that period, which are of nearly a similar nature to those of his regular duties, are paid for by his salary. And to overcome this presumption he must show an express agreement for extra pay, otherwise he cannot recover."

In Coughton vs. Kitterman, 52 Pac. 898 (Court of Appeals, Kansas), the court laid down this proposition:

> "A person employed as housekeeper at an agreed price per week cannot recover from the estate of such employer, who dies during the employment, compensation for services as nurse in addition to her weekly wages as housekeeper when it does not appear that any agreement was ever made to pay for such extra services, or that the employer had any knowledge that she expected to charge therefor."

(4) With the above kindred propositions out of the way, let us now consider specifically the question which you submit, and that is, whether the trustees of the home, who are desirous so to do, may in advance make arrangements with the matron to the effect that if she personally renders the services mentioned in your communication, she should receive compensation in addition to that which she receives by virtue of her contract of employment.

The statute says that the employes, including the matron of the home "shall receive for their services such compensation as the trustees may by by-laws from time to time direct," and, as said before, this same section provides that the employes, including the matron, "shall perform such other duties as the trustees may by by-laws from time to time direct."

From these provisions it is my opinion that if the trustees of the home consider the services mentioned by you to be services beyond those which ordinarily devolve upon the employes of the home, then they might agree by resolution or by-laws to pay the matron of the home such extra compensation as might to them seem fair and just. The law seems to have left this matter entirely within the discretion of the trustees of the home to regulate from time to time.

But, as said before in this opinion, I feel that the trustees could under the law, and also in justice to the matron, in view of her contract of hire, require her to perform the services mentioned by you, and that without any additional compensation; so that this opinion simply goes to the effect that if the trustees of the home consider the services mentioned by you to be duties other than those ordinarily to be performed in the home, then they may pay an additional compensation for the rendition of said services.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

1417.

OHIO AGRICULTURAL EXPERIMENT STATION—DEPOSITS MADE BY MISTAKE IN STATE TREASURY MAY BE WITHDRAWN.

Where the Ohio Agricultural Experiment Station paid into the state treasury money to be credited to a certain fund, and it afterwards develops that the said station really had no money to deposit, the state auditor would be warranted in issuing his warrant in favor of the station for the amount so deposited, provided the warrant is drawn against the same fund in which the money was originally deposited.

COLUMBUS, OHIO, August 21, 1918.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I have your communication as of date July 1, 1918, signed by Mr. C. A. Seiple, auditor of accounts, in your office. This communication reads as follows:

> "We are inclosing herewith voucher No. 2162 with letter of explanation attached thereto. The same was issued by the Ohio Agricultural Experiment Station in favor of W. H. Kramer for $1,316.10. Your decision is desired as to whether or not the auditor of state can legally issue his warrant in payment thereof."

To this communication is attached a letter received by you from the Ohio Agricultural Experiment Station. This communication reads as follows:

> "Regarding our voucher No. 2162 payable to the undersigned for $1,316.10. This amount was received from the sale of wool and was sent to

the state treasurer on October 27, 1917, our revenue voucher No. 177 and was credited to the animal husbandry rotary fund.

The check received from Elza Wood in payment of this wool was deposited in our local bank and sent by them to the Vinton County National bank, McArthur, Ohio, on which the check was drawn. This check was protested and returned to me, since which time I have been carrying the protested check and trying to collect the amount from Mr. Wood.

On April 20th the amount $1,316.10 with interest making a total of $1,359.00 was sent to your office for collection. If this voucher can be paid, it will relieve me from personally carrying this account and it will then be carried as an open account of the station."

The facts briefly stated are these: The Ohio Agricultural Experiment Station sold wool to one Elza Wood to the amount of $1,316.10, in payment of which Mr. Wood sent his check to the Ohio Agricultural Experiment Station. Upon receiving the check the station sent to the state treasurer on October 27, 1917, the amount represented by the check, which amount was credited according to law to the animal husbandry rotary fund. It afterwards turned out that the bank upon which the check was drawn had not funds with which to take up the same; neither has Mr. Wood up to this time made payment for the wool purchased by him. The question now is as to whether you would be authorized in law to return the amount so deposited by you to the Ohio Agricultural Experiment Station.

It is my opinion that you have authority to do so. The transaction between the Ohio Agricultural Experiment station and yourself was based upon a mutual mistake of fact; while both parties considered that there was $1,316.10 which could be credited to the animal husbandry rotary fund, yet the fact was that there was no such amount of money which could be credited to said fund.

It is almost universally held that where money is paid under a mistake of fact, it can be recovered back, or the party to whom it is paid is warranted in law in paying the same back. This would be all the more true in those cases in which the transaction took place between two different departments of the same government.

From all the above, it is my opinion that you would be authorized in drawing your warrant for said amount in favor of the Ohio Agricultural Experiment Station, providing you draw it upon the same fund in which the money was originally placed.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

1418.

DISAPPROVAL OF ARTICLES OF INCORPORATION OF THE HOME PURCHASING ASSOCIATION COMPANY.

COLUMBUS, OHIO, August 21, 1918.

HON. WM. D. FULTON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I return herewith the proposed articles of incorporation of The Home Purchasing Association Company, of Cleveland, Ohio, advising you that the same should not be filed and recorded by you.

The purpose clause of the articles to which you call attention is as follows:

> "Said corporation is formed for the purpose of soliciting and selling contracts in serial form of the denomination of $100.00 to $1,000.00; to hold moneys thus received as a trust fund; to loan only to contract holders upon the maturity of said contracts when secured by real estate mortgage and other valuable securities; to receive, hold and assign mortgages; to do all things necessary and incident to the carrying on of such business."

I am unable to determine from this language just what the nature of the business, which the incorporators of this company propose that it shall do, is. The language is so vague and indefinite in meaning that the articles should not be filed for this reason alone. Indeed, the language gives rise to the suspicion that the object of the incorporators is to evade the legislation of this state respecting building and loan associations; but this, of course, can not be determined until the language is made sufficiently specific to enable one to tell what the business of the proposed corporation is to be.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1419.

"THROUGH" AS USED IN SECTION 13031-6 G. C. DEFINED.

The word "through" as used in section 13031-6 *G. C. does not necessarily mean from end to end or from side to side, but does mean "within."*

COLUMBUS, OHIO, August 22, 1918.

HON. GEORGE F. CRAWFORD, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR:—Your request for my opinion reads:

> "I desire your opinion or interpretation of the word 'through' in section 13031-6 G. C., as amended in 103 O. L., page 188, this section being a part of the White Slave law of the State of Ohio.
>
> The section reads in part as follows:
>
> "Any person who shall knowingly transport or cause to be transported or aids or assists in obtaining transportation for, by means of conveyance, through or across this state, any female with the intent or purpose to induce, entice, * * *. Any person who shall commit the crime in this section mentioned may be prosecuted, indicted, tried and convicted in any county into or through which he shall have so transported any female as aforesaid."

Now, the question is, has the word "through" a significance or difference from the word "across" as used in the section, and if it is different, what would be considered such transportation through the state as would bring a case within this section? For instance, is the transportation of a female from one point in the state to another point in the state a transportation of a female *through* the state, as defined by this section?

I find one case that seems to me in point somewhat on this matter, being Provident Life & Trust Co., vs. Mercer County, reported 170 U. S., page 593, at page 602. In this case it was held that a railroad company entering a county from without, and passing 20 miles within the territory, and to within two miles of the border of the opposite side, was such a passing through the county as would render subscribers liable to pay their subscriptions.

As each word of a statute should be given effect, if possible, it would seem to me that the legislature intended a narrower meaning to the word "through" than the word "across" and that the word "through" would apply to a case where a female would be transported from one point in the state to another point within the state."

That part of section 13031-6 G. C. which is necessary for our consideration is quoted in your inquiry, and it will not be necessary for me to again quote the same here, but simply accept and again call to your attention the quotation therefrom. It is the word "through" as used in said section that you desire me to construe or give definition to.

The word "through" ordinarily means from one side to the other; into or out of at opposite, or at another point; or from one limit to the opposite limit. If this were the only definition given, and it is the one which is nenerally given, then your proposition would be comparatively an easy one. But under certain circumstances I find that the word "through" has a more limited or restricted meaning than that above given. To illustrate: In St. L. M. & S. E. R. R. Co. vs. Houck, 97 S. W., 963, the court had under consideration the construction of the words "through" or "into." The case arose from a stock subscription to a railroad company in which it was provided that the railroad company must go "through" or "into" the city before the stock subscribed by the city was payable. The court held that the company had performed its part of the contract, and the stock subscribed was payable at the time the company built its line to a point outside of the city where a junction was made with an old line over which trains were transported from the new line *into* the city. If in that case the words "through" and "into" could be given the above construction, then under the section above referred to by you, they would have a different meaning from the general definition above given; that is, from one side to the other, or into and out of at opposite points, or from one limit to the other, and instead thereof the passing into and going over any portion of the county would be sufficient, for the latter portion of the section provides that any person who shall commit the crime in this section mentioned may be prosecuted, indicted, tried and convicted in any county *into or through* which he shall have so transported any female as aforesaid.

By the use of the word "into," it seems to me that the restricted meaning is given to the word "through"; that is, that the legislature did not intend to give the word "through" the broad meaning which it ordinarily has, but that it meant the crime should be considered completed and punishment might be had therefor if the transportation was merely had "into" any county in the state whether the transportation was had entirely across said state or not.

The case which, however, is cited by all the authorities upon this question is referred to by you and marks the line of construction to be followed herein more clearly than any or all other cases in the books contained. It is entitled Provident Life etc. Insurance Company vs. Mercer County, 170 U. S. 593, in which case it was held that the word "through" does not always mean from end to end or from

side to side, but frequently means "within." In that case Mercer county, Kentucky, subscribed for stock of the Louisville Southern Railroad Company. The obligation was not to be binding until the railway of said company shall have been so completed *through* such county that a train of cars shall have passed over the same. The railroad was not completed through Mercer county, but the railroad was completed through Mercer county to the depot of the Southwestern road at Harrodsburg, the county seat. A train of cars moved by an engine passed over said road to Harrodsburg. Harrodsburg lies entirely within the county and the road was at no time completed beyond Harrodsburg or entirely across the county from side to side.

The question then was, had the railroad company sufficiently completed its contract that collection could be made on the stock subscribed by Mercer county. Mr. Justice Brewer delivered the opinion of the court, and on page 603 of said report, used the following language:

> "That condition is that the bonds shall not be binding until the railway of the said company shall have been so completed *through* such county that a train of cars shall have passed over the same. It is contended that the word 'through' means clear through the county from one end of the county to the other; and that while the railway enters the north line of the county and runs within the county limits a distance of nearly twenty miles, it does not touch the south line nor come within a nearer distance of it than two miles. So it is said the railway does not run *through* the county, and therefore the condition upon which the bonds could become binding and valid obligations did not, and does not, exist. It is true the primary meaning of the word 'through' is from end to end or from side to side, but it is used in a narrower and different sense. Its meaning is often qualified by the context. Thus if one should say that he had spent the summer traveling through New England, it would not be construed as carrying an affirmation that he had been from one side clear to the other or from one end clear to the other, but that his travels had been within the limits of New England. The book which is said to have a wider circulation than any except the Bible, Bunyan's Pilgrim's Progress, opens with this sentence: 'As I walked through the wilderness of this world I lighted on a certain place where there was a den and laid me down in that place to sleep.' Does the writer mean that he passed from one end of the wilderness to another and that at the further end found the den, or simply that he traveled in the wilderness and lighted on the den? Obviously the latter. Many similar illustrations might be cited. They show that 'through' does not always mean from end to end or from side to side, but frequently means 'within.'"

No other or clearer construction could be conceived when the last sentence of said section 13031-6 is considered along with the other considerations of the word "through" as used in said section.

I must advise you from a consideration of all the above that the word "through" as used in section 13031-6 G. C. does not necessarily mean from end to end or from side to side, but that it does mean "within."

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

1420.

INDUSTRIAL COMMISSION NOT PREVENTED BY 1465-46 G. C. ADVISING OF ACCEPTANCE UNDER 1465-98—WORKMEN'S COMPENSATION LAW—INCLUDES MARITIME EMPLOYMENTS NOT INTEGRAL PART OF INTERSTATE RAILROAD—INCLUDES CERTAIN EMPLOYES INTERSTATE RAILROAD UPON ELECTION.

1. *There is no inhibition in the Ohio Workmen's Compensation Act to prevent the Industrial Commission from giving information as to whether or not the acceptance provided for by section* 1465-98 *G. C. had been filed.*

2. *Maritime employments so far as the Ohio Compensation act is concerned do not differ in any way from other employments to which the act is applicable, unless the particular maritime employment constitutes an integral part of the operation of a common carrier by rail engaged in interstate commerce.*

3. *The Ohio Workmen's Compensation act applies to employers and employes engaged in this state in intrastate and also in interstate and foreign commerce, except common carriers by railroad, and some of their employes who may become subject to it in a limited way by the election provided for in section* 1465-98 *of the General Code.*

COLUMBUS, OHIO, August 23, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—You have submitted the following request for my opinion:

"I enclose herewith a communication from P. J. Monahan, of this department, addressed to the commission with reference to a request from Messrs. Payer, Winch & Minshall for information as to whether or not the Pelee Island Sand & Gravel Co. and its employes have filed 'written acceptances' mentioned in section 51 of the Compensation law.

Will you please let us have your opinion as to whether or not compliance with this request would be in violation of section 1465-46 of the Workmen's Compensation law of Ohio; also whether it is necessary for employers coming in the class of maritime employers to elect to come under the Workmen's Compensation law and whether such election should be certified to the Industrial Commission, accompanied by the election of the employes."

The questions as stated in the communication from Mr. Monahan are:

First. May the commission, upon request, furnish information as to whether or not an employer has filed the written acceptances provided for by section 51 of the Compensation act (section 1465-98 G. C.), that is, does section 5 of the act, (section 1465-46) prohibit the giving of this information.

Section 1465-46 G. C. provides:

"The information contained in the annual report provided for in the preceding section, and such other information as may be furnished to the board by employers in pursuance of the provisions of said section, shall be for the exclusive use and information of said board in the discharge of its official duties, and shall not be open to the public nor be used in any court in any action or proceeding pending therein unless the board is a party to such action or proceedings; but the information contained in said report may be tabulated and published by the department, in statistical

form, for the use and information of other state departments and the public. Any person in the employ of the board who shall divulge any information secured by him in respect to the transactions, property or business of any company, firm, corporation, person, association, co-partnership or public utility to any person other than the members of the board, while acting as an employe of the board, shall be fined not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00), and shall thereafter be disqualified from holding any appointment or employment with the board."

The information prohibited from being given is that furnished to the commission under the provisions of section 1465-45 G. C., which does not in any way prohibit information being given as to whether or not an employer has filed the acceptances provided for by section 51 of the act, (section 1465-98 G. C.), which reads as follows:

"The provisions of this act shall apply to employers and their employes engaged in intrastate and also in interstate and foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, and then only when such employer and any of his workmen working only in this state with the approval of the state liability board of awards, and so far as not forbidden by any act of congress, voluntarily accept the provisions of this act by filing written acceptances, which, when filed with and approved by the board, shall subject the acceptors irrevocably to the provisions of this act to all intents and purposes as if they had been originally included in its terms, during the period or periods for which the premiums herein provided have been paid. Payment of premiums shall be on the basis of the payroll of the workmen who accept as aforesaid."

This section is one of the sections relating to the compliance by employers with the terms of the Workmen's Compensation act, and there is no more reason for keeping secret the fact that an employer and any of his workmen accepted the provisions of the act by filing the written aceptances provided for, than there is for keeping secret the fact that employers have complied with this act by paying in the ordinary premiums due or by electing to operate under section 22.

The second question is whether in view of the recent amendment to the federal law governing maritime employments it is necessary for employers coming in the class of maritime employers to elect to come under the Workmen's Compensation act in Ohio under section 1465-98 G. C.

It will be noted that this section only refers to:

"Employers and their employes engaged in intrastate and also in interstate and foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the congress of the United States."

The only such "rule of liability" established by Congress of the United States is the Federal Employers' Liability act, which relates only to "every common carrier by railroad while engaged in commerce between any of the several states or territories, etc." The act applies only to persons engaged

"In something having direct and substantial connection with *railroad operations* and not with another kind of carriage recognized as separate and distinct from transportation on land and no mere adjunct thereto. It is unreasonable to suppose that Congress intended to change long established rules applicable to maritime matters merely because the ocean-going ship concern happened to be owned and operated by a company also a common carrier by railroad. The word "boats" in the statute refers to vessels which may be properly regarded as in substance a part of a railroad's extension or equipment as understood and applied in common practice."

So. Pacific Co. vs. Jensen, 244 U. S. 205.

The first two paragraphs of the syllabus in this case provide:

"The Federal Employers' Liability act applies only where the injury occurs in railroad operations or their adjuncts, and cannot be extended to interstate maritime transportation merely because the vessel in the case is owned and operated by an interstate carrier by railroad.

The word 'boats' in the statute refers to vessels which may be properly regarded as but part of a railroad's extension or equipment as understood and applied in common practice."

This decision and other decisions of the Supreme Court make it clear that the Federal Employers' Liability act has no application whatever to maritime commerce, no matter whether the same be intrastate or interstate, unless the maritime operation is an adjunct or a part of the railroad operation. The mere fact that a railroad company owns and operates a steamship line does not bring the steamship operation under the Federal Employers' act, even though it be interstate commerce.

So. Pac. Co. vs. Jensen, 244 U. S. 205.

In an opinion to your commission rendered by me July 14th, 1917 (Volume II, Opinions of the Attorney-General 1917, page 1219), I held that the provisions of the Ohio Compensation act, including section 1465-98 were unenforcible

"As to all employers engaged in employments maritime in nature, under maritime contracts with an employer engaged in maritime pursuits upon any of the navigable waters of the United States, whether the employment be interstate or intrastate."

This holding was based upon the opinion of the Supreme Court of the United States in the case of Southern Pacific R. R. Co. vs. Jensen, above referred to, which held that the state compensation laws were unenforcible as to maritime employments, not on account of the Federal Employers' Liability act, but because, as stated in the opinion in the Jensen case,

"Exclusive jurisdiction of all civil cases of admiralty and maritime jurisdiction is vested in the Federal District courts 'saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it.' The remedy which the Compensation statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court and is not saved to suitors from the grant of exclusive jurisdiction."

This ruling of the United States Supreme Court was based upon Article III, section 2 of the Constitution of the United States, which extends the judicial power of the United States to "all cases of admiralty and maritime jurisdiction," and Article I, section 8, which confers upon Congress the power

> "To make all laws which may be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States or in any department or officer thereof."

Section 9 of the Judicial act of 1789, 1 Stat. 76-77, vested the District courts of the United States with

> "Exclusive original cognizance of all civil actions of admiralty and maritime jurisdiction * * * saving to suitors in all cases the right to a common law remedy, where the common law is competent to give it."

This section stood, as above quoted, at the time of the decision of the Jensen case (see sections 24 and 256 of the Judicial Code), but since the announcing of that decision it appears from Mr. Monahan's statement that the said section has been amended by an act of Congress approved October 6, 1917, so that it now reads:

> "THIRD: Of all causes of admiralty and maritime jurisdiction, saving to suitors in law cases, the right of a common-law remedy, where the common-law is competent to give it, and to claimants the rights and remedies under the Workmen's Compensation law of any state."

Mr. Monahan's question suggests implications which divide it into two parts, not separate and independent, but distinct though interdependent. They may be stated as follows:

> (1) Since the amendment of October 6, 1917, and as a result thereof, does the Ohio Workmen's Compensation law in its compulsory features, or as a main body of law, apply to maritime employments and injuries occurring in the course thereof?
>
> (2) If the Ohio law does not apply in its main or compulsory features to such maritime employments and injuries resulting therefrom, does section 1465-98 of the General Code apply to such employments and authorize the employers and their employes voluntarily to accept the provisions of the Ohio law to the extent therein mentioned?

I am satisfied that the above statement of these two questions and their interdependent relations is correct, and that the second question does not arise unless the first question be answered in the negative.

I have already quoted section 1465-98. The first Federal Employers' Liability act was passed in 1906 and it was held invalid by the Supreme Court of the United States in *In Re Employers' Liability Cases,* 207 U. S., 463, because it was not limited to interstate commerce, that it, it included the regulation of master and servant, or of servants among themselves, as to things which were not interstate commerce; the act attempted to regulate persons because they engaged in interstate commerce and did not alone regulate the business of interstate commerce and thus included subjects wholly outside of the power of Congress.

After this decision Congress passed the second Federal Employers' Liability act in April, 1908, and its constitutionality was established in *Second Employers' Liability Cases,* 223 U. S. 1. This act applies only to common carriers by railroad and their employes while both are engaged in interstate commerce. It is stated in the syllabus of that case:

> "State legislation, even if in pursuance of a reserved power, must give way to an act of Congress over a subject within the exclusive control of Congress. Until Congress acted on the subject the laws of the several states determined the liability of interstate carriers for injuries to their employes while engaged in such commerce; but Congress having acted its action supersedes that of the state, so far as it covers the same subject. That which is not supreme must yield to that which is."

This decision as to the constitutionality of the Federal Employers' Liability act was announced in 1911. The original Ohio Compensation act, which was optional, was passed in 1911 (102 O.L.524), and the present compulsory act, containing section 1465-98 (original section 51) was passed in 1913 (103 O. L. 72), and section 1465-98 was largely intended to be in the nature of a disclaimer on the part of the legislature of any intention to interfere in any way in the field which had been or might be occupied by federal legislation. This was largely on account of what was said in the Second Employers Liability cases above referred to , for when Congress enters a field in which it can legitimately operate, state legislation is excluded.

I call attention to the fact that not only does section 1465-98 provide for optional compensation, but it also limits such compensation to that on account of injuries occurring in intrastate work to workmen working only in this state; whereas the main body of the law, if applicable to a given appointment at all, does not lose its force apparently because of the fact that the injury occurred outside of the state of Ohio and in the course of an interstate activity. I call attention to the fact that the whole operation of section 1465-98 is conditioned upon the establishment by Congress of a rule of liability or method of compensation for the employers and their employes to whom the section applies and who may take advantage of it. All these features of the section taken together lead me to the conclusion that if it be determined that the class of employments now under consideration is one to which, by virtue of the amendment of the Federal Judicial code above referred to, the compulsory features of the Ohio Workmen's Compensation act would otherwise apply in their entirety, section 1465-98 has no application thereto.

I return, therefore, to the task of determining, first, whether or not maritime employments, as such, are in the present condition of federal and state legislation subject to the complete application of the Ohio Workmen's Compensation act in its general or compulsory features.

As previously stated, it is now thoroughly settled that but for the amendment to the Federal Judicial code the Ohio Workmen's Compensation law would have no application to maritime employments, whether interstate in character or not. What, then, is the effect of the amendment? As we have seen, it saves from the grant to the Federal courts of exclusive jurisdiction of "all causes of admiralty and maritime jurisdiction" "the rights and remedies under the Workmen's Compensation law of any state," and it saves them "to claimants." This short saving clause invokes consideration of several points regarding the jurisdiction of the Federal courts in admiralty and the interpretation of section 1465-70 of the General Code of Ohio. I have given careful consideration to these points and, without elaborating my reasons at this time, give it as my opinion that the effect of the amendment of the Federal Judicial code is such that the compulsory features of the Ohio

Workmen's Compensation law now apply to such maritime employments as are not covered by the Federal Employers' Liability act—that is to say, to such maritime employments as are not purely interstate in character and upon a vessel or other instrument of interstate commerce which constitutes virtually a part or an extension of a railroad.

When I say that the compulsory features of the law apply I mean that without any voluntary election on the part of employer and employe alike maritime employers are required to pay into the state insurance fund the appropriate premiums which may be established for this class of employments.

It is probably true that the Federal courts of admiralty still retain their appropriate jurisdiction of all maritime causes.

> Southern Pacific Co. vs. Jensen, supra; Schuede vs. Zenith S. S. Co., 244 U. S. 646; Schuede vs. Zenith, S. S. Co., 216 Fed. 566; The Fred E. Sander, 208 Fed. 724; The Fred E. Sander, 212 Fed. 545; and other cases which might be cited.

But the express saving of both rights and remedies under the Workmen's Compensation acts of the several states from the grant of exclusive jurisdiction to such courts undoubtedly has the effect of destroying the foundations upon which many of these opinions proceeded, and of giving full scope to the operation of Workmen's Compensation laws as against the claim that their principles are in conflict with those formerly known to the admiralty courts.

The decision may still leave some doubt as to the effect to be given to all the provisions of the Ohio law when relied upon as the foundations of causes of action or defenses in admiralty courts; but that is a Federal question upon which I do not deem it necessary to express an opinion. The weight of authority in the several states which have workmen's compensation acts most like that of Ohio is to the effect that, regardless of what may be the attitude of the courts of admiralty in this respect, such Workmen's Compensation acts will be given full effect in the state courts.

> Walker vs. Clyde S. S. Co., 215 N. Y. 529; Northern Pacific Steamship Co. vs. Industrial Accident Com. of California, 163 Pac. 199.
>
> See also State ex rel. Jarvis vs. Daggett, 87 Wash. 253; Shaughnessy vs. Northland S. S. Co. 94 Wash. 325.

There is absolutely no dissent on this point so far as states having optional Workmen's Compensation laws are concerned.

> Lindstrom vs. Mutual Steamship Co., 132 Minn. 328; Kennerson vs. Thames Towboat Co., 89 Conn. 367.

And it is at least clear that in admiralty full effect will be given to all features of Workmen's Compensation acts in death cases.

> Bjolstad vs. Pacific Coast Steamship Co., 244 Fed. 634.

Hon. Timothy S. Hogan, then attorney general, expressed the opinion in a letter to the commission under date of March 3, 1914 (Annual Report of the Attorney-General for that year, Volume I, page 300; 11 O. L. R. 549), that admiralty would recognize the negative force of section 1465-70 of the General Code, which creates immunity from common law or statutory action in favor of an employer

who has complied with the act, save when the injury has occurred through his own wilful act or that of his agents or servants or the failure to comply with some lawful safety requirements. His opinion was, of course, predicated upon an assumption as to the then existing law which was rejected by the subsequent decisions in the *Jensen* case and other similar cases; but the amendment of the Federal Judicial code has removed the effect of these decisions in this particular, and this opinion, if correct at the time it was written but for the considerations upon which the *Jensen* case was founded, now applies to the situation. I see no reason, why I should not adhere to the conclusions expressed in that opinion and advise you that they are now to be followed. Though doubt may be felt upon the point just discussed, the effect of that doubt as bearing upon the main question involved is minimized by the fact that the majority of the state courts hold that the attitude of admiralty in this respect is immaterial so far as the application of their respective Workmen's Compensation acts in the state courts is concerned.

This conclusion makes it unnecessary to consider section 1465-98 G. C. for reasons which have already been stated, except in so far as maritime employments in connection with railroad operations interstate in character may be involved. As I have previously stated, such employments are affected by the Federal Employers' Liability act to the extent that the latter applies to injuries occurring while the injured employe is engaged in interstate commerce. Examples of such employments may easily be imagined. For instance, a car ferry operated by a railroad, if there be any such in Ohio, would be a "boat" within the meaning of the Federal Employers' Liability act, as it would constitute a "part of a railroad's extension or equipment" as understood and applied in common practice; and hence if an employe engaged in the operation of such a ferry should be injured while the ferry was transporting interstate commerce the liability of his employer would be governed by the Federal act. Under the rule in the Jensen case it would seem that a stevedore or dock laborer employed by a railroad and engaged in unloading ships at docks owned by a railroad would come within the class of maritime employes; and if injured while engaged in interstate commerce the liability of his employer would be governed by the Federal Employers' Liability act. All such employments are to be regarded as in a class separate from other maritime employments for the purposes of this opinion. In other words, within the purview of the federal legislation they take their predominant aspect from the fact that they are railroad employments which may be interstate in character rather than from the fact that they are maritime employments. They come within a field the boundaries of which are marked out by the overlapping of railroad employments and maritime employments respectively, as such, together with the fact that as railroad employments they are subject to the possibility of being concerned with interstate transportation.

As to this class of employments, then, the maritime character thereof may be ignored for present purposes and they are to be considered as governed by the same rules with respect to the application of section 1465-98 as other railroad employments partly interstate in character. It will not be necessary, therefore, in this opinion to deal with the class of maritime employments which has just been described; but I refer the commission to the opinion of former Attorney General Hogan to your commission, under date of December 22, 1914. (Opinions of Attorney General, 1914, p. 1611). This opinion and the decision referred to in it govern this question at present and I do not feel warranted in reviewing it.

I may add, however, to this opinion the remark that I am not unmindful of the view taken by the Washington court and intimated by Mr. Justice McReynolds in the *Jensen* case, to the effect that the Limited Liability acts of Congress are rules of liability for maritime cases. But they are not rules enacted by Congress under its power to regulate commerce; but rather, as pointed out in decisions which have been

cited, under its power to define and regulate the exercise of the jurisdiction in admiralty. Moreover, they are not really "rules of liability" within the meaning of this section at all, but merely limitations on the gross liability which a single vessel owner may be made subject to. Such rules are not the kind of rules about which the state legislature was thinking when it passed section 1465-98.

I answer Mr. Monahan's second question, therefore, by saying that section 1465-98 of the General Code does not apply to maritime employments, as such, at all, but that it does apply to maritime employments upon boats or in other places which constitute adjuncts or extensions of railroads; in other words, that a maritime employment which is a part of a railroad operation is to be considered for the purpose of section 1465-98 as a railroad employment, and its maritime character is to be ignored. So considered it appears that such employment would not be subject to the compulsory features of the Ohio Workmen's Compensation act, but would be of such character as to afford to the employers and employes concerned therein the option of electing to be governed by the provisions of the Ohio Workmen's Compensation law as to injuries to workmen working only in this state, occurring in the course of purely intrastate employment, where such employment can be separated from interstate employment.

My conclusions, therefore, upon this inquiry are as follows:

First: There is no inhibition in the Ohio Workmen's Compensation act to prevent the commission from giving information as to whether or not the acceptance provided for by section 1465-98 G. C. had been filed.

Second: Maritime employments so far as the Ohio Compensation act is concerned do not differ in any way from other employments to which the act is applicable, unless the particular maritime employment constitutes an integral part of the operation of a common carrier by rail engaged in interstate commerce.

Third: The Ohio Workmen's Compensation act applies to employers and employes engaged in this state in intrastate and also in interstate and foreign commerce, except common carriers by railroad, and some of their employes who may become subject to it in a limited way by the election provided for in section 1465-98 of the General Code.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General

1421.

WATERWORKS—NO AUTHORITY FOR THE PUBLICATION OF RULES AND RATES.

There is no direct statutory authority for the publication of the rates and rules of the waterworks department of a municipality.

COLUMBUS, OHIO, August 23, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your letter of recent date requesting my opinion as follows:

> "We are referring you to section 3957 G. C., which provides that the by-laws and regulations made by the director of public service for the con-

trol of the waterworks shall have the same validity as ordinances.

1. Is there any authority of law for the director of public service in cities, or the board of trustees of public affairs in villages, when establishing code of rates, rules, etc., to advertise the same in newspaper?

2. If such publication be legal, would it be governed by the laws of publication covering ordinances?"

Section 3957 G. C. to which you refer provides as follows:

"Such director may make such by-laws and regulations as he deems necessary for the safe, economical and efficient management and protection of the waterworks. Such by-laws and regulations shall have the same validity as ordinances when not repugnant thereto or to the constitution or laws of the state."

It will be observed that this section lacks a provision similar to that found in the sections relating to the orders and regulations of municipal boards of health. The provision in this respect is that of section 4413 of the General Code, which is as follows:

"The board of health of a municipality may make such orders and regulations as it deems necessary for its own government, for the public health, the prevention or restriction of disease, and the prevention, abatement or suppression of nuisances. Orders and regulations not for the government of the board, but intended for the general public, shall be adopted, advertised, recorded and certified as are ordinances of municipalities, and the record thereof shall be given, in all courts of the state, the same force and effect as is given such ordinances."

There is no general provision requiring the publication of any municipal regulations other than ordinances and rules of the board of health. It necessarily follows that there is no direct statutory authority for the publication of the rates and rules of the waterworks department of a municipality.

From the form in which your question is submitted I assume that council has not attempted to authorize the director of public service or the board of trustees of public affairs to make any publication other than that directly authorized by the statute. Accordingly I do not pass upon the question as to the power of council in this respect.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1422.

CORPORATIONS — TAXATION — MONEYS, CREDITS AND INVESTMENTS, WHERE SITUATED—"FIXED PROPERTY" FOR TAXATION DEFINED.

The moneys, credits and investments of a corporation are "situated" for the purpose of section 5405 *G. C. in the taxing district wherein the corporation has its principal place of business, where such principal place of business is in a given county in which the return is made.*

The term "fixed property" as used in section 5405 *G. C. in prescribing the rule of apportionment embraces all tangible personal property other than that which is*

continuously used in a transitory manner like the rolling stock of a railroad; and the term includes such tangible personal property as is so used and also intangible property, such as moneys, credits, investments in stocks, etc.

COLUMBUS, OHIO, August 23, 1918.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of recent date requesting my opinion upon the following:

> "1. An Ohio corporation has all of its property located in Stark county. Its principal office is located in the city of Massillon and its plant, together with all of the personal property necessary to its operation, is located in an adjoining township. Section 5405 G. C. provides as follows:
>
> 'Returns shall be made to the several auditors of the respective counties where such property is situated, together with a statement of the amount thereof which is situated in each township, village, city or taxing district therein.'
>
> In complying with this provision where should the company state that its moneys, credits and investments in stocks and bonds, etc., are situated?
>
> 2. This section further provides that the county auditor shall ascertain and determine the value of the company's property and deduct from the amount thereof the assessed value of the company's real estate and apportion the remainder to such cities, villages, townships or taxing districts pro rata in proportion to the value of the real estate and fixed property included in the return, in each of such cities, villages, townships or taxing districts.
>
> Which of the several items enumerated in section 5376 as amended 107 O. L. 32, are subject to this apportionment and what is the basis of the apportionment, that is, what is meant by 'real estate and fixed property' as used in this section?"

In considering your first question the following factors must be taken into account:

Intangible property cannot with any accuracy be said to be "situated" anywhere; that is to say, in the nature of things it can not have any independent situs. Hence, at common law, and in the absence of statute incorporeal property was assigned location wherever its location was necessary by applying the maxim *mobilia sequuntur personam.* It is now established, however, that it is within the power of a state to deal with intangible property on the footing of situs, as Mr. Justice Holmes puts it in Wheeler vs. Sohmer, 233 U. S., 434-439—that is, to assign to intangible property an artificial location dependent upon some such factor as the place where the tangible evidence of the property may be kept, the place where the business is conducted which originates the intangible property, etc., and in so doing to reject the principle *mobilia sequuntur personam.*

Legislation directed to this end would, of course, most appropriately take the form of an express declaration that for a given purpose—in this instance property taxation—the intangible property in question should be deemed to be situated or located at some such place. But it is well established that statutory expressions containing no direct mention of the subject of situs or location may be construed and applied as intended to accomplish this end. Thus, the statutes about which you inquire require corporations, wherever organized, to list for taxation *inter alia*

"moneys and credits" in this state. (Section 5404 G. C.) Under this statute it has been held that moneys and credits originating in the conduct of the business of a foreign corporation in the state of Ohio have a taxable situs in this state.

> Hubbard vs. Brush, 61 O. S. 252; Ins. Co. vs. Bowland, 196 U. S. 611; Simes vs. Best, 1 O. C. C. n. s. 41.

The exact point in this state at which such intangibles will have their situs depends upon whether or not the foreign corporation has an office or principal place of business in this state, as may be realized by comparing the last two of the above cited cases. Indeed, even as to natural persons the principle of business situs as an exception to the principle of *mobilia sequuntur personam* has been recognized.

> Jack vs. Walker, 96 Fed. 578; Grant vs. Jones, 39 O. S. 506; Meyers vs. Seeberger, 45 O. S. 232.

Though the result in these cases is dependent upon the application of the statute requiring an agent to list all moneys and credits in his possession and under his control as agent, thus making the maxim *mobilia sequuntur personam* applicable to the residence of the agent rather than that of the principal.

In the case you submit, however, it does not seem that any of the exceptions recognized by the Ohio statutes and cases already referred to apply because the principal office and the plant of the corporation are both located in the same county and there is no question of interstate situs whatsoever.

We have other provisions in our statutes, however, relating to situs such as that of section 5371 G. C. which, as it now stands, contains the following expressions:

> "* * * Merchants' and manufacturers' stock, and personal property upon farms, shall be listed in the township, city or village in which it is situated. All other personal property, moneys, credits and investments, except as otherwise especially provided, shall be listed in the township, city or village in which the person to be charged with taxes thereon resides at the time of the listing thereof, if such person resides in the county where the property is listed, and if not, then in the township, city or village where the property is when listed."

So far as intangibles are concerned this section merely declares the rule of *mobilia sequuntur personam.* The declaration that if the owner does not reside in the county the property shall be listed "in the township, city or village where the property is" means nothing with respect to intangible because, as we have seen, such property is inherently incapable of natural location.

Again, there is section 5371-4 of the General Code (107 O. L. 31) which provides as follows:

> "Property pertaining to a business carried on by a person, firm, partnership, association or unincorporated company, shall be listed in the township, city or village in which such business is carried on. Provided, however, that if such business is carried on in more than one township, city or village in the same county, the value thereof shall be ascertained and apportioned to and assessed in the several townships, cities or villages in which such business is carried on."

This section recognizes and applies the principle of business situs, but it does

not relate to the property of incorporated companies and therefore can not be considered in connection with your question.

The so-called Parrett-Whittemore law contained an express provision on the subject of your first inquiry in the form of section 5406-3 G. C. This section was intended to articulate with sections 5404 et seq. about which your question arises; but it was repealed in 107 O. L., 45, and no substitute for it was provided for in the repealing act.

There are no other statutory provisions, past or present, which in any way relate to the subject under consideration. Whatever may have been the effect of section 5406-3 as an effort to depart from the rule *mobilia sequuntur personam,* there is at present in force no statute which in any way modifies this, the common law principle, which governs your first question.

This being true we must assign to the intangible property of the corporation in question the location of the corporation itself. In the case you submit, the choice of locations is between the place where the principal office of the corporation is located and the place where its manufacturing enterprises, which presumably constitute its chief activities, are conducted.

I have no hesitancy in advising that the first of these places is that at which the corporation has its domicile and accordingly is the place at which its intangible property has its taxable situs.

> Salt Co. vs. Davis, 21 O. S., 555; Pelton vs. Transportation Co., 37 O. S. 450; Hubbard vs. Brush, supra; Simes vs. Best, supra.

In other words, the corporation "resides" at its principal place of business, and on the principle that movable things take their situation from the residence of their owner, which applies to intangible property in this state for the purpose of taxation, it follows that the moneys, credits and investments of the corporation about which you inquire are "situated" for the purposes of section 5405 of the General Code in the taxing district in which the company has its principal place of business.

I may say that I am not at all sure, having regard to all the provisions of section 5405, that the first sentence thereof is intended to apply to property which has no situation of its own. The whole section is as follows:

> "Return shall be made to the several auditors of the respective counties where such property is situated, together with a statement of the amount thereof which is situated in each township, village, city, or taxing district therein. Upon receiving such returns, the auditor shall ascertain and determine the value of the property of such companies, and deduct from the aggregate sum so found of each, the value as assessed for taxation of any real estate included in the return. The value of the property of each of such companies, after so deducting the value of all the real estate included in the return, shall be apportioned by the auditor to such cities, villages, townships, or taxing districts, pro rata, in proportion to the value of the real estate and fixed property included in the return, in each of such cities, villages, townships, or taxing districts. The auditor shall place such apportioned valuation on the tax duplicate and taxes shall be levied and collected thereon at the same rate and in the same manner that taxes are levied and collected on other personal property in such township, village, city or taxing district."

Without at this time discussing your second question, it is obvious that after the real estate included in the return by a corporation of its property which is located

in a given county is deducted from the aggregate value thereof, the remainder is to be located, for the purposes of taxation and by the rule of apportionment, in the districts in which the "real estate and fixed property included in the return" is located.

Whatever the term "fixed property" in this context means, it is at least clear that it is a qualifying term and prima facie does not embrace all taxable property other than real estate, yet before a taxing district is entitled to any part of the valuation of the property located in the county, it must have in it "real estate and fixed property," or either, and the apportionment to the district is based upon the relative value of such real estate and fixed property as compared to the whole value of such real estate and fixed property in the county. Hence, as the ultimate result of the process required by section 5406, the "situation" of intangible property will become perfectly immaterial unless such property were deemed to be "fixed property." That is to say, even if all the intangible property of a corporation might be regarded as situated within a given taxing district by the application of the rule *mobilia sequuntur personam,* which as I have held would apply to the case you submit, yet such property would not reach the duplicate of such taxing district except in proportion to the relative amount of real estate and fixed property in such district, and if there be no real estate and fixed property belonging to the corporation in that taxing district, then none of the intangible property which would otherwise be situated therein would be placed upon the duplicate of that district for taxation purposes.

However, the first sentence of section 5405 seems to assume that all property of the company which is taxable in the county must be assigned some situation therein and in some taxing district thereof, for the purpose of the original return at least. For this reason I do not feel able to advise that the corporation which you describe in making its return may omit to assign any situation to its intangibles, though I point out that the assigning of such a situation is of no practical value or importance unless intangible property be regarded as fixed.

This brings me to your second question the discussion of which I may preface by repeating the statement that the phrase "fixed property" evidently is more restricted in its import than the phrase "all other property" would be.

Conceivably the term "fixed property" might mean any of the following:

(1) Immovable property, i. e., that which is in law immovable, in which sense, contrasted as it is with "real estate," it would be meaningless because nothing is in contemplation of law immovable excepting real estate and interests therein which so far as the tax laws of Ohio are concerned are all comprised under the heading of "real property." For example, mineral rights and the like would be "real estate" for the purpose of taxation in Ohio. Therefore this meaning must be rejected.

(2) Property which though legally movable is in use stationary, in which sense the term would include such things as office furniture, books, light machinery, merchants' stocks, etc.

(3) Property which though legally movable is not only stationary in use but is attached in a more or less permanent way to particular real estate and adapted to the purposes for which that real estate is used—in other words such "fixtures" as would not be considered either "land" or "buildings" for the purpose of taxation. This meaning would exclude such articles of tangible property as are given as examples of the second possible meaning of the term.

(4) All tangible personal property—in which sense it would include animals, highly movable in character but capable of an independent situs of their own under section 5371 of the General Code.

(5) A meaning which might be described as something between the second

and fourth of the meanings already suggested and which would include all tangible personal property excepting such as in use would be constantly in movement such as automobile trucks not ordinarily housed in one particular place to the exclusion of others, boats used for commercial transportation of a private character, etc.

The first of these suggested meanings having been eliminated the choice among the other four must be made, I think, by considering the legislative history of what are now sections 5404 and 5405 of the General Code. Its subject matter appeared first in the tax law of 1859, 56 O. L., 183, as section 16 thereof. That section provided a scheme for the taxation of the property of all corporations whose taxation was not specifically provided for otherwise in the act—just as the present sections do. Among the kinds of companies, however, to which it then related were some for whose taxation specific provision has since been made. Most significant among these were railroad companies. Indeed, the legislature seems to have had particularly in mind the case of railroad companies in framing section 16 as the following language quoted from that section will show:

> "The president, * * * shall list for taxation, * * * all the personal property, which shall be held to include road bed, water and wood stations and such other realty *as is necessary to the daily running operations of the road,* moneys and credits of such company or corporation, within the state, at the actual value in money, in manner following; in all cases return shall be made to the several auditors of the respective counties where such property may be situated, together with a statement of the amount of said property which is situated in each township, incorporated village, city or ward therein; the value of all movable property shall be added to the stationary and fixed property and real estate, and apportioned to such wards, cities, incorporated villages, or townships, pro rata, in proportion to the value of the real estate and fixed property in said ward, city, incorporated village or township, * * *."

The tax commission will at a glance recognize some of this language and remember where it has gone in the subsequent history of the taxing laws of our state.

When railroads were taken out of the operation of this section it was first amended by merely striking out the words "railroad company" leaving in the section the anomalous reference to road bed, water and wood stations and other similar terms, (See 73 O. L. 138).

When the statutes were codified in 1880 the reference to "water and wood stations" was left out, but what is now section 5405 G. C. appeared in what was then section 2744 R. S. as follows:

> "In all cases return shall be made to the several auditors of the respective counties where such property may be situated together with a statement of the amount of said property which is situated in each county, village, city or ward thereof. The value of all movable property shall be added to the stationary and fixed property or real estate and apportioned * * * in proportion to the value of the real estate and fixed property * * *."

In the codification of 1910 this language was retained. The present form of the statute dates from its amendment in 102 O. L., 60.

I call attention to the fact that in the original there were two words which were left out in the amendment of 1911—"stationary" which in the original was coupled with the word "fixed," the meaning of which is now under consideration, and the

word "movable" which was contrasted in the original with "stationary and fixed" property. In other words, in the original statute which, as has been remarked was intended to apply to railroad companies with other corporations, it seems clear that all property of such companies, excepting real estate, was divided into two classes, viz: (1) "movable property," and (2) "stationary and fixed property and real estate." The legislature in making this provision was undoubtedly thinking about the rolling stock of railroads, such as engines and cars, and intended to set such rolling stock over against all other species of tangible property at least. The problem still exists under said original section, however, to determine whether moneys, credits and investments which, as has been observed, were incapable of acquiring any independent situs of their own, were intended to be clased as "movable" or as "stationary and fixed." Undoubtedly the reason impelling the legislature to contrast rolling stock with some other property was that the rolling stock did not have any natural fixed situs. The same reason might well have been applied to intangible property.

Again, in the original section, though the first classification was as above outlined, the apportionment was to be made, not on the basis of "stationary and fixed property and real estate," but on the basis of "real estate and fixed property," thus omitting the word "stationary."

In this connection it will be further observed that in the amendment of 1911 the word "stationary" was dropped. I do not attach any significance either to the change in phraseology from one clause to another in the original section nor to the omission of the word "stationary" in the amendment of 1911. In my opinion the phrase "stationary and fixed" was intended by the legislature in 1859 to be synonymous with the word "fixed" as subsequently used and the meaning of the word "fixed" having thus been determined its retention in 1911 must be regarded as indicative of an intention on the part of the General Assembly to the effect that the meaning of the word should be the same as it had previously been, viz: equivalent to "stationary and fixed." In this view I am supported by the only case which I have been able to find bearing on the question. I refer to Railway Co. vs. Kelsey, 9 O. Dec. Rep. 227, affirmed by the supreme court without report. The reporter's syllabus of that case is as follows:

> "Revised statutes, 2774, did not change the prior law, and the rules for the taxation of a railroad company, whose line runs through several counties of this state are: 1st. The value of the rolling stock is to be apportioned to the different counties and cities not as to value, but in proportion to the length of the road in each. 2nd. The fixed property is to be apportioned in the proportion that the value of the part in each county or city bears to the total in the state. 3rd. The value of moneys and credits are to be apportioned in each locality in the same proportion as the fixed property."

The syllabus refers to a change made by Revised Statutes, section 2774, in the prior law. The court was considering whether or not the act of 1862, above referred to, changed the original law enacted in 56 O. L. 183. The amendment as we have seen provided a new scheme for the assessment of railroads by boards of county auditors and the rule of apportionment therein was as follows:

> "To each city, village, township or district, or part thereof therein, shall be apportioned such part thereof, as shall equalize the relative value of the real estate, structures, and stationary personal property of such company therein, in proportion to the whole value of the real estate, structures

and personal property of such railroad company in this state, and so that the rolling stock of such company shall be apportioned in the same proportion that the length of such road in said county bears to the entire length thereof in all of said counties or county, and to each city, village and district, or any part thereof therein."

The controversy in the case was as to whether the moneys and credits of the railroad company should be apportioned like the rolling stock was required to be apportioned under section 2774, viz. according to the miles of main track or in proportion to the "real estate, structures and personal property." The court held that the latter rule of apportionment was correct and in so holding based its conclusion upon the reasoning set forth in the syllabus, viz., that the railroad act of 1862 was no different in respect to its rule of apportionment for moneys and credits than the general corporation act of 1859 which formerly applied to railroads had been. In other words, so far as apportionment was concerned the court was of the opinion that the only change made in the statute was to require rolling stock to be apportioned according to the miles of main track instead of in proportion to the "stationary and fixed property" in each taxing district. The court therefore necessarily considered and decided what the meaning of the original law of 1859 was as to the apportionment of moneys and credits. On this point the court said at page 230:

> "The moneys and credits of the company have relation to its other property and should be accredited as much to one dollar thereof as to another, and as such moneys and credits have no special locality, the statute provides that they shall be apportioned to each county, city, village and township, in the same proportion that the fixed property is."

This decision, then, which as careful perusal of the entire opinion shows was influenced by the practice which had been followed and of which apparently the court was cognizant, establishes the result that moneys, credits and investments, i, e., all intangible property, is outside of the classification of "fixed property" as that classification was created by the law of 1859. As I have previously stated that in my opinion the term "fixed property" as it now appears in the statute after the amendment of 1911 has the same meaning as that which it had acquired previously to that amendment, it follows that the term "fixed property" does not include intangible property such as moneys, credits and investments.

The case cited did not, of course, pass directly upon the question as to whether any tangible property was to be regarded as outside of the classification of "fixed" property. I think it is clear, however, that any property having the attributes of the rolling stock of a railroad would not be regarded as "fixed"; that is to say, any tangible personal property which in use would be constantly in motion from one place to another is not within the scope of the term "fixed property." Whether there is any property belonging to corporations other than public utilities and having these characteristics I can not say. I can conceive of such a case as, for example, motor trucks or motor vehicles used by manufacturing or mercantile corporations for transportation purposes and not so kept as to return regularly to some particular garage as their home station. Thus such a company might provide motor vehicles for the use of its traveling salesmen who would tour some district of the state soliciting orders for the product of the company. Such property could not be regarded as "fixed" and it would necessarily take its taxable situs from the domicile of the company—the company's principal place of business.

Section 5371, above quoted, might be regarded as furnishing a test which is to

be applied here. That section as we have seen requires merchants' and manufacturers' stocks and personal property upon farms to be listed in the district in which it is situated, thus giving to such tangible personal property an independent situs of its own. It further requires all other personal property, tangible and intangible, to be listed in the district in which the person to be charged with taxes thereon resides, except that if such person does not reside within the county where the property is listed it shall be listed in the township, city or village where the property is when listed. This last provision, though meaningless as I have stated when attempt is made to apply it to intangible property, is perfectly capable of application to tangible property such as office furniture, vehicles, domestic animals, other than those upon farms, and the like. The principle which I have in mind may be phrased thus:

That property is to be regarded as "fixed" for the purposes of section 5405 which has an independent situs of its own by virtue of section 5371 of the General Code. To apply this principle, however, would produce results which I do not think the legislature intended. For example, as applied to a railroad company under the tax law of 1859 it would result in all office furniture in the county wherein the railroad had its principal place of business being listed in the taxing district wherein that principal place of business was situated, whereas all such property in all the other counties of the state would be situated in the several taxing districts in which it might be found. In other words such property would be regarded as "fixed" in the counties other than the one in which the principal place of business of the company was located and as otherwise in the county wherein such place of business was located.

I find myself therefore obliged to reject the provisions of section 5371 as a test in determining the meaning of section 5405. I come back therefore to the meaning previously suggested which I may epitomise as follows:

The term "fixed property" includes all tangible personal property which in use is being kept on tax listing day at some particular place though it may be taken from that place occasionally and even habitually if it is always returned to that place for safe-keeping or otherwise when not in use. The term excludes all intangible property such as moneys, credits and investments and such tangible property as vehicles which are not only habitually moved about from place to place when in use but which are not assignable to any particular place as a place of safe-keeping or rest.

From this statement it will be seen that I can make but a partial and imperfect answer to your question as to what items of those mentioned in section 5376 represent property which is subject to apportionment and what come within the classification of "fixed property." Section 5376 is not framed on this basis. However, I may undertake such an answer to your question as I find myself able to give.

Section 5376 G. C. provides as follows:

> "Such statements shall truly set forth all live stock, all vehicles, all tools and machinery, all household goods and furnishings, all jewelry, all moneys, all credits, all bonds and corporate stocks, all annuities, and the value of each of all said items; the average value of the materials and manufactured articles required to be listed by manufacturers; the average value of the goods and merchandise required to be listed by merchants; all property required to be listed by pawnbrokers, and the value thereof; the monthly average amount or value, for the time he held or controlled them within the preceding year, of all moneys, credits, or other effects, within that time invested in, or converted into bonds or other securities not taxed,

to the extent he may hold or control such bonds or securities on tax listing day, and no indebtedness created in the purchase of such bonds or securities shall be deducted from the credits required to be listed herein; all other personal property, of every kind, character or description, and the value thereof."

The following is a tabular statement of the classification of items mentioned in this section for the purposes of section 5405 G. C.:

Fixed Property.	*Apportioned Property.*
Live stock on farms or kept at any particular place.	Live stock, if any, so used for transportation purposes and not having any definite or assignable location of its own.
Vehicles subject to the classification above expressed respecting live stock.	Vehicles subject to the classifications above expressed respecting live stock.
Tools, machinery, household goods (office furniture), furnishings.	Moneys.
Jewelry.	Credits.
Manufacturers' stocks.	Bonds and corporate stocks.
Materials.	Annuities.
Machinery, etc.	Effects converted into non-taxable securities.
Merchants' stocks (other than those of peddlers).	Peddlers' stocks.
Property in pawn.	
Other personal property.	

It is to be sure possible, at least in an academic sense, that any given class of tangible property, excepting probably manufacturers' stocks, may acquire a transitory character by the manner in which the owner uses it. That is to say, by a transitory character I mean that the property is habitually and continually in a state of transit so that it can have no situs anywhere excepting at the domicile of its owner. This, an incorporated company might well, through its agents, peddle goods, for this purpose having horses and wagons and stocks of merchandise continually "on the move" from place to place. Such property would, of course, not be "fixed."

In short, I can do no more than repeat the statement that I have already made to the effect that the items set forth in section 5376 of the General Code are not divisible into classes for the purpose of section 5405 of the General Code at all.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1423.

APPROVAL OF BOND ISSUE OF THE CITY OF LORAIN—$37,500.00.

COLUMBUS, OHIO, August 26, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In re: Bonds of the city of Lorain, in the sum of $37,500.00, for the purpose of extending the water mains of the waterworks of said city.

I have examined the transcript of the proceedings of the council and other officers of the city of Lorain in the issuance of the above described bonds, and beg to advise you that said proceedings are in all respects legal, and that the bonds when issued will constitute valid and binding obligations of the city, payable according to their tenor.

In this connection I may state that the transcript discloses the fact that the proceeds of the bonds are intended to be used in carrying out an agreement made between the council of the city and the United States Shipping Board Emergency Fleet Corporation, the general tenor of which is that the corporation, which is securing housing facilities for a large number of laborers engaged in war shipping industries, is to put in all necessary municipal improvements, and the city is to pay such part as it would ordinarily pay for the making of such municipal improvements by way of reimbursement to the corporation.

This procedure would be, of course, violative of those provisions of the General Code which require municipal improvements to be made upon contracts entered into by the director of public service after competitive bidding. However, this fact does not in my judgment affect the validity of the bonds, which are issued for a perfectly lawful purpose, but goes to the legality of the proceedings for the expenditure of the fund created by the sale of the bonds after such sale takes place.

I therefore approve the bonds for purchase, and retain the transcript for the purpose of comparison with the bonds when printed and delivered, though the form of the bonds which is set forth in the transcript is perfectly satisfactory.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1424

APPROVAL OF CONTRACT BETWEEN SECRETARY OF AGRICULTURE AND HARRY C. HOLBROOK.

COLUMBUS, OHIO, August 26, 1918.

HON. N. E. SHAW, *Secretary of Agriculture, Columbus, Ohio.*

DEAR SIR:—You have submitted to this department contract entered into between yourself and one Harry C. Holbrook, under date of August 14, 1918, wherein Mr. Holbrook is to act as architect for an addition to the Ohio State Fish Hatchery building at Put-in-Bay, Ohio, he to receive therefor the sum of five per cent of the cost of the work.

I have approved the contract after careful examination and after having received from the auditor of state a certificate that there is money available for the purposes thereof, and have filed said contract in the office of the auditor of state, herewith returning to you the duplicate copies which you submitted.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1425.

APPROVAL OF ABSTRACT OF TITLE TO LOT 86 OF WOOD BROWN PLACE, FRANKLIN COUNTY, OHIO.

COLUMBUS, OHIO, August 27, 1918.

HON. CARL E. STEEB, *Secretary, Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—I am in receipt of an abstract of title for the following described lot of land, situated in Franklin county, Ohio, and known as lot number eighty-six (86) of the Wood Brown Place, as shown by plat of said addition recorded in plat book 5, pages 196-197, recorder's office, Franklin county, Ohio, being a part of the following premises, to-wit:

> Being a part of quarter township number three (3), township number one (1), range number eighteen (18), United States military lands. Beginning at a point in the center of Lane avenue, where it intersects the west line of the right of way of The Columbus, Hocking Valley and Toledo Railroad, thence running in a southerly direction with and along said west line of the right of way of said railroad to the point where it intersects the north line of the land owned by Jerry O. Lisle, thence running in a westerly direction with said Jerry O. Lisle's north line 905 feet, more or less, to a point in the center of the Scioto river and Olentangy free turnpike, thence running in a northerly direction along the center of said Olentangy and Scioto river free turnpike 1,348 feet, more or less, to the center of Lane avenue, thence running in an easterly direction with the center of Lane avenue 515 feet, more or less, to the point of beginning—containing twenty-four (24) acres of land, more or less.

I have carefully examined said abstract and find no defects in the title as disclosed thereby.

There are no encumbrances or liens upon said premises except the taxes for the year 1918 which are undetermined and unpaid; also a special assessment on said premises for pike improvement, amounting to 40c principal and 1c interest due in June, 1919.

I am therefore of the opinion that said abstract disclosed on August 19, 1918, a good title in Anna Pheneger to the premises hereinbefore described.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1426.

APPROVAL OF ABSTRACT OF TITLE TO LOT 87 OF WOOD BROWN PLACE, FRANKLIN COUNTY, OHIO.

COLUMBUS, OHIO, August 27, 1918.

HON. CARL E. STEEB, *Secretary, Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—I am in receipt of an abstract of title for the following described lot of land, situated in Franklin county, Ohio, and known as lot number eighty-seven (87) of the Wood Brown Place, as shown by plat of said addition recorded in

plat book 5, pages 196-197, recorder's office, Franklin county, Ohio, being a part of the following premises, to-wit:

> Being a part of quarter township number three (3), township number one (1), range number eighteen (18), United States military lands. Beginning at a point in the center of Lane avenue, where it intersects the west line of the right of way of The Columbus, Hocking Valley and Toledo railroad, thence running in a southerly direction with and along said west line of the right of way of said railroad to the point where it intersects the north line of the land owned by Jerry O. Lisle, thence running in a westerly direction with said Jerry O. Lisle's north line 905 feet, more or less, to a point in the center of the Scioto river and Olentangy free turnpike, thence running in a northerly direction along the center of said Olentangy and Scioto river free turnpike 1,348 feet, more or less, to the center of Lane avenue, thence running in an easterly direction with the center of Lane avenue 515 feet, more or less, to the point of beginning—containing twenty-four (24) acres of land, more or less.

I have carefully examined said abstract and find no defects in the title as disclosed thereby.

There are no encumbrances or liens upon said premises except the taxes for the year 1918 which are undetermined and unpaid; also a special assessment on said premises for pike improvement, amounting to 40c principal and 1c interest due in June, 1919.

I am therefore of the opinion that said abstract disclosed on August 19, 1918, a good title in Louise Pheneger to the premises hereinbefore described.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1427.

APPROVAL OF ABSTRACT OF TITLE LOT 34 OF WOOD BROWN PLACE, FRANKLIN COUNTY, OHIO.

COLUMBUS, OHIO, August 28, 1918.

HON. CARL E. STEEB, *Secretary, Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—I am in receipt of an abstract of title for the following described lot of land, situated in Franklin county, Ohio, and known as lot number thirty-four (34) of the Wood Brown Place, as shown by plat of said addition recorded in plat book 5, pages 196-197, recorder's office, Franklin county, Ohio, being a part of the following premises, to-wit:

> Being a part of quarter township number three (3), township number one (1), range number eighteen (18), United States military lands. Beginning at a point in the center of Lane avenue, where it intersects the west line of the right of way of The Columbus, Hocking Valley and Toledo railroad, thence running in a southerly direction with and along said west line of the right of way of said railroad to the point where it intersects the north line of the land owned by Jerry O. Lisle, thence running in

a westerly direction with said Jerry O. Lisle's north line 905 feet, more or less, to a point in the center of the Scioto river and Olentangy free turnpike, thence running in a northerly direction along the center of said Olentangy and Scioto river free turnpike 1,348 feet, more or less, to the center of Lane avenue, thence running in an easterly direction with the center of Lane avenue 515 feet, more or less, to the point of beginning—containing twenty-four (24) acres of land, more or less.

I have carefully examined said abstract and find no material defects in the chain of title to said premises as disclosed thereby.

Said abstract does not show any encumbrances or liens upon said premises except the taxes for the year 1918, which are undetermined as to amount and unpaid; and except a special assessment on said premises for road improvement, amounting to 41c, inclusive of interest.

I am therefore of the opinion that said abstract discloses that on August 19, 1918, the heirs of George W. Lakin had a good and sufficient title to the premises hereinbefore described, subject, however, to the dower interest of Mary E. Lakin, widow of said George W. Lakin. It does not appear from said abstract that an affidavit has been prepared in accordance with the provisions of section 2768 General Code (103 Ohio Laws, 99) showing the heirs at law or next of kin of said George W. Lakin at the time of his death and presented to the county auditor for transfer of said premises of said George W. Lakin to his heirs at law, and recorded in the office of the county recorder.

Would therefore advise you to see that said affidavit is placed on record prior to your acceptance of the deed for said premises.

I am returning herewith the abstract of title submitted.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1428.

APPROVAL OF BOND ISSUE OF VILLAGE OF WEST PARK—$10,359.00.

COLUMBUS, OHIO, August 28, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In re: Bonds of the village of West Park, Ohio, in the amount of $10,359.00, in anticipation of assessments levied for the construction of sidewalks on certain streets of said village.

I have examined the transcript of the proceedings of the council and other officers of the village of West Park, Ohio, in the issuance and sale of the above described bonds, and am of the opinion that such proceedings are in all respects legal, and that the bonds when properly signed and delivered will constitute valid obligations of said village, payable in accordance with their terms.

The form of the bonds has been approved, but the transcript will be retained for the purpose of making comparison with the original bonds.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1429.

APPROVAL OF ABSTRACT OF TITLE TO LOT NO. 25 OF WOOD BROWN PLACE, FRANKLIN COUNTY, OHIO.

COLUMBUS, OHIO, August 30, 1918.

HON. CARL E. STEEB, *Secretary, Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—I am in receipt of an abstract of title for the following described premises, situate in the township of Clinton, in the county of Franklin, and in the state of Ohio, to-wit:

> Being lot number twenty-five (25) of Wood Brown Place Addition, as the said lot is numbered and delineated upon the recorded plat thereof, of record in plat book No. 5, pages 196-197, recorder's office, Franklin county, Ohio.

In addition your Mr. Kohr informs me that Samuel R. Watkins, who executed a deed for said premises on November 2, 1915, to Arminta B. Ickes, was unmarried at that time and at the time the said deed was delivered.

Mr. Kohr has also furnished me with copy of a release of the aforesaid premises from the operation of the judgment obtained in the case of The Ohio State Savings Association vs. Arminta B. Ickes et al., in cause No. 65,193, Franklin county, Ohio, court of common pleas. Said release was placed on record August 29, 1918, and a copy thereof has been attached to the abstract.

I have carefully examined said abstract in connection with the additional information given above and find no material defects in the title as disclosed thereby.

The abstract discloses no encumbrances or liens upon said premises except the taxes for the year 1918, which are undetermined as to amount and are unpaid and a lien.

I am therefore of the opinion that said abstract, when taken in connection with the additional information that I have referred to above, disclosed on August 19, 1918, at 7 a. m., a good and sufficient title in Henry G. Watson to the premises hereinbefore described.

I am returning herewith the abstract submitted.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1430.

APPROVAL OF BOND ISSUE OF THE VILLAGE OF EAST VIEW, OHIO. $11,800.00.

COLUMBUS, OHIO, August 31, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

> In re: Bonds of the village of East View, Ohio, in the sum of $11,800.00, for the purpose of constructing a water main in Van Ness boulevard, in said village.

I have examined the transcript of the proceedings of the council and other officers of the village of East View, Ohio, in the issuance and sale of the above described bonds, and am of the opinion that such proceedings are in all respects legal and that the bonds when properly signed and delivered will constitute valid obligations of the said village, payable in accordance with their terms.

The form of the bonds has been examined but the transcript will be retained for the purpose of making comparison with the original bonds.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1431.

APPROVAL OF BOND ISSUE OF THE VILLAGE OF EAST VIEW, OHIO. $32,600.00.

COLUMBUS, OHIO, August 31, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In re: Bonds of the village of East View, Ohio, in the sum of $32,600.00, in anticipation of special assessments for constructing storm and sanitary sewers in Van Ness boulevard, in said village.

I have examined the transcript of the proceedings of the council and other officers of the village of East View, Ohio, in the issuance and sale of the above described bonds, and am of the opinion that such proceedings are in all respects legal and that the bonds when properly signed and delivered will constitute valid obligations of the said village, payable in accordance with their terms.

The form of the bonds has been examined but the transcript will be retained for the purpose of making comparison with the original bonds.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1432.

MUNICIPALITY—CITY ENGINEER—POWER OF APPOINTMENT AND REMOVAL OF.

The power of appointment and removal of the city engineer is vested in the mayor if such engineer is the head of a sub-department established in the department of public service by the director thereof; if no such sub-department has been so established the engineer is a general employe of the department of public service and is to be appointed and removed by the director thereof.

COLUMBUS, OHIO, September 4, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—You request my opinion as follows:

"We are respectfully calling your attention to sections 4246 and 4247 G. C., and might cite you to opinion, page 337 of the Annual Reports of the

Attorney General for 1912, giving the director of service the power of making appointments.

Question: Is the selection or removal of a city engineer vested in the director of public service?"

The following sections of the General Code furnish, I believe, a rather clear answer to your question:

"Section 4246.—The executive power and authority of cities shall be vested in a mayor, president of council, auditor, treasurer, solicitor, director of public service, director of public safety, and such other officers and departments as are provided by this title."

"Section 4247.—Subject to the limitations prescribed in this subdivision such executive officers shall have exclusive right to appoint all officers, clerks and employes in their respective departments or offices, and likewise, subject to the limitations herein prescribed, shall have sole power to remove or suspend any of such officers, clerks or employes."

"Section 4250.—The mayor shall be the chief conservator of peace within the corporation. He shall appoint, and have the power to remove, the director of public service, the director of public safety, and the heads of the sub-departments of the departments of public service and public safety, * * *."

"Section 4327.—The director of public service may establish such sub-department as may be necessary and determine the number of superintendents, deputies, inspectors, engineers, harbor masters, clerks, laborers and other persons, necessary for the execution of the work and the performance of the duties of this department."

I think a mere reading of these sections makes it obvious that your question can not be answered unequivocally either way. It all depends upon whether there is a sub-department of engineering in the department of public service. Such a sub-department, if it exists, would be established by the director of public service and by no other authority. If the director establishes such a sub-department then the head of it is subject to appointment and removal by the mayor. If no such sub-department has been created then any engineer who would be employed in the department of public service, no matter how dignified his title might be, would be merely a general employe of the department and not the head of a sub-department. As such, he would be subject to appointment and removal by the director of public service.

The answer to your question, then, depends upon whether or not the engineer is the head of a sub-department created by the director of public service within his department.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1433.

COLLATERAL INHERITANCE TAX—BEQUEST TO GRANDSON NOT SUBJECT TO.

A bequest to a grandson, whose mother is living and is also a beneficiary of the grandfather's will, is not subject to the collateral inheritance tax.

COLUMBUS, OHIO, September 5, 1918.

HON. FRED W. MCCOY, *Prosecuting Attorney, Carrollton, Ohio.*

DEAR SIR:—You request my opinion upon the following question:

> "Mr. S. of this place willed his daughter and only child, Mrs. G., who is now living, $100.00 and the balance of his estate to her son—G., grandson of S., who is now living.
>
> Is the bequest to the grandson under the circumstances subject to this tax?"

Section 5331 of the General Code imposes a tax upon interests in property passing by death "to a person in trust, or otherwise, other than to or for the use of the father, mother, husband, wife, *lineal descendant* or adopted child, * *"

Section 5333 of the General Code, which would have to be applied if the bequest to the grandson were taxable, in order to arrive at the value of his taxable interest, provides as follows:

> "When a person bequeaths or devises property to or for the use of father, mother, husband, wife, lineal descendant or adopted child, during life or for a term of years, and the remainder to a collateral heir, or to a stranger to the blood, the value of the prior estate, shall be appraised, within sixty days after the death of the testator, in the manner hereinafter provided, and deducted, together with the sum of five hundred dollars, from the appraised value of such property."

Section 5333 throws light upon the meaning of the phrase "lineal descendant" as used in section 5331; for it makes it rather clear that the general assembly did not intend to exclude from the scope of that term any person in the direct line of descent from the decedent. In other words, any descendant of the decedent who is not a "collateral heir or a stranger to the blood" within the meaning of section 5333 appears to have been regarded by the general assembly as a "lineal descendant." Section 5333 further makes it apparent that the question as to whether or not a given person is a "lineal descendant" of the decedent can not depend upon the fact that there are other "lineal descendants" living, more nearly related to the decedent than he. In other words, the phrase "lineal descendant" is not limited to the nearest surviving lineal descendant, but applies to any who would come within the natural scope of that phrase.

Of course, if there were no other provisions in the statute one would say that the phrase "lineal descendant" would naturally include a grandson. Such other expressions as we find in the statute do not tend to show that the phrase is used in any other than its natural sense. It would rather emphasize its use in that sense.

If authority is needed for the proposition that the phrase "lineal descendant" naturally includes a grandson, I might refer you to *In re Winchester's Estate,* 140 Cal. 468. The exact result in that case may not be law in Ohio because of the

phraseology of the amendment to section 5331 as compared with that of the original statute; but in so far as it touches the question now under consideration it was, in my opinion, correctly decided.

I might add that the phrase "adopted child" as used in the statute probably is limited in its scope to the person sustaining that relation to the decedent; so that probably the issue of an adopted child would be persons whose interests are subject to the tax. This is because section 5331 as originally enacted added the phrase "or the lineal descendants of an adopted child" to the catalogue of excepted persons, and this phrase was dropped when the section was amended in 1913. Hence it might be argued that because the whole phrase is "lineal descendant or adopted child" the legislature must have intended the same kind of a limitation with respect to the persons entitled to claim exemption under the first term as it apparently intended to impose with respect to those so entitled under the second term of the phrase. Such an argument, however, would not be well founded in my opinion. Going back to the original section we find the following language therein, which has also been omitted from the section as amended:

> "The wife or widow of a son, the husband of the daughter of a decedent."

Here we have the words "son" and "daughter" used in one part of the statute and the phrase "lineal descendant" in another. The general assembly evidently did not intend the latter phrase to be synonymous with "son" or "daughter," or it would have used those words throughout. In the original, then, "lineal descendant" undoubtedly included a grandson. The amendment did nothing to change this meaning, which remains the same as that which the phrase acquired in the original. This examination of the history of the statute, then, affords additional reasons for arriving at the result which I have previously expressed.

For all the foregoing reasons, I am of the opinion that a bequest to a grandson, whose father or mother is living, is exempt from the collateral inheritance tax—or, more accurately, not within the statute imposing the tax at all. Of course, I do not need to add that the issue of a daughter are just as much "lineal descendants" as the issue of a son would be.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1434.

TUITION—WHEN BOARD OF EDUCATION NOT LIABLE WHEN PUPIL ATTENDS SCHOOL IN ADJOINING DISTRICT.

Where a pupil lives more than one and one-half miles from the school to which he has been assigned in his own district, and there is located a nearer school in his own district, but such pupil attends a school in an adjoining district, which school in the adjoining district, although nearer than the school to which the pupil is assigned, is farther than the school which the pupil might have attended in his own district, under such circumstances tuition cannot be collected from the board of education of the district of the residence of such pupil by the board of education of the district where such pupil attended school.

Where a pupil lives more than one and one-half miles from the school to

which he has been assigned in his own district, but attends school in another district, which is farther from the residence of such pupil than the school in his own district, the board of education of such district where such pupil attends school cannot collect tuition from the board of education of the district where the pupil resides.

COLUMBUS, OHIO, September 5, 1918.

HON. A. C. MCDOUGAL, *Prosecuting Attorney, Woodsfield, Ohio.*

DEAR SIR:—Your letter requesting my opinion reads:

"I desire to have your opinion on the following statement of facts on behalf of the board of education of the Woodsfield Village School district of Woodsfield, Ohio.

"Last year the John Feldner children were assigned to the Standing Stone school, No. 14, which is more than three miles from their residence by the public road, The Feldner children attended the Woodsfield village schools, 652 rods from the Feldner residence by the public road, the Woodsfield Village School district being an adjoining district to that in which the Feldners reside. The distance from the Feldner residence to No. 12 rural school is 570 rods by the public road and the distance from the Feldner residence to No. 5 rural school is about 560 rods.

"School districts Nos. 14, 12 and 5 are all in the Center Township School district, the Woodsfield Village School district being an adjoining district in the same township.

"The question arises as to whether or not Center township pays for the schooling of the Feldner children in the Woodsfield Village School district or whether Mr. Feldner should pay it.

"For this school year the Feldner children have been assigned to No. 12 school, being in the Center Township School district, the district in which they reside, the distance being 570 rods from the Feldner residence to No. 12. May they attend the Woodsfield village schools at the expense of the Center Township district?"

Pertinent to your inquiry is section 7735 G. C., which reads in part:

"When pupils live more than one and one-half miles from the school to which they are assigned in the district where they reside, they may attend a nearer school in the same district, *or if there be none nearer therein*, then the nearest school in another school district, in all grades below the high school. * * *."

Applying the same to your case we have in substance the following:

The children of John Feldner, who live in Center Township Rural School district, were assigned to the Standing Stone school, No. 14 of said district, which Standing Stone school was more than three miles from the Feldner residence. The Feldner children, instead of attending the school to which they had been assigned in their own district, attended the Woodsfield school, which is located in an adjoining district. The Woodsfield school is located 552 rods from the Feldner residence. In Center Township Rural School district there is located school No. 5, which is 560 rods from the Feldner residence, and school No. 12, which is 570 rods from the Feldner residence.

The first question is: Can the Woodsfield village board of education collect tuition for such Feldner children from the Center Township rural board of education, on account of the attendance of said Feldner children at the Woodsfield school?

The section above quoted provides that when children live more than one and one-half miles from the school to which they are assigned in the district in which they reside, such pupils have a right to attend a nearer school in the same district. In your case you say that the children lived more than three miles, so that they could not be required under said section to attend the school to which they had been assigned. The section provides, though, that if there be no nearer school than the one to which they have been assigned in their own district, then they may attend the nearest school in another school district. That condition does not arise in this case because schools Nos. 5 and 12 are both nearer to the Feldner residence than is the Woodsfield school, and while the children would have had a right to attend a nearer school in their own district, they did not have a right to attend a school located outside of their district when there was a nearer school located within the district. In other words, several conditions must attach before a board of education is required to pay the tuition of pupils who attend a nearer school than the one to which they have been assigned in their own district. (1) They must live more than one and one-half miles from the school to which they have been assigned, and, (2) there must be no nearer school in their own district. When both of these conditions attach, then a pupil may attend a nearer school in another district and the board of education of the district of the residence of such pupils must pay the tuition of such pupils who attend such nearer school in the other district. (The above, however, is subject to the further condition that said schools are not centralized and the transportation is not provided.)

In Boyce vs. Board of Education, 76 O. S., 365, the children of the plaintiff were assigned to a school which was more than one and one-half miles from their home. They sought admittance in a school in an adjoining district, which school was farther from their residence than the one to which they had been assigned. Admittance was refused and a mandamus action was commenced, in the petition in which it was alleged that the road along which the pupils would be compelled to travel, in going to and from the school to which they had been assigned, was shaded on both sides with large trees and was dangerous to travel. In a *per curiam* opinion the court say, at page 368:

> "It is equally clear from the language which the legislature has employed that the only purpose to be accomplished by the section is to relieve school children from the necessity of attending a school in their own district which is more than one mile and a half from their residence *if there is a nearer school in another district.* Since the petition admits that the school which is under the control of the defendants is more remote from the residence of the relator than is the school of the district in which he resides, the circuit court correctly determined that the statute does not authorize the transfer."

So in our case, since it is admitted in the statement of facts that the Feldner children could have attended a nearer school in their own district, the tuition to which they would have been entitled, had there been no such nearer school, cannot be collected from the board of education of the district of their residence.

In your second question you say that the children have this year been assigned to school No. 12 and you ask if they can attend the Woodsfield school and collect tuition from the board of education of their residence for such attendance.

The Boyce case, above mentioned, settles your question precisely, for you state in your letter that school No. 12 is only 570 rods from the Feldner residence and that the Woodsfield school is 652 rods from their residence. So that, the tuition could not be collected from said board of education of the district of the residence of said pupils.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1435.

APPROVAL OF ABSTRACT OF TITLE TO LOT NO. 43 OF WOOD BROWN PLACE, FRANKLIN COUNTY, OHIO.

HON. CARL S. STEEB, *Secretary Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—I am in receipt of an abstract of title covering lot of land located in Franklin county, Ohio, known as lot No. 43, Wood Brown Place, as shown by plat of said addition recorded in plat book 5, p. 196-197, recorder's office, Franklin conuty, Ohio, and being part of the following described premises, to-wit:

> "Being a part of quarter township number three (3), township number one (1), range number eighteen (18), United States military lands. Beginning at a point in the center of Lane avenue, where it intersects the west line of the right of way of The Columbus, Hocking Valley and Toledo railroad, thence running in a southerly direction with and along said west line of the right of way of said railroad to the point where it intersects the north line of the land owned by Jerry O. Lisle, thence running in a westerly direction with said Jerry O. Lisle's north line 905 feet, more or less, to a point in the center of the Scioto river and Olentangy free turnpike, thence running in a northerly direction along the center of said Olentangy and Scioto river free turnpike 1,348 feet, more or less, to the center of Lane avenue, thence running in an easterly direction with the center of Lane avenue 515 feet, more or less, to the point of beginning—containing twenty-four (24) acres of land, more or less."

I have carefully examined said abstract and find no material defects in the title as shown thereby. Said abstract does not show any liens or encumbrances upon said lot No. 43 except the taxes for the year 1918, which are undetermined and unpaid.

I am, therefore, of the opinion that said abstract disclosed on September 4th, 1918, a good title in Joseph P. Byers to the premises hereinbefore described.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1436.

APPROVAL OF BOND ISSUE OF WILLIAMS COUNTY—$40,000.00.

COLUMBUS, OHIO, September 7, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In re: Bonds of Williams county, Ohio, in the sum of $40,000.00, for the purpose of creating a fund for the construction of fifteen certain designated and described bridges in said county.

I have carefully examined the corrected transcript of the proceedings of the board of county commissioners of Williams county, Ohio, and of other officers relating to the above issue of bonds and find said proceedings to be in all respects in conformity to the provisions of the General Code of Ohio relative to bond issues of this kind.

I am therefore of the opinion that properly prepared bonds covering said issue will, when the same are properly executed and delivered, constitute valid and subsisting obligations of said county, to be paid according to the terms thereof.

No bond form of the bonds to be printed covering said issue has been submitted for my approval, and I am therefore retaining said transcript until proper bond form is submitted and approved.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1437

COUNTY RECORDER—INDICES KEPT BY HIM NOT "RECORDS"—NO FEES FOR SEARCH CAN BE CHARGED.

The indexes required or authorized to be kept by a county recorder are no part of the record. To consult such indexes at the request of a citizen is not a "search of the record without copy" for which a fee may be charged.

COLUMBUS, OHIO, September 7, 1918.

HON. JOHN L. CABLE, *Prosecuting Attorney, Lima, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of recent date requesting my opinion as follows:

"Section 2779 of the General Code, referring to the fee to be collected by the county recorder, provides in part:

'For each search of the record without copy, fifteen cents.'

The present county recorder and those who have held office prior to him in this county have, at the request of persons coming into the office gone to the abstract index and advised them as to who holds the title to a lot inquired about and also advised from this same abstract index, the number, and amount of mortgages and made no charge for the same.

Will you please give me a definition of the above term, 'for each search of the record without copy, fifteen cents'?

Also advise if the recorder has any authority to refer to this abstract index record without making a charge for the same—this index record showing the number of the lot or the quarter section of land and is in fact an abstract of that particular real estate, all appearing upon the one page.

I call your attention to section 12930 of the General Code."

Section 12930 of the General Code, to which you refer, makes it a penal offense for a salaried county official to remit a fee.

You have sufficiently quoted from section 2779 of the General Code. The following other provisions of the General Code with respect to the duties of the county recorder may be considered:

"Section 2757.—The recorder shall keep four separate sets of records, namely: First a record of deeds, in which shall be recorded all deeds, powers of attorney, and other instruments of writing for the absolute and unconditional sale or conveyance of lands, tenements and hereditaments; second, a record of mortgages, in which shall be recorded all mortgages, powers of attorney, or other instruments of writing by which lands, tenements, or hereditaments are or may be mortgaged or otherwise conditionally sold, conveyed, affected, or incumbered in law; third, a record of plats, in which shall be recorded all plats and maps of town lots, and of the sub-divisions thereof, and of other divisions or surveys or lands; fourth, a record of leases, in which shall be recorded all leases and powers of attorney for the execution of leases. All instruments entitled to record shall be recorded in the proper record in the order in which they are presented for record."

It will be observed that none of the indexes which the recorder is required or authorized to keep are mentioned in this section, which prescribes the "records" which he shall keep. The indexes which it is the recorder's duty to keep are: The general alphabetical indexes (section 2764), a daily register of deeds and mortgages (section 2765), and when the county commissioners so order "sectional indexes," or as you describe them "abstract indexes" (section 2766).

It is my opinion that these indexes are not "records." It is not the duty of the county recorder to consult the indexes upon the request of a citizen, and he may lawfully refuse to do so. Indeed, in a refined sense it may be said that he has no right to perform this service. This technical view, however, is extreme, and it would seem to be not improper for the recorder, on the making of a request such as that described in your letter, to consult the abstract index and inform the inquirer what it shows. No fee is prescribed for this service, and it must be regarded as a mere gratuitous accommodation. At all events, a recorder who has extended such an accommodation and charged no fee for it is not subject to prosecution under section 12930 of the General Code.

You ask me to advise you as to the meaning of the phrase "for each search of the record without copy." In my opinion, this phrase contemplates a search of one of the records mentioned in section 2757 of the General Code.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1438.

APROVAL OF BOND ISSUE OF MAHONING COUNTY, OHIO—$48,000.00.

COLUMBUS, OHIO, September 7, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In re: Bonds of Mahoning county, Ohio, in the sum of $48,000.00, in anticipation of the collection of taxes and assessments to pay in part the respective shares of said county and of the owners of benefited property assessed of the cost and expense of improving I. C. H. No. 82, section "D", located in said county and in Beaver township.

I have carefully examined the corrected transcript of the proceedings of the board of county commissioners of Mahoning county, Ohio, and of other officers relating to the above issue of bonds and find said proceedings to be in all respects in conformity to the provisions of the General Code of Ohio relating to bond issues of this kind.

I am therefore of the opinion that properly prepared bonds covering said issue will, when the same are properly executed and delivered, constitute valid and subsisting obligations of said county, to be paid according to the terms thereof.

The bond form submitted with and as a part of the corrected transcript is not entirely satisfactory to me and I am therefore retaining said transcript until a proper bond form is submitted and approved.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1439.

APPROVAL OF BOND ISSUE OF MAHONING COUNTY, OHIO—$10,000.00.

COLUMBUS, OHIO, September 7, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In re: Bonds of Mahoning county, Ohio, in the sum of $10,000.00, in anticipation of the collection of taxes to pay the respective shares of said county and of Canfield township of the cost and expense of constructing the Youngstown-Salem road improvement located in said county and township.

I have carefully examined the corrected transcript of the proceedings of the board of county commissioners of Mahoning county, Ohio, and of other officers relating to the above issue of bonds and find said proceedings to be in all respects in conformity to the provisions of the General Code of Ohio relative to bond issues of this kind.

I am therefore of the opinion that properly prepared bonds covering said issue will, when the same are properly executed and delivered, constitute valid and subsisting obligations of said county, to be paid according to the terms thereof.

The bond form submitted with and as a part of the corrected transcript is not entirely satisfactory to me and I am therefore retaining said transcript until a proper bond form is submitted and approved.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1440.

APPROVAL OF BOND ISSUE OF MAHONING COUNTY, OHIO—$5,000.00.

COLUMBUS, OHIO, September 7, 1918.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

In re: Bonds of Mahoning county, Ohio, in the sum of $5,000.00, in anticipation of the collection of taxes and assessments to pay the respective shares of said county, of Jackson township and of the owners of benefited property assessed of the cost and expense of constructing the Akron-Youngstown I. C. H. No. 18, section "R-2", road improvement, located in said county and township.

I have carefully examined the corrected transcript of the proceedings of the board of county commissioners of Mahoning county, Ohio, and of other officers relating to the above issue of bonds and find said proceedings to be in all respects in conformity to the provisions of the General Code of Ohio relative to bond issues of this kind.

I am therefore of the opinion that properly prepared bonds covering said issue will, when the same are properly executed and delivered, constitute valid and subsisting obligations of said county, to be paid according to the terms thereof.

The bond form submitted with and as a part of the corrected transcript is not entirely satisfactory to me and I am therefore retaining said transcript until proper bond form is submitted and approved.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1441.

DISAPPROVAL OF BOND ISSUE OF VILLAGE OF BRYAN, O.—$90,000.00.

COLUMBUS, OHIO, September 7, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

In re: Bonds of the village of Bryan, Ohio, in the sum of $90,000.00, for the stated purpose of enlarging, purchasing and installing new additional power machinery for the municipal electric light and waterworks plant and making water main extensions in said village.

GENTLEMEN:—I have carefully examined the transcript of the proceedings of the council and other officers of the village of Bryan, Ohio, relating to the above issue of bonds and regret to say that I am compelled to disapprove said issue specifically for the reason that the ordinance of council providing for said issue of bonds does not make provision for annual tax levies for interest and sinking fund purposes, as required by section 11 of Article XII of the State Constitution, which reads as follows:

> "No bonded indebtedness of the state, or any political sub-divisions thereof, shall be incurred or renewed, unless, in the legislation under which such indebtedness is incurred or renewed, provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds, and to provide a sinking fund for their final redemption at maturity."

The financial statement of said village, which has been submitted with and as a part of said transcript, shows that the village has now outstanding "waterworks and electric light bonds" in the aggregate amount of $81,000.00. As to these bonds the clerk certifies that the income from the waterworks and electric light plant in said village is sufficient to cover the cost of all operating expenses and interest charges and to pass a sufficient amount to the sinking fund to retire all of such outstanding waterworks and electric light bonds.

It is quite possible that the authorities of the village of Bryan, in providing for the issue of bonds here in question, contemplated that the income from its waterworks and electric light plant would be sufficient to provide for the payment of interest on these bonds and to create a sinking fund for their retirement as well. This may or may not explain the failure of council to provide for annual tax levies for interest and sinking fund purposes with respect to these bonds, in the ordinance providing for their issue.

These bonds, however, if otherwise legal, would be direct obligations of the village as such, and a charge, so to speak, against the taxable real and personal property in said village. This being so, it would be the duty of the council of the village to levy taxes annually for interest and sinking fund purposes with respect to these bonds, at least to the extent that the income from the waterworks and electric light plant might not be sufficient for the purpose, and to this end it was the duty of council, in enacting the ordinance providing for this issue of bonds, to make provision for such annual tax levies for interest and sinking fund purposes, in regard to the isue of bonds therein provided for.

Link vs. Karb, 89 O. S. 326.

In addition to the objection in the proceedings relating to this bond issue, just noted, I note that on May 1, 1918, the village issued electric light and waterworks bonds in the sum of $40,000.00. In view of this fact, the present proposed issue is subject to the approval of the Capital Issues committee which has assumed jurisdiction to pass upon the purpose of all bonds, which, added to other bonds issued since April 5, 1918, exceed in the aggregate the sum of $100,000.00.

The transcript does not show such approval by the Capital Issues committee and irrespective of any other consideration I would not feel justified in approving this bond issue for purchase by you, without the approval of such committee.

Again, I note that though this issue of bonds was offered to the trustees of the sinking fund of the village, before the same was offered to you, said bonds were not offered to the board of commissioners of the sinking fund of the village school district.

The provisions of sections 3922 to 3924 inc. G. C. are somewhat uncertain with respect to the question of their application to bonds issued by villages. This department, however, in passing upon the validity of village bonds purchased by you, has uniformly required the village authorities to offer such bonds to the board of commissioners of the sinking fund of the village school district, before approving their purchase by you. Of course if a separate board of commissioners of the sinking fund of the village school district has not been appointed by the common pleas court and qualified, in the manner provided by section 7614 G. C., the board of trustees of the sinking fund of the village under the provisions of said section may also act as the board of commissioners of the sinking fund of the village school district.

Railway vs. Norwalk, 22 C. C. (N. S.) 590.

However, there is nothing in the transcript to show that the board of trustees of the sinking fund of the village of Bryan is acting in such dual capacity, or that this issue of bonds was offered to and rejected by such board of trustees of the sinking fund, in the capacity of a board of commissioners of the sinking fund of the village school district, as well as in its primary capacity as a board of trustees of the sinking fund of the village.

In this connection I might say that I would not be disposed to disapprove of the bond issue here in question on the two grounds last discussed, without awaiting further information with respect to these objections, or without, if need be, giving the village authorities an opportunity to comply with the requirements noted in said respective objections, by securing the approval of the Capital Issues committee and by making an offer of this bond issue to the board of commissioners of the sinking fund of the village school district.

A consideration of the transcript of the proceedings relating to this bond issue suggests two other questions which I do not find it necessary to decide, but which are proper to be noted by me at this time. The first relates to the stated purpose for which these bonds are to be issued. In this connection I note that this issue is one on a vote of the electors of the village and is in part "for the purpose of enlarging, purchasing and installing new additional power machinery for the municipal electric light and waterworks plant." The question suggested is whether to this extent the stated purpose of the bond issue is a single one, or whether the same comprehends two separate and distinct purposes, which should have properly been voted on as separate propositions.

Section 3939 G. C. (107 O. L. 553), in paragraph "11" thereof, authorizes a municipal corporation to issue bonds for erecting or purchasing waterworks for supplying water to the corporation and the inhabitants thereof.

Paragraph "12" of the same section authorizes the issue of bonds for erecting or purchasing works for the generation and transmission of electricity, for the supplying of electricity to the corporation and the inhabitants thereof.

Paragraph "2" of this section of the General Code provides for the issue of bonds of the municipal corporation "for extending, enlarging, improving, repairing or securing a more complete enjoyment of a building or improvement authorized by this section, and for equipping and furnishing it."

It may be stated as a general principle that where the question of issuing bonds for several different purposes is submitted to the voters, a failure to specify the amount to be used for each purpose and to submit the different propositions separately renders the election illegal and the bonds invalid, and that the test whether a proposition for the issuance of municipal bonds is a single one is whether or not the several parts of the project for which the bonds are to be voted are so related that united they form in fact but one combined and rounded whole.

The legislation relating to this issue of bonds does not recite in so many words that these bonds are issued for the purpose of purchasing and installing machinery in a *combined* waterworks and electric light plant. It fairly appears, however, that this is the case and in view of this fact I am not disposed to question the legality of the stated purpose of the bond issue in the light of the principle above noted and the express provisions of paragraph "2" of section 3939, supra. However, I have made no exhaustive study of this question, and, as before noted, I do not find it necessary to express any settled opinion upon the question.

As hereinabove stated, it appears from the financial statement, made a part of the transcript, that this village has outstanding waterworks and electric light bonds in the sum of $81,000.00. It likewise appears from said financial statement that about $47,000.00 of these outstanding waterworks and electric light bonds, in addition to street assessment bonds and other bonds entitled to deduction, will have to be deducted from the total amount of the outstanding bonds of the village, in order to permit the present issue within the five per cent. net limitation prescribed by the Longworth law with respect to bonds issued under vote of the electors.

The certificate made by the village clerk in regard to the outstanding waterworks and electric light bonds of the village has already been referred to. If these outstanding bonds were waterworks bonds and it appeared that the income from the waterworks plant of the village was sufficient to cover the cost of operating expenses, interest charges and to pass a sufficient amount to a sinking fund for the retirement of such bonds, the village authorities would be entitled to deduct the amount of such waterworks bonds from the whole amount of the outstanding bonds of the village and thereby permit the proposed issue of bonds to be made within the five per cent. net limitation of the Longworth law.

However, I know of no statutory provision requiring any part of the income of an electric light plant to be devoted to interest and sinking fund purposes with respect to bonds issued for the construction or improvement of such plant; nor do I know of any statutory provision which under any circumstances permits deduction of municipal electric light bonds from the total bonded indebtedness of the municipality for the purpose of determining the net indebtedness of a municipality with respect to any of the limitations of the Longworth law.

The question here suggested is whether or not municipal bonds, issued for the erection or improvement of a combined waterworks and electric light plant owned by the municipality, can be deducted on a showing that the income from such combined plant is sufficient to cover the cost of operating expenses, interest charges and to pass a sufficient amount to a sinking fund for the retirement of such bonds when due.

The question is one of considerable difficulty, but in view of the fact that I am required to disapprove this bond issue on the present legislation of council, for the reason first herein above noted, it is not necessary for me to decide this question and my only purpose in noting same is to insure proper consideration of the question in any future proceedings by council of the village relating to the proposed issue of bonds.

On the consideration first herein above noted, I am of the opinion that the issue of bonds here in question is not valid and that you should not purchase the same.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1442.

APPROVAL OF BOND ISSUE OF STRUTHERS VILLAGE SCHOOL DISTRICT, MAHONING COUNTY, OHIO—$10,000.00.

COLUMBUS, OHIO, September 7, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In re: Bonds of Struthers Village School district of Mahoning county, Ohio, in the sum of ten thousand dollars (10,000.00) for the purpose of improving the public school property of said school district by installing a sanitary system in the Sexton school and completing equipment in the Center street school.

I have carefully examined the corrected transcript of the proceedings of the board of education of the Struthers Village School district relating to the above issue of bonds, and find said proceedings to be in conformity to the provisions of the General Code of Ohio relating to bond issues of this kind. I am, therefore, of the opinion that properly prepared bonds covering the bond issue will, when the same are properly executed and delivered, constitute valid and binding obligations of said school district to be paid according to the terms thereof. The bond form submitted with and as a part of the transcript is not satisfactory to me, and I am, therefore, holding said transcript for the preparation of a suitable bond form.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1443.

APPROVAL OF BOND ISSUE OF HARDIN COUNTY, OHIO—$17,711.99.

COLUMBUS, OHIO, September 7, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

In re: Bonds of Hardin county, Ohio, in the sum of $17,711.99, in anticipation of the collection of taxes and assessments to pay the respective shares of said county, of Buck township and of the owners of benefited property assessed, of the cost and expense of constructing Bellefontaine-Kenton I. C. H. No. 226, section "A-1" road improvement located in said county and township.

GENTLEMEN:—I have made a careful examination of the transcript submitted to me of the proceedings of the board of county commissioners of Hardin county and of other officers, relating to the above issue of bonds.

I find said proceedings to be in conformity to the provisions of the General Code relating to bond issues of this kind and I am therefore of the opinion that properly prepared bonds covering said issue, when the same are properly executed and delivered, will constitute valid and binding obligations of said county, to be paid in accordance with the terms thereof.

No bond form has been submitted with and as a part of said transcript and I am therefore holding said transcript for the preparation and approval of a proper bond form.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

1444.

APPROVAL OF BOND ISSUE OF VILLAGE OF CENTERBURG, OHIO. $2,810.74.

COLUMBUS, OHIO, September 10, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

In re: Bonds of the village of Centerburg, Ohio, in the sum of $2,810.74, in anticipation of the collection of assessments for the improvement of Preston street in said village, by the construction of a sanitary sewer therein, with all necessary manholes, flush tanks and lateral connections, with vitrified sewer pipe.

GENTLEMEN:—I have made a careful examination of the corrected transcript of the proceedings of the council and other officers of the village of Centerburg, Ohio, relating to the above issue of bonds and find that said proceedings are in conformity to the provisions of the General Code of Ohio relating to bond issues of this kind. I am therefore of the opinion that properly prepared bonds covering the above issue, when the same are executed and delivered, will constitute valid and binding obligations of said village of Centerburg, Ohio, to be paid in accordance with the terms thereof.

The bond form submitted with and as a part of said transcript is not entirely satisfactory and I am therefore holding the transcript for the preparation and approval of a proper bond form.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

1445.

APPROVAL OF BOND ISSUE OF VILLAGE OF CENTERBURG. OHIO $669.13.

COLUMBUS, OHIO, September 10, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

In re: Bonds of the village of Centerburg, Ohio, in the sum of $669.13, in anticipation of the collection of assessments for the improvement of alley south of Main street in said village, by constructing sanitary sewer therein, with all necessary man-holes, flush tanks and lateral connections with vitrified sewer pipe.

GENTLEMEN:—I have made a careful examination of the corrected transcript of the proceedings of the council and other officers of the village of Centerburg,

Ohio, relating to the above issue of bonds and find that said proceedings are in conformity to the provisions of the General Code of Ohio relating to bond issues of this kind. I am therefore of the opinion that properly prepared bonds covering the above issue, when the same are executed and delivered, will constitute valid and binding obligations of said village of Centerburg, Ohio, to be paid in accordance with the terms thereof.

The bond form submitted with and as a part of said transcript is not entirely satisfactory and I am therefore holding the transcript for the preparation and approval of a proper bond form. Very truly yours,

JOSEPH MCGHEE,
Attorney-General.

1446.

APPROVAL OF BOND ISSUE OF THE VILLAGE OF CENTERBURG, O. $1,240.00.

COLUMBUS, OHIO, September 10, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

In re: Bonds of the village of Centerburg, Ohio, in the sum of $1,240.00, in anticipation of the collection of assessments for the improvement of Union street in said village, by the construction of a sanitary sewer therein, with all necessary manholes, flush tanks and lateral connections with vitrified sewer pipe.

GENTLEMEN:—I have made a careful examination of the corrected transcript of the proceedings of the council and other officers of the village of Centerburg, Ohio, relating to the above issue of bonds and find that said proceedings are in conformity to the provisions of the General Code of Ohio relating to bond issues of this kind. I am therefore of the opinion that properly prepared bonds covering the above issue, when the same are executed and delivered, will constitute valid and binding obligations of said village of Centerburg, Ohio, to be paid in accordance with the terms thereof.

The bond form submitted with and as a part of said transcript is not entirely satisfactory and I am therefore holding the transcript for the preparation and approval of a proper bond form. Very truly yours,

JOSEPH MCGHEE,
Attorney-General.

1447.

APPROVAL OF BOND ISSUE OF THE VILLAGE OF CENTERBURG, O. $2,418.57.

COLUMBUS, OHIO, September 10, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

In re: Bonds of the village of Centerburg, Ohio, in the sum of $2,418.57, in anticipation of the collection of assessments for the improve-

ment of Hartford street in said village, by constructing sanitary sewer therein with all necessary manholes, flush tanks and lateral connections with vitrified sewer pipe.

GENTLEMEN:—I have made a careful examination of the corrected transcript of the proceedings of the council and other officers of the village of Centerburg, Ohio, relating to the above issue of bonds and find that said proceedings are in conformity to the provisions of the General Code of Ohio relating to bond issues of this kind. I am therefore of the opinion that properly prepared bonds covering the above issue will, when the same are executed and delivered, constitute valid and binding obligations of said village of Centerburg, Ohio, to be paid in accordance with the terms thereof.

The bond form submitted with and as a part of said transcript is not entirely satisfactory and I am therefore holding the transcript for the preparation and approval of a proper bond form.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1448.

APPROVAL OF BOND ISSUE OF CLARK COUNTY, OHIO—$61,300.00.

COLUMBUS, OHIO, September 11, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In re: Bonds of Clark county, Ohio, in the sum of $61,300, for the purpose of paying the respective shares of Clark county, Harmony township and of the owners of benefited property assessed of the cost and expense of improving inter-county highway No. 1, from the intersection of said inter-county highway, with the west corporation line of the village of Vienna, eastward along the route of said inter-county highway, through the village of Vienna to the intersection of said inter-county highway with the Madison county line.

I have made a careful examination of the transcript of the proceedings of the board of county commissioners of Clark county, Ohio, and of other officers, relating to the above issue of bonds, and to the improvement for which said bonds are issued. I find said proceedings to be in conformity to the provisions of the General Code of Ohio relating to and affecting bond issues of this kind, and I am therefore of the opinion that properly prepared bonds covering said issue will, when the same are executed and delivered, constitute valid and binding obligations of Clark county, Ohio, to be paid according to the terms thereof.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1449.

APPROVAL OF THE FOLLOWING LEASES OF CANAL LANDS: TO THE EDWARD H. EVERETT CO., NEWARK; THE LOGAN MFG. CO., LOGAN; DANIEL SIFFORD, LANCASTER; CHAS. L. CRAWFORD, BUCKEYE LAKE; FRED HAYNES, COLUMBUS; G. B. NUTTER AND K. W. OSBORN, COLUMBUS; THE NORFOLK & WESTERN RY. CO. AND THE PITTSBURG, CINCINNATI, CHICAGO & ST. LOUIS RY. CO.

COLUMBUS, OHIO, September 11, 1918.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of August 31, 1918, in which you enclose the following leases for canal land (in triplicate) for my approval:

	Valuation.
To The Edward H. Everett Co. of Newark, Ohio, lease of a portion of the old North Fork Feeder in east Newark, Ohio	$2,000.00
To The Logan Mfg. Co. part of the abandoned Hocking Canal in the village of Logan, O.	1,666.66⅔
To Daniel Sifford of Lancaster, O., lease for cottage site at Buckeye Lake.	333.33⅓
To Chas. L. Crawford of Buckeye Lake, O., lease of 50 feet of the outer slope and borrow pit adjacent thereto of the reservoir embankment at Buckeye Lake	1,666.66
To Fred Haynes of Columbus, Ohio, lease for cottage site at Buckeye Lake.	400.00
To G. B. Nutter and K. W. Osborn, cottage site at Buckeye Lake, ½ lot,	300.00
The Norfolk & Western Ry. Co., 3,380 feet of right-of-way over canal property south of Chillicothe,	7,440.00
The Pittsburg, Cincinnati, Chicago & St. Louis Ry. Co., railway crossing over Ohio Canal near Tyndall, Coshocton county, O.,	500.00
To The Pittsburg, Cincinnati, Chicago and St. Louis Ry. Co., railway crossing over Ohio Canal near Conesville, Coshocton county, Ohio,	500.00

I have carefully examined said leases, find them correct in form and legal and have therefore endorsed my approval thereon and forwarded them to the Governor of Ohio for his consideration.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1450.

APPROVAL OF ABSTRACT OF TITLE TO THE NORTH HALF OF THE NORTH HALF OF LOT NO. 278 IN R. P. WOODRUFF'S AGRICULTURAL COLLEGE ADDITION TO COLUMBUS, OHIO.

COLUMBUS, OHIO, September 11, 1918.

HON. CARL E. STEEB, *Secretary, Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—I am in receipt of an abstract of title covering a parcel of land situated in the city of Columbus, in the county of Franklin and the state of Ohio, and more particularly described as follows:

> "Being the north half of the north half of lot number two hundred and seventy-eight (278) in R. P. Woodruff's Agricultural College addition to Columbus, Ohio, as the same is numbered and delineated on the recorded plat thereof of record in plat book 3, page 203, recorder's office, Franklin county, Ohio, excepting therefrom thirty feet off of the north side of said lot deeded to the city of Columbus, Ohio, for street purposes."

I have examined said abstract and find some imperfections and defects in the chain of title of said premises as disclosed thereby, but feel convinced that they are not material and have been cured by the lapse of time.

Said abstract does not show any liens or encumbrances upon said property except the taxes for the year 1918, which are undetermined and unpaid.

I am therefore of the opinion that said abstract disclosed on August 21, 1918, at 7 a. m. a good title in Fred F. Greene to the premises hereinbefore described.

I am returning herewith the abstract submitted by you.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1451.

APPROVAL OF ABSTRACT OF TITLE TO LOTS NOS. 22, 33, 34, 36, 38, 39 AND 40 OF JOHN W. BURTON'S SUBDIVISION OF THE NORTH HALF OF THE SOUTH HALF OF LOT NO. 278 IN R. P. WOODRUFF'S AGRICULTURAL COLLEGE ADDITION, AND LOTS NOS. 44 AND 45 OF R. P. WOODRUFF'S SUBDIVISION OF THE SOUTH HALF OF THE SOUTH HALF OF LOT NO. 278 OF R. P. WOODRUFF'S AGRICULTURAL COLLEGE ADDITION TO THE CITY OF COLUMBUS, O.

COLUMBUS, OHIO, September 11, 1918.

HON. CARL E. STEEB, *Secretary, Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—I am in receipt of an abstract of title covering the following lots of land located in the city of Columbus, county of Franklin and state of Ohio, and described as follows:

> "1. Being lots numbers 22, 33, 34, 36, 38, 39 and 40 of John W. Burton's subdivision of the north half of the south half of lot No. 278 in R. P.

Woodruff's Agricultural College addition to said city of Columbus, as said lots are delineated on the plat of said subdivision in plat book No. 3, page 350, recorder's office, Franklin county, Ohio.

2. Being lots Nos. 44 and 45 of R. P. Woodruff's subdivision of the south half of the south half of lot No. 278 of R. P. Woodruff's Agricultural College addition to said city of Columbus, as the said lots are delineated on the plat of said subdivision in plat book No. 3, page 421, recorder's office, Franklin county, Ohio.

I have examined said abstract and find some imperfections and defects in the chain of title of said premises as disclosed thereby, but feel convinced that they are not material and have been cured by the lapse of time.

Said abstract does not show any liens or encumbrances upon said property except the taxes for the year 1918, which are undetermined and unpaid.

I am therefore of the opinion that said abstract disclosed on August 21, 1918, at 7 a. m. a good title in Effie G. Brown to the premises hereinbefore described.

I am returning herewith the abstract submitted by you.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1452.

APPROVAL OF ABSTRACT OF TITLE TO LOTS NOS. 27, 28 AND 29 OF CRITCHFIELD & WARDEN'S SUBDIVISION OF THE SOUTH HALF OF THE NORTH HALF OF LOT NO. 278 OF R. P. WOODRUFF'S AGRICULTURAL COLLEGE ADDITION TO COLUMBUS, OHIO.

COLUMBUS, OHIO, September 11, 1918.

HON. CARL E. STEEB, *Secretary, Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—I am in receipt of an abstract of title covering the following lots of land situated in the city of Columbus, county of Franklin and state of Ohio, and described as follows:

"Being lots numbers 27, 28 and 29 of Critchfield & Warden's sub-division of the south half of the north half of lot number 278 of R. P. Woodruff's Agricultural College addition to Columbus, Ohio, as shown on the plat recorded in plat book No. 4, page 234, recorder's office, Franklin county, Ohio."

I have examined said abstract and find some imperfections and defects in the chain of title of said premises as disclosed thereby, but feel convinced that they are not material and have been cured by the lapse of time.

Said abstract does not show any liens or encumbrances upon said property except the taxes for the year 1918, which are undetermined and unpaid.

I am therefore of the opinion that said abstract disclosed on August 21, 1918, at 7 a. m. a good title in Effie G. Brown to the premises hereinbefore described.

I am returning herewith the abstract submitted by you.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1453.

WHERE ELECTION OFFICERS SUGGEST NAMES AT PRIMARY, AND PARTIES NOMINATED, BOARD OF ELECTIONS HAS NO AUTHORITY TO GO BACK OF RETURNS.

Where a political party has not nominated candidates for certain offices and the judges and clerks of that party on the day of the primary, at the various polling places furnished the voters affiliated with that party with a list of candidates to be voted for, the result being that the candidates, suggested by the election officers, received more than eight per cent. of all the votes cast, and the returns of the election have been made to the board of deputy state supervisors of elections; HELD: there is but one duty for said board of deputy state supervisors of elections and that is to declare the result from the returns made to them.

COLUMBUS, OHIO, September 12, 1918.

HON. BENTON G. HAY, *Prosecuting Attorney, Wooster, Ohio.*

DEAR SIR:—I am in receipt of your inquiry as to whether a valid nomination is made under the following circumstances:

A political party not having the names of candidates printed on the official ballot, the judges and clerks of that party on the day of the primary, at the polling places furnished the voters affiliated with that party with a list of candidates for these county offices which are vacant, on the ballot, owing to no declarations of candidacy having been filed, and the voters so furnished with such names by the judges and clerks wrote in said names on the ballot, the result being that the candidates whose names were so written received more than eight per cent. of all the votes cast at the election.

You ask first, may the board of deputy state supervisors of elections refuse to place the names of such candidates on the election ballot? You also ask, if such candidates were not legally nominated, what would be the legal procedure necessary to prevent their names being placed on the ballot at the election?

Sections 4949 and 4969 G. C. provide for nominations for offices or places on the primary ballot, under the primary election act.

Section 4984-1 G. C. provides that no valid nomination shall be made for an office for which nominations are sought to be made and for which no nominating petitions have been filed, unless the name of the person attempting to be nominated shall have been written on at least eight per cent. of the ballots containing such vacancy, which have been voted at such primary election.

As I understand your first question, the candidate voted for received more than eight per cent., and what you desire to know is concerning the right or authority of the board of deputy state supervisors of elections to refuse to place the names of such candidates on the election ballot, owing to the facts stated as to how such names were furnished by the judges and clerks.

Section 4983 G. C. provides for the returns of the result of the election of the different precincts to be made to the board of deputy state supervisors of elections, with any tickets cast and counted, or left uncounted, concerning the legality of which there has been doubt.

Section 4984 G. C. provides for a canvass of the vote and certifying to the result thereof by the deputy state supervisors on the following Thursday after the primary.

Section 4967 G. C. provides among other things that all statutory provisions relating to general elections shall, so far as applicable, apply to and govern primary elections.

Section 5090 G. C. provides for the counting of "disputed ballots" at a *general* election.

Sections 5093, et seq., provide for the transmission of returns of elections to the deputy state supervisors and for the canvass and abstract of same.

In State ex rel. Pardee vs. Pattison, Governor, 73 O. S. 305, the supreme court held that in certifying the election of an officer, the power of the deputy state supervisors of elections is limited to certifying that the successful candidate has been elected and they have no power to decide upon a disputed term of office.

Under the provisions of a former statute (section 2981, R. S.), defining the duties of the canvassers of election returns, which require that:

> "In making the abstracts of votes they shall not decide upon the validity of the returns, but shall be governed by the number of votes stated in the poll-books,"

the duties of such canvassers are merely ministerial, and they have no power to decide such returns, or any part of them, invalid by reason of fraud at the election or in the returns thereof as made to the clerk; and have no power to exclude such returns, or any part thereof, from the count for such reasons.

> Dalton vs. State, ex rel., 43 O. S. 652 (reversing State, ex rel. vs. Dalton, 1 O. C. C. 139, 1 O. C. D. 82).

In State ex rel, vs. Tanzey, 49 O. S. 656, it was held that the authority of the election board extends no further than to make the abstract specified, and that the board had no power to hear evidence, to contradict the tally-sheet or to explain the same; nor had it power to act on any information which it may have acquired outside of said tally-sheets.

It is pretty well settled that canvassing boards are limited to the tally-sheets returned to them, unless otherwise expressly provided by statute. You will recall that there is no express provision for contest of election under the primary act, and in the instant case, since there was only the one set of candidates, there would not be contesting parties for the offices in question.

I am of the opinion that the board of deputy state supervisors of elections has only one duty and that is to determine from the returns made whether or not the parties have received at least eight per cent. of the vote necessary under section 4984-1 G. C., there being only one candidate, as I understand, for each office, and in consequence no necessity of the determination of which one or two or more persons has the highest vote for the particular office. The board of deputy state supervisors has no authority to go back of the returns.

As far as your second question is concerned, viz., what would be the legal procedure necessary to prevent the names of candidates who are not legally nominated from being placed on the ballot, inasmuch as my opinion is that the nominees in question were legally nominated, it is not necessary to determine what procedure would be necessary if a contrary conclusion had been reached.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1454.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN ASHTABULA, BROWN, BUTLER, CLERMONT, GEAUGA, HIGHLAND, LICKING, MAHONING, MORGAN, PORTAGE, PREBLE, SENECA, SUMMIT AND WILLIAMS COUNTIES.

COLUMBUS, OHIO, September 12, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of September 5, 1918, in which you enclose, for my approval, the following final resolutions:

Cleveland-Buffalo Road—I. C. H. No. 2, section N (O) & P, Ashtabula county.

Ripley-Hillsboro Road—I. C. H. No. 177, section A, Brown county.

Eaton-Middletown Road—I. C. H. No. 184, section A-1, Butler county.

Cincinnati-West Union Road—I. C. H. No. 30, section 1-1, Clermont county.

Bethel-Chilo Road—I. C. H. No. 257, section J, Clermont county.

Cleveland-Meadville Road—I. C. H. No. 15, section K-1, Geauga county.

Hillsboro-Chillicothe Road—I. C. H. No. 258, section A, Highland county (In duplicate).

Newark-Mt. Vernon Road—I. C. H. No. 377, section E-1, Licking county.

Youngstown-Lisbon Road—I. C. H. No. 82, section D, Mahoning county (In duplicate).

McConnelsville-Athens Road—I. C. H. No. 162, section H, Morgan county.

Alliance-Yale Road—I. C. H. No. 76, section "a", Portage county.

Eaton-Greenville Road—I. C. H. No. 210, section C, Preble county.

Tiffin-Fostoria Road—I. C. H. No. 270, section B-1, Seneca county, types A and B.

Lima-Sandusky Road—I. C. H. No. 22, section P, Seneca county.

Cleveland-Massillon Road—I. C. H. No. 17, section N-1, Summit county.

Bryan-Pioneer Road—I. C. H. No. 306, section L, Williams county, type A.

Bryan-Edgerton Road—I. C. H. No. 309, section B, Williams county, types A, B, C and D.

I have carefully examined said final resolutions, find them correct in form and legal and have therefore endorsed my approval thereon, in accordance with the provisions of section 1218 G. C., with the exception of the final resolution having

to do with the Tiffin-Fostoria, I. C. H. No. 270, section B-1, (type A), Seneca county, improvement, which I am returning without my approval for the reason that neither the certificate of the county auditor, to the effect that the money is in the treasury of the county, nor the certificate of the clerk of the board of county commissioners, that the final resolution is a correct copy, is signed by said respective officers.

I will call attention to a few irregularities which appear in some of the resolutions I have approved and suggest that they be corrected. The final resolution covering the improvement of the Hillsboro-Chillicothe road, I. C. H. No. 258, section A, Highland county states that the preliminary application of the county commissioners was made on November 5, 1918, which apparently should be November 5, 1917.

The final resolution pertaining to the improvement of the Eaton-Middletown road, I. C. H. No. 184, section A-1, Butler county, does not state the date upon which the preliminary application of the county commissioners of Butler county was made.

The final resolution in regard to the improvement of the Bryan-Edgerton road, I. C. H. No. 309, section B, Williams county, type B, sets forth that the county commissioners made their preliminary application on February 25, 1919, which no doubt should be February 25, 1918. Very truly yours,

JOSEPH MCGHEE,
Attorney-General.

1455.

APPROVAL OF BOND ISSUE OF MEDINA COUNTY, OHIO—$12,473.22.

COLUMBUS, OHIO, September 12, 1918.

The Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

In re: Bonds of Medina county, Ohio, in the sum of $12,473.22, in anticipation of taxes and assessments to pay the respective shares of Hinckly township and the owners of benefited property assessed of the the cost and expense of improving section G-1 of the Wadsworth-Hinckley county road No. 9, under the provision of section 6906 to 6956, inclusive of the General Code of Ohio.

I have carefully examined the transcript of the proceedings of the board of county commissioners of Medina county and of other officers relating to the above issue of bonds and find said proceedings to have been taken in conformity to the provisions of the General Code of Ohio relating to bond issues of this kind.

I am therefore of the opinion that properly prepared bonds covering the above issue will, when same are properly executed and delivered, constitute valid and binding obligations of Medina county, Ohio, to be paid in accordance with the terms thereof.

Some slight corrections are necessary in the bond and coupon form submitted with and as a part of said transcript and I am therefore accordingly holding same until such bond and coupon form is corrected and approved.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1456.

APPROVAL OF BOND ISSUE OF MARION COUNTY—$14,500.00.

COLUMBUS, OHIO, September 12, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In re: Bonds of Marion county in the sum of $14,500 for the construction and repair of certain designated bridges in said county.

I am herewith enclosing with my approval transcript of the proceedings of the board of county commissioners of Marion county, Ohio, relating to the above issue of bonds. The above issue of bonds is for the purpose of providing a fund for the construction and repair of certain designated and described bridges of said county, and the proceedings relating thereto are in conformity to the provisions of the General Code of Ohio relating to bond issues of this kind. I am, therefore, of the opinion that bonds covering the above issue executed according to bond form submitted will, when the same are properly signed and delivered, constitute valid and subsisting obligations of said county to be paid in accordance with the terms thereof.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1457.

APPROVAL OF BOND ISSUE OF MONROE TOWNSHIP RURAL SCHOOL DISTRICT, DARKE COUNTY, OHIO—$75,000.00.

COLUMBUS, OHIO, September 12, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In re: Bonds of Monroe Township Rural School district, Darke county, Ohio, in the sum of $75,000 for the purpose of purchasing a site for and constructing a centralized school building in said school district.

I have carefully examined the transcript submitted in the proceedings of the board of education and other officers of Monroe Township Rural School district, Darke county, Ohio, relating to the above issue of bonds, and find same to be in conformity with the provisions of the General Code relating to bond issues of this kind.

I am, therefore, of the opinion that properly prepared bonds covering said issue will, when the same are properly executed and delivered, constitute valid and binding obligations of said school district. No bond form of the bonds to be printed covering this issue has been submitted and I am, therefore, holding the transcript until proper bond form is submitted and approved.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1458.

APPROVAL OF BOND ISSUE OF CLARK COUNTY, OHIO.—$69,750.00.

COLUMBUS, OHIO, September 16, 1918.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In re: Bonds of Clark county, Ohio, in the sum of $69,750, for the purpose of paying the respective shares of Clark county, of Springfield and Harmony townships, and of the owners of benefited property assessed, of the cost and expense of improving inter-county highway No. 1 from the east end of section "A" of said inter-county highway eastward along the route of said inter-county highway to its intersection with the west corporation line of the village of Vienna.

I have made a careful examination of the transcript of the proceedings of the board of county commissioners of Clark county, Ohio, and of other officers relating to the above issue of bonds, and to the improvement for which said bonds are issued. I find said proceedings to be in conformity to the provisions of the General Code of Ohio relating to and affecting bond issues of this kind, and I am therefore of the opinion that properly prepared bonds covering said issue will, when the same are executed and delivered, constitute valid and binding obligations of Clark county, Ohio, to be paid according to the terms thereof.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1459.

APPROVAL OF ABSTRACT OF TITLE TO LOT NO. 28 OF WOOD BROWN PLACE, FRANKLIN COUNTY, OHIO.

COLUMBUS, OHIO, September 16, 1918.

HON. CARL E. STEEB, *Secretary, Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—I am in receipt of an abstract of title covering the following lot of land located in the city of Columbus, county of Franklin and state of Ohio, and described as follows:

Being lot number twenty-eight (28) of Wood Brown Place sub-division, as the same is numbered and delineated upon the recorded plat thereof, of record in plat book 5, page 196, recorder's office, Franklin county, Ohio.

I have examined said abstract and find no material defects in the chain of title to said premises as disclosed thereby.

Said abstract does not show any liens or encumbrances on said property except the taxes for the year 1918, which are undetermined and unpaid.

I am therefore of the opinion that said abstract disclosed on August 17, 1918, a good title in George H. R. Tyler to the premises hereinbefore described.

I am returning herewith the abstract submitted by you.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1460.

APPROVAL OF THE FOLLOWING LEASES OF CANAL LANDS: TO COMMISSIONERS OF COSHOCTON COUNTY; JOSEPH A. KLUNK, COLUMBUS, OHIO; THOMAS J. McLEISH, COLUMBUS, OHIO, AND CLIFFORD BLAIR, ET AL., WAPAKONETA, OHIO.

COLUMBUS, OHIO, September 16, 1918.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of September 13, 1918, in which you enclose the following leases (in triplicate) of certain canal lands, and ask my approval of the same.

	Valuation.
To commissioners of Coshocton county, 2,000 feet of the berme embankment of the Ohio canal to be used for public highway purposes,	$400.00
To Joseph A. Klunk of Columbus, Ohio, cottage site at Buckeye Lake,	400.00
To Thomas Murnane of Columbus, Ohio, cottage site at Buckeye Lake,	400.00
To Thomas J. McLeish, Columbus, Ohio, cottage and landing purposes, land in front of lots 27 and 28 of Taylor's Sandy Beach allotment, at Buckeye Lake,	200.00
To Clifford Blair, et al., Wapakoneta, Ohio, boat house and landing purposes at Indian Lake,	200.00

I have carefully examined said leases, find them correct in form and legal and I am therefore returning same to you with my approval endorsed thereon.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1461.

TERM OF DISTRICT SUPERINTENDENT WHEN COUNTY BOARD OF EDUCATION REDISTRICTS COUNTY—SCHOOL DISTRICTS UNITED FOR HIGH SCHOOL PURPOSES CANNOT BE SEPARATE DISTRICT. WHEN—COUNTY BOARD OF EDUCATION APPOINTS DISTRICT SUPERINTENDENT, WHEN.

1. *Where a county board of education has re-districted the county school district and has changed the district lines of any district supervision therein by*

adding a rural or village district, or by taking a rural or village district therefrom, and the newly created district employs a district superintendent, such district superintendent can be employed for the term of only one year.

2. *Where districts unite for high school purposes, but have employed no superintendent in said district, such district so united for high school purposes cannot be formed into a separate district under section* 4740 *G. C.*

3. *Where a district superintendent is not elected by the electing body of a supervision district for any reason prior to September* 1*st in any year, then the county board shall appoint a district superintendent for such district for the term of one year.*

COLUMBUS, OHIO, September 18, 1918.

HON. JOHN C. D'ALTON, *Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR:—I have your several communications and I gather the statement of facts upon which you desire my opinion to be in substance as follows:

In 1915 the Lucas county board of education created a supervision district from Richfield, Spencer, Sylvania village, Sylvania rural and Berkey districts. The presidents of the boards of education of said districts duly met and elected Mr. A. P. Stalter as district superintendent for the school year beginning September 1, 1915, and ending August 31, 1916. In 1916 the county was re-districted and the supervision district above mentioned was changed by striking out Spencer district and adding Springfield district thereto, so that the district in 1916 consisted of Richfield, Springfield, Sylvania village, Sylvania rural and Berkey districts, and the presidents of said districts duly met and attempted to elect said A. P. Stalter for a term of three years to begin September 1, 1916. In 1918 Sylvania village and Sylvania rural districts united under section 7669 for high school purposes and made an application under section 4740 to be continued as a separate district under the direct supervision of the county superintendent and said application was granted by the county board of education. The boards of education of said two districts, Sylvania village and Sylvania rural, are attempting to re-elect Mr. A. P. Stalter, as district superintendent, but are dead-locked, one board voting for him and the other board voting for Mr. E. S. Poling. Mr. A. P. Stalter claims to have one year yet on his contract as district superintendent and claims that by virtue of said contract he is entitled to act as the district superintendent of the pretended 4740 district composed of Sylvania village and Sylvania rural districts. Upon said statement of facts your several questions arise as follows:

1. Could the presidents of the boards of education of said supervision district elect Mr. A. P. Stalter as district superintendent for a term of three years, the same to begin September 1, 1916?

2. Could a 4740 district be created from the Sylvania village and Sylvania rural districts in 1918?

3. If a 4740 district could be so created, has Mr. A. P. Stalter a right to superintend the schools for said district for the year beginning September 1, 1918?

4. If the boards of education of said separate district failed to elect a district superintendent, may the county board of education elect such district superintendent in their place and stead?

The first question we must determine is, could the presidents of the rural and village boards of education of said supervision district elect Mr. A. P. Stalter as district superintendent for a term to begin on the first of September, 1916, and to extend for a period of three years? In your statement of facts you say that said county was re-districted into supervision districts in 1916 and that the supervision district, which for 1915 was composed of Richfield, Spencer, Sylvania village, Sylvania rural and Berkey districts, in 1916 was changed so as to strike therefrom Spencer district and add thereto Springfield district. This made the supervision district a new district and under the provisions of section 4741 G. C. a district superintendent must have been elected therein. That such district superintendent could not be elected for three years but that he could only be elected for one year in such new district has been determined by this department in Opinion No. 1252, rendered to George F. Crawford, prosecuting attorney, Greenville, Ohio, on June 3, 1918. That part of said opinion which is necessary for consideration reads as follows:

"Section 4741 G. C. provides in part:

'The *first* election of a district superintendent shall be for a term not longer than one year. Thereafter he may be *re-elected* in the *same* district for a period not to exceed three years * * *.'

The language of said section is so clear that a construction of the same seems almost unnecessary in order to determine its meaning, for it says the *first* election of *any* district superintendent shall be for a term *not longer than one year,* and that thereafter he may be elected for a term of not to exceed three years. Whenever a supervision district is changed, either by adding to such district or by taking from such district any territory of the county school district, then the supervision district is a new district, that is, it is a different district from what it was before such redistricting was had. It is noted from section 4738 * * * that supervision districts may be formed from one or from more than one village or rural school districts of the county school district, and each supervision district, when so formed, shall elect a district superintendent, either by the boards of education of such districts, which compose such supervision district, if there are three or less districts in such supervision district, or by the presidents of such boards of education of the districts which compose such supervision district, if there are more than three in such supervision district. When, then, a new supervision district is formed by adding to an old supervision district another district, the electing body is a new electing body and it will be the first election for such new electing body. That some of the electing body has participated in a previous election of a district superintendent cannot, in any manner, affect the status of the body as a whole.

Therefore, but one conclusion can be reached and that is that where the county board of education has redistricted the county school district and has changed the district lines of any supervision district therein, the district superintendent of such newly created supervision district can be employed for but one year at the first election held in such newly created supervision district."

The above answers your first question so completely that nothing more may be said thereon except to state the conclusion in relation thereto, that is, that Mr. A. P. Stalter could not be elected for three years in the new supervision district, it being

the first election of a district superintendent therein, and his contract, instead of being for three years, was from year to year, i. e., one year at a time.

The next question is not so easy to determine, that is, as to whether or not the districts of Sylvania village and Sylvania rural could be established in 1918 into a separate district. You will remember that the two said districts were a part of the supervision district which was composed of Richfield, Springfield, Sylvania rural, Sylvania village and Berkey districts. Under the provisions of section 7669, et seq., of the General Code, the districts of Sylvania village and Sylvania rural united for high school purposes, or, in other words, joined for high school purposes, and I take it selected two members from each board as a high school committee to conduct or manage such high school. After the said districts were so joined for high school purposes, and I take it after the first grade high school had been properly established therein, then an attempt was made to have such union of districts created into a separate district under the direct supervision of the county superintendent, and as is provided by section 4740 G. C. Said section 4740, as amended in 107 O. L., 622, reads in part as follows:

> "Any village or wholly centralized rural school districts or *union* of *school districts for high school purposes which maintains a first grade high school and which employes a superintendent* shall upon application to the county board of education before June 1st of any year, be continued as a separate district under the direct supervision of the county superintendent until the board of education of such district, by resolution, shall petition to become a part of a supervision district of the county school district. * * *."

The said district was a union of school districts for high school purposes and therefore came within one of the classes of districts which might become separate districts under the provisions of said section. But two other things are necessary before such district can be so formed. First, the district must maintain a first grade high school and, as noted above, I am assuming that the first grade high school was properly in existence at the time the application to become such separate district was made to the county board of education, and, second, the district must employ a superintendent. This is the place where we find difficulty in ascertaining how such application could have been granted by the county board of education. The "district" was a union of school districts for high school purposes and had been so formed in the year 1918. To be specific, the resolution thereon was passed on the third day of June, 1918. It had never existed as a union district prior to that date. It had no superintendent. It is urged that the superintendent of the supervision district, of which this union district was a part, was the superintendent of such union district. The answer to that is that the district superintendent was the superintendent of the entire district and not the superintendent only of the union district. In other words, the five separate districts made up the supervision district of which Mr. A. P. Stalter was district superintendent and the union district, that is, the district which was united for high school purposes, was a new creation and took no part and could take no part in the employing of the district superintendent when such district superintendent was so employed. As a union district, the statute makes no provision for its representation in the employing of a district superintendent. What the statute does say is that the district superintendent shall be elected by the presidents of the village and rural boards of education of such supervision district when there are more than three boards so located in said supervision district. No provision is made for the election of a superintendent in a union of school districts for high school purposes.

It is not necessary to determine here, and the question will not be determined, as to whether or not it is possible for a union of school districts for high school purposes to elect a district superintendent. The joint boards are attempting to elect a superintendent and are dead-locked. No action thereon is taken and no action can be taken by such joint boards because section 7705, which permitted two or more districts to unite and appoint the same person as superintendent, was repealed in 1914. There is no substitute provision therefor contained in the new school code. So that the said union district of Sylvania village and Sylvania rural districts, not having had a superintendent, and not being able to elect one in the manner above suggested, it was impossible for such district to qualify as a separate district under the direct supervision of the county superintendent.

Another reason is given why the district could not be so created and that is that the same was not done prior to June 1st of this year, that is to say, the union was perfected since June 3d. But, having reached the above conclusion it is not necessary for me to decide this question and no opinion will be expressed as to whether the date of June 1st of any year, as contained in section 4740, is merely directory or if the same is mandatory to the extent that any action taken by the county board, in relation to a separate district, would be void if performed after June 1st in any year.

Answering your second question, then, I must advise you that under the circumstances in the above matter it was impossible to create a 4740 district from the districts of Sylvania village and Sylvania rural districts, above mentioned.

The next question is, who shall superintend the schools of Sylvania village and Sylvania rural districts. I learn from the superintendent of public instruction that when the county board of education attempted to create said districts into a separate district, it at the same time created the remainder of this county into supervision districts, thus intending to redistrict the entire county into supervision districts. If the schools of Sylvania village and Sylvania rural districts contain not less than thirty teachers, and if, when Lucas county school district was re-districted into supervision districts, it was the intention of the county board to create a supervision district of said rural and village districts, then and in that event the boards of education of said districts could select the district superintendent, provided the same was done prior to the first day of September. If, however, for any cause a district superintendent has not been appointed by September 1st by the local boards, then under section 4741 the county board of education must appoint such superintendent for a term of one year. If, on the other hand, the two districts of Sylvania village and Sylvania rural do not employ thirty or more teachers, then under the provisions of section 4738 the county board of education may, at their discretion, require the county superintendent to personally supervise said teachers, provided the entire amount of teachers in the county school district, which the county board of education requires the county superintendent to personally supervise, does not exceed forty teachers therein. When the county superintendent is thus directed to supervise said teachers, this supersedes the necessity of the district supervision of said schools.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1462.

MEMBER PUBLIC HEALTH COUNCIL, STATE DEPARTMENT OF HEALTH, STATE OFFICER.

A member of the public health council of the state department of health is a "state officer."

COLUMBUS, OHIO, September 18, 1918.

HON. JAMES E. BAUMAN, *Deputy Commissioner of Health, Columbus, Ohio.*

DEAR SIR:—You have asked for my opinion upon the following question:

> "A question has been raised as to whether or not a member of the public health council of the State Department of Health is a state officer. I should be glad to have your opinion on this matter."

You do not advise me as to the exact manner in which the question you submit has been raised—i. e., as to the purpose for which a member of the Public Health council is or is not to be regarded as a "state officer"; so I shall therefore answer your question generally.

Referring to the act establishing the State Department of Health under its present organization (107 Ohio Laws, 522), I observe that the members of the Public Health council are appointed by the Governor for definite terms of office (section 3, section 1234 G. C.); vacancies in their positions are to be filled for the unexpired term (section 3, section 1234 G. C.); the council shall hold meetings at stated periods and its members are to receive compensation for participating in its conferences and their necessary traveling and other expenses incurred in the performance of their official duties (section 3, section 1234 G. C.); the members are to appoint the commissioner of health, who shall be the executive officer of the health department (section 2, section 1233 G. C.).

The public health council as a board has the powers enumerated in section 4 (section 1235 G. C.), as follows:

> "(a) To make and amend sanitary regulations to be of general application throughout the state. Such sanitary regulations shall be known as the sanitary code;
>
> (b) To take evidence in appeals from the decision of the commissioner of health in a matter relating to the approval or disapproval of plans, locations, estimates or cost or other matters heretofore required to be submitted to the state board of health for approval;
>
> (c) To conduct hearings in cases where the law heretofore required that the state board of health shall give such hearings; to reach decisions on the evidence presented, which shall govern subsequent actions of the commissioner of health with reference thereto;
>
> (d) To prescribe by regulations the number of divisions and qualifications of directors of divisions;
>
> (e) To enact and amend by-laws in relation to its meetings and the transaction of its business.
>
> (f) To consider any matter relating to the preservation and improvement of the public health and to advise the commissioners thereon with such recommendations as it may deem wise.

The public health council shall not have nor exercise executive or administrative duties."

I may say, of course, that all the duties of the public health council are necessarily "executive or administrative," and it could not be given "legislative" power in the exact sense without violating the constitution. The statement at the end of section 4 and the use of the word "legislation" in section 2 should, therefore, be understood in a qualified sense as relating to the adoption of rules and regulations to carry out the general statutes of the state respecting public health.

There are other provisions of the act which might be quoted. I think, however, I have referred to enough of its provisions to show clearly that members of the public health council are, generally speaking, state officers. That they are public officers is clear because they exercise sovereign powers in an independent capacity, and are members of a body which is continuous and intended not to do a particular thing but to discharge a given set of public functions from time to time as occasion may arise. The members have terms of office and receive compensation.

That the members are officers of the state seems equally clear; the department is designated "a state department of health," and the regulations which are to be made by the council are to be "of general application throughout the state." The sovereign power exercised is, therefore, that of the state and is not limited in its application by boundary lines other than those of the state itself.

It seems clear to me that all the indicia of state officers are to be found in the statute which creates the positions of members of the public health council.

I am therefore of the opinion that, for general purposes at least, such members are state officers.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1463.

MOTHER'S PENSION— MOTHER LIVING WITH HER MOTHER ENTITLED TO, WHEN—DOMESTIC SERVANT ENTITLED TO, WHEN.

If the other necessary conditions required by the Mother's pension law be satisfied, a mother who makes her home with her mother and her step-father is entitled to the pension, if such home is a proper place for the children of such mother and without the pension the mother would be required to absent herself from her children in order to work for her own support, though she might be able to leave the children with her relatives during her absence.

An applicant under the Mother's pension law who is at the time of application employed as a domestic servant in the home of another is, the other conditions of the law being satisfied, entitled to the pension if its allowance will enable her to set up a home for herself and children elsewhere, but not if the application is made for the purpose of enabling her to bring her children to reside with her in the home in which she is employed as a servant.

COLUMBUS, OHIO, September 18, 1918.

HON. J. S. TAYLOR, *Probate Judge, McConnelsville, Ohio.*

DEAR SIR:—You have requested my opinion upon the following questions:

"Under the Mother's Pension act, section 1683-2 of the General Code, found on page 877 of Ohio laws, Volume 103, would a mother having two

small children, who lives with her mother and step-father, be entitled to any allowance under this act?

Would a mother, having a dependent child, and who is employed in a private home as a domestic be entitled to an allowance under this act?"

You have really not stated sufficient facts for me to give you an unequivocal answer to either of these questions. The applicable statutes are sections 1683-2 and 1683-3 of the General Code. These sections are to be given the liberal construction enjoined upon the courts in the case of the juvenile court act, to which they are supplementary and *in pari materia* with which they are, inasmuch as they are administered by the juvenile judge which liberal interpretation is provided for by section 1683 General Code. The sections which I have mentioned provide, in part, as follows:

"Section 1683-2.—For the partial support of women whose husbands are dead, or become permanently disabled by reason of physical or mental infirmity, or whose husbands are prisoners or whose husbands have deserted, and such desertion has continued for a period of three years, when such women are poor, and are the mothers of children not entitled to receive age and schooling certificate, and such mothers and children have a legal residence in any county of the state for two years, the juvenile court may make an allowance to each of such women as follows: * * * Such *homes* shall be visited from time to time * * *."

"Section 1683-3.—Such allowance may be made by the juvenile court, only upon the following conditions: First, the child or children for whose benefit the allowance is made must be living with the mother of such child or children; second, the allowance shall be made only when in the absence of such allowance, the mother would be required to work regularly away from her home and children, and when by means of such allowance she will be able to remain at home with her children, except that she may be absent for work for such time as the court deems advisable; third, the mother must in the judgment of the juvenile court be a proper person, morally, physically and mentally for the bringing up of her children; fourth, such allowance shall in the judgment of the court be necessary to save the child or children from neglect and to avoid the breaking up of the home of such woman; fifth, it must appear to be for the benefit of the child to remain with such mother; sixth, a careful preliminary examination of the home of such mother must first have been made under the direction of the court by the probation officer, the agent of an associated charities organization or humane society, or in the absence of such probation officer, society or organization in any county, the sheriff of such county shall make such investigations as the court may direct, and a written report of the result of such examination or investigation shall be filed with the juvenile court, for the guidance of the court in making or withholding such allowance."

Although the latter of these two sections enacts certain conditions upon which the allowance known as the "mother's pension" may be granted, it is clear that it does not state all of them. A complete catalog of such conditions could be formulated only by having regard to the provisions of section 1683-2 as well as those of section 1683-3, and would be substantially as follows:

(1) The husband must be either dead, permanently disabled, a prisoner (whose wages while he is in prison do not go to the wife in sufficient

amount to support the child or children), (section 1683-6), or must have deserted for a period of three years.

Your letter does not advise me whether these conditions exist, but I assume, of course, that one or another of them does in each of the cases mentioned by you.

(2) The wife or widow must be "poor" to the extent that in the absence of such allowance she would be required to work regularly away from her home and children and by means of the allowance she will be able to remain at home with her children except that she may be absent for work for such time as the court deems advisable.

Such facts as you state in each of these cases raise some question as to the application of this condition, which will hereinafter be discussed.

(3) The wife or widow must be mother of children not entitled to receive age and schooling certificates.

You do not state the facts with respect to this condition, but assume that they exist, so that it is satisfied.

(4) The mother and children must have a legal residence in some county of the state for two years.

You do not state the facts in this regard but I assume that the necessary condition exists.

(5) The child or children must be living with the mother.

Your questions evidently relate to this condition, and its application to the facts you state will be further considered in this opinion.

(6) The mother must, in the judgment of the juvenile court, be a proper person for the bringing up of her children.

In the absence of any statement of facts on this point I assume that both mothers are in your judgment such proper persons.

(7) The allowance must in the judgment of the court be necessary to save the child or children from neglect and to avoid the breaking up of the home of such woman.

In a sense such facts as you state raise questions with respect to the application of this condition which will be further discussed in this opinion.

(8) It must appear to be for the benefit of the child to remain with the mother.

This seems to be a slightly different way of stating the condition that the mother must be a proper person for the bringing up of her children.

(9) A careful preliminary examination of the home of the mother must be made.

Coming now to the facts stated by you, it appears that in the first case the mother lives with her mother and step-father. This fact raises questions in the light of the above enumerated conditions, as follows:

(1) Has the mother a home?

(2) May it be said that she is living with her child or children when other persons are members of the domestic establishments in which she resides?

(3) Inasmuch as she has a home can it be said that she would be required to work regularly away from her home and children, and that by means of the allowance she will be able to remain at home with her children?

(4) Is the home a proper place for the children in view of the fact that adults other than the mother reside there?

With respect to the first of these questions I think that it need not appear under the statute that the mother's home is one of which she is the head, except in so far as the fact that other adults share her place of residence and have the control of it, coupled with their personal characters, may tend to establish the conclusions that the surroundings are not fit for the children. In other words, if the mother and stepfather are of good character and the establishment maintained by them is a suitable place in which to bring up children under the discipline of their mother, I think such establishment may be regarded as the mother's "home," if that is her usual place of residence, the fact that she may stay there by sufferance or under some more or less temporary arrangement with the mother and step-father being, in my opinion, immaterial.

The fact that the mother lives with her mother and step-father may have some bearing upon the question as to whether she would but for the allowance be required to work regularly away from her children. You do not say whether or not this is the case. If the mother is at present working out by the day, or if she is in such financial straits as that she will have to obtain outside employment in order to support herself or the children, or both, then this condition would be satisfied. The law aims at keeping the children and the mother together in a home. The fact that the mother may be able to leave the children with her relatives while she works out and thus give them some care is immaterial on the one hand, and the fact that other persons than the mother live in the home is immaterial on the other hand, if such other persons are of proper character.

I can not say, therefore, as to the first case which you submit that the fact that the mother lives with her mother and step-father is of itself sufficient to disqualify her from receiving a mother's pension.

In submitting your second case you state that the mother is employed in a private home as a domestic servant and that she has a dependent child. You do not say whether she is now keeping the child with her in the house where she is employed or not; nor do you state whether or not, if the child is not at present with her in that place, she desires the allowance for the purpose of bringing the child to live with her there. It will be necessary for me, therefore, to consider three possible statements of fact in order to answer your second question.

Assuming that the purpose of the mother in applying for an allowance is to enable her to keep the child at a place other than that in which she is employed, which place is to be her home and that of her child, I think it is very clear that she would be entitled to the pension, the other necessary facts existing. The very object of the law is to enable a mother who must work in order to support herself and her children to spend a proper proportion of her time caring for her children in their home. If the making of the allowance will enable the mother to provide a home for her child, so that such domestic service as her necessities require her to perform may be rendered for such part of each day only as may be acceptable to the judge, this object would be achieved.

In this connection the fact that the child may be at present with her in the residence in which she is employed as a domestic servant would be of no consequence if her purpose in obtaining the allowance is to set up an establishment of her own as the home of herself and child. So that two of the cases which I have imagined may be answered without difficulty by saying that whether the child is with her at present in the residence where she is employed as a domestic servant or not she is entitled to the allowance, the other conditions existing, if it will enable her to provide a home at another place for the child.

Greater difficulty is presented in considering the question as to whether or not this mother is entitled to the allowance for the purpose of enabling her to keep the child with her in the place where she is employed as a domestic servant. Upon

careful consideration I am of the opinion that a negative answer must be returned to this question. The reason upon which such an answer would be predicated is that the residence of another in which the mother would be living in the capacity of a domestic servant would not be a "home" within the meaning of the statute. To be sure, I have held in considering your first question that the home of the mother and child need not belong to the mother in the proprietary sense, so that she may live with relatives and still have a "home." But I would draw the line between the mother's residence in a place for the purpose of domestic service at that place and her residence in the home of a relative, where such domestic service as she may render to the establishment may be attributed rather to the ties of relationship than to the contractual obligation of service. In common parlance, a domestic servant would not be referred to as living at home, and this popular conception of the situation is, in my judgment, that which is embodied in the statute.

I am of the opinion, therefore, that if the allowance is applied for by the second mother whom you have described for the purpose of enabling her to keep her child with her in the place where she is employed as a domestic servant, the application should not be granted.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1464.

MUNICIPALITY—SUBDIVISION—OWNER OF LOTS THEREIN MAY RE-PLAT WITHOUT VACATING FORMER PLAT.

The owner of lots within a municipal corporation may subdivide them and re-plat them without first having vacated the former plat under section 3593 et seq. G.C.

COLUMBUS, OHIO, September 18, 1918.

HON. CLARE CALDWELL, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR:—Your request for my opinion reads as follows:

> "I wish to submit to you the question of procedure when the owner of lots within a municipality rearranges the lot lines, thereby making new lots or a re-plat of all or part of a former duly accepted plat.
>
> The question which has been raised is this: Must the owner of the property proceed under favor of section 3593 et seq. G. C., and in the first place have the property vacated?
>
> There have been numerous instances under my observation where one or more lots of a plat have been re-platted and the only formality required was that which was required in the original platting which is covered by section 3584."

Upon my request for additional information you submit the following under date of August 27th:

> "It often happens that after a plat of certain lots within a municipal corporation has been placed on record, some of the lots lying together are acquired by a single owner who desires to re-arrange them, thereby making out of his lots a greater or less number with different frontages and

different lines as lot boundaries.

It has been the practice to permit the owner in question to re-plat his lots and have the re-plat recorded after the usual formalities as to acknowledgment and acceptance by the proper city authorities.

In your opinion may said procedure be had in any event, or must the owner of the lots in question in all events first vacate them under favor of section 3593, thus creating an out-lot which he then may plat anew?"

Section 3584 G. C., to which you refer, reads as follows:

"A proprietor of lots or grounds in a municipal corporation, who subdivides or lays them out for sale, shall cause to be made an accurate map or plat of such subdivision, describing with certainty all grounds laid out or granted for streets, alleys, ways, commons or other public uses. Lots sold, or intended for sale shall be numbered by progressive numbers, or described by the squares in which situated, and the precise length and width shall be given of each lot sold, or intended for sale. Such map or plat shall be subscribed by the proprietor, or his agent, duly authorized by writing, acknowledged before an officer authorized to take the acknowledgment of deeds, who shall certify the acknowledgment of the instrument, and recorded in the office of the recorder of the county."

This section points out the method to be followed in platting lots within a municipal corporation, and of course must be followed regardless of whether or not it is necessary to vacate the former plat.

Section 3593 G. C., to which you refer, and the following sections provide the method of vacating a plat. Said sections read as follows:

Section 3593.—"Upon the application of two-thirds of the proprietors thereof, the court of common pleas may alter or vacate the plat of any municipal corporation, addition thereto, or parts thereof, within the county, as hereinafter specified."

Section 3594.—"Application for vacating or altering a plat, addition, or part thereof, shall be by petition in writing, filed with the clerk of the court of common pleas, and the applicant or applicants shall give thirty days' notice thereof by publication in a newspaper printed and of general circulation in the county. The notice shall set forth briefly the part or parts of the plat or addition to be vacated."

Section 3595.—"If the petitioners produce to the court satisfactory evidence that such notice has been given, and that two-thirds of the persons owning lots or parts thereof in the corporation or the addition, as the case may be, or their authorized agents or attorneys, have made application to have the whole or a part of such corporation or addition altered or vacated, the court shall, in its discretion, proceed to alter or vacate such corporation or addition, or any part of either. The vacation of a municipal corporation, addition, or part thereof, shall not vacate any part of a state or county road."

I am of the opinion that it would not be necessary to proceed under the three last above quoted sections simply to rearrange or subdivide certain lots in the municipality or an addition thereto. That is, that these sections were not meant to apply to a situation such as you have in mind, but are only applicable when it is the plan of an owner or owners of lots in a municipality to rearrange the whole

scheme of an addition, or a part thereof, by changing not only lot lines, but changing the streets and alleys thereof. Or, in other words, that these sections only apply when the contemplated change will affect the public generally (such as vacating streets) or other lot owners therein.

This is not the case in the question presented by you, for the rearrangement of lot lines only can in no way affect the public or other lot owners in the addition. This view is borne out by the sections above quoted relating to vacation of plats. Section 3594 G. C. provides for filing an application for vacating or altering a plat and for the publication of notice. This it seems to me shows that the legislature had in mind only such proceedings as would affect the public and provided such publication so that persons who might be interested would have notice of such proceeding in order that they would have opportunity to present their objections to such scheme.

Section 3595 G. C. provides for the proceedings in court.

Section 3596 G. C. provides for a record of the proceedings and a method by which an interested person may be made a party defendant.

Section 3599 G. C. provides for rendering judgment in favor of persons damaged by reason of such vacation.

All these sections show that the proceedings under them are not applicable to such a case as you present. If a lot owner desires to subdivide his lot into two or more parts and sell it in that manner, it can in no way affect any person or persons, and the legislature would not compel him to give public notice of his intention, because the public would have no interest in any way nor would the legislature provide a way of making interested persons parties defendant when there could be no interested persons. The publication of notice and the court proceedings would in this case be not only expensive but unnecessary, and I do not think such was the intent or purpose of these sections.

For the foregoing reasons I advise you that the owner of lots within a municipal corporation may subdivide them and re-plat them without first having vacated the former plat under section 3593 et seq. G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1465.

MUNICIPALITY—COUNCIL—POWER TO CREATE POSITIONS AND FIX TERMS IN VARIOUS DEPARTMENTS.

Council of a municipal corporation has no power to create any position in the department of public service. An ordinance which assumes to create such a position and to fix a term for it is, therefore, of no effect as fixing such term.

Council has power to provide a fixed term for the position of deputy auditor, co-extensive with that of the principal.

Whether or not council has authority to provide a fixed term for the position of deputy treasurer depends upon its power to create the position as that of a real deputy. If the position is that merely of an assistant or clerk, however called, council may not fix a term for it because of the provisions of section 486-17a *General Code (civil service law), unless it is one of those exempt from the classified service under section* 486-8 *G. C.*

Council may fix a term of office for the position of smoke inspector created as the head of an independent municipal department.

Council has no authority to create the position of inspector of food products, and consequently none to fix a term of office for it; no term of office may be fixed by any municipal authority for this position because of the provisions of section 486-17a *General Code (civil service law).*

Council has no authority to fix a term for the position of assistant clerk of council. Section 4210 *of the General Code fixes a term of office for all employes of council, and this section controls as to all those whose duties are "legislative." Such employes of council as do not perform such "legislative" duties, however, have an indefinite tenure of office by virtue of the civil service law.*

Assuming that the clerk to the mayor is the incumbent of a position in the unclassified service of a city, council would have the authority to fix a term for that position.

By virtue of the civil service law a stenographer to the trustees of the sinking fund is entitled to serve during good behavior. Therefore an ordinance of council fixing a term of service for such stenographer would yield to the civil service law and be ineffective.

Assuming that a "clerk and stenographer to city solicitor" is the incumbent of a position in the unclassified service the city council has authority to fix a term therefor.

By virtue of the civil service law the police surgeon and fire department surgeon are entitled to serve during good behavior. An ordinance of council attempting to fix a term for the incumbents of these positions must therefore yield to the civil service law.

COLUMBUS, OHIO, September 18, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your letter of recent date submitting an ordinance of a certain city passed in the year 1912 and containing the following provisions:

> "To create the offices of deputy auditor, deputy treasurer, smoke inspector, inspector of food products, assistant clerk of council, clerk to mayor, stenographer to trustees of sinking fund, clerk and stenographer to solicitor, police surgeon, fire department surgeon and superintendent of waterworks and electric light plants, fixing duties, amount of compensation, and amount of bond of each of said offices.
>
> 'Section 1.—That the following offices be and hereby are created: Deputy auditor, deputy treasurer, smoke inspector, inspector of food products, assistant clerk of council, clerk to mayor, stenographer to trustees of sinking fund, clerk and stenographer to solicitor, police surgeon, fire department surgeon and superintendent of waterworks and electric light plants.
>
> Section 2.—Officers shall be appointed to fill each of said offices as provided by law and their terms of office shall commence with the date their appointment shall be made and shall terminate with close of the 31st day of December of the years ending with odd numbers, thus making each of the terms ending the same as of the official making these appointments, * *. Wherever bond is required, it may be signed by a responsible surety company, and the premium on such bond shall be paid by the city * * * out of the same fund hereinafter provided for the payment of their respective salaries.
>
> Section 3.—Said officers shall perform the duties and render such services as usually devolve upon their respective office, and shall perform

such other duties and render such further service as may be prescribed by council, or the head of such respective department."

Section 4 of the ordinance fixes salaries for each of the positions named in the first section.

Section 5 authorizes the auditor to draw warrants for the said salaries upon the appropriate funds.

With respect to this ordinance you submit the following questions:

Question 1. Can council legally provide a fixed term for the officers and employes herein designated?

Question 2. Where council has provided a fixed term, can the salary be increased or diminished during such term?

Your first question is really divisible into as many parts as there are positions which are enumerated in the ordinance submitted.

It also has a civil service aspect which it may be necessary to consider.

Council has attempted in the ordinance which has been quoted to do the following things with respect to the positions in question:

(1) To create them (section 1).
(2) To fix terms of office for them (section 2).
(3) To define—though very generally—their respective duties (section 3).
(4) To fix their salaries (section 4).

You inquire about the authority to do but one of these things, viz: fix terms. I think it is very clear, however, that unless the power to fix terms is expressly or by implication conferred upon council as an independent power, or unless the council has in this instance in section 2 passed legislation which, while perhaps not effective in a technical sense, is in another sense valid because it conforms to some provision of the law with respect to terms of office, this power concerning which you inquire cannot be claimed by council, unless as an implication arising from the power to create the office. That is to say, if council has no authority to create an office or position or employment in the service of the city, and no express authority to fix terms of office as an independent power, and no such authority flowing as an implication from any other source, it would seem clear that as to the positions of which these statements might be made your first question would have to be answered in the negative.

There is at least one position in the catalog mentioned which I think falls within the class of those to which the statements just made do apply. I refer to that of superintendent of waterworks and electric light plants. Council has no authority to create this position. It is one which exists in the department of public service. The council of a city has not general legislative power with respect to the creation of executive departments and positions. Its power in this respect is special and limited. It arises from section 4214 of the General Code, which provides that—

"Except as otherwise provided in this title, council, * * * *shall determine the number* of officers, clerks and employes in each department of the city government, and shall fix * * * their respective salaries and compensation, and the amount of bond to be given for each * * *, if any be required. * * *"

Section 4327 G. C. provides that—

> "The director of public service may establish such sub-department as may be necessary and determine the number of superintendents, * * * and other persons, necessary for the execution of the work and the performance of the duties of this department."

I must admit that the phrase "determine the number" is slightly indefinite in meaning. However, it seems to me that the existence of this power in the director of public service and the exception made in section 4214 as to the power of council in this respect are together enough to preclude the idea that one municipal authority can be said to have power to create positions of certain kinds and another the authority to determine the number of such positions which shall exist. Strictly speaking, of course, number is one thing and name, nature or definition is another. Therefore it might be argued that council would have the authority to create superintendencies, clerkships, positions of engineers, and the like, for the service department, and the director of public service would then be required to determine how many of such positions within the catalog of kinds of positions created by council he would desire to have in his department. Conversely, it might also be argued that the director of public service would be required first to act by determining how many employes he would want in his department, specifying their duties, and that the council should then act by formally creating the positions in the department and fixing salaries for them. But as I have said, I do not believe that either course of reasoning is correct and, in my opinion, the authority to determine the number of superintendents, clerks, other employes, etc. vested by law in the director of public service for his department excludes the power of council to create positions in the department of public service.

Now, if council has no authority to create a position no authority to fix a term for such position can arise by implication from such a source; and if such power exists it must be found elsewhere. Nowhere in the Municipal Code is there reposed in council any authority to fix terms of office or employment. Section 4213 of the General Code implies that any municipal officer, clerk or employe may have a term, for it provides that—

> "The salary of any officer, clerk or employe shall not be increased or diminished during the term for which he was elected or appointed, * *."

But any implication that may arise from this section is not strong enough to vest the power to fix terms where none are fixed by law in any particular agency of the municipal government, such as the council.

I know of no other provision of the Municipal Code in any way shedding light upon the question as to whether a term of office or employment can be fixed for officers or employes in the department of public service. If such power exists—which the facts submitted do not require me to determine—it resides, in my opinion, in the director of public service and not in council. The authority of council is limited to fixing salaries for the positions created by the director of public service. I answer your first question, therefore, in so far as it relates to the superintendent of waterworks and electric light plants in the negative.

As to the deputy auditor I observe that at the time this ordinance was passed (September 17, 1912) section 4276-1 of the General Code was in force and provided as follows:

> "The auditor of any city may, when authorized by council ordinance, appoint a deputy who, in the absence or disability of the auditor, shall perform the duties of the auditor."

This section, in my opinion, confers upon council the authority to create the position of deputy auditor. The refined argument might be made to the effect that council has less authority than this, in that the power to determine whether or not he will appoint a deputy still resides in the auditor under the section quoted, after council has authorized such action. That is, the position is in a sense not a permanent one in the city government in which there may be said to be a "vacancy" at any time, that it would be the duty of the auditor to fill. However, I believe the power to authorize the appointment of a deputy is broad enough to authorize council to provide that such deputy shall hold his position for such term as may end with that of the official making the appointment, subject to removal. This is in fact nothing more than the consequence which the law itself would attach to the appointment of a deputy. The relation between a deputy and his principal is such as that the deputy's "natural" term of office, so to speak, may be said to be co-terminous with that of his principal. He does not hold over until his successor is elected and qualified.

Now a deputy of this character is, in my opinion, in the unclassified service of the municipal civil service by virtue of the state civil service law, so that no question can arise as to the effect of the provisions of that law respecting the tenure of incumbents of positions in the classified civil service upon an ordinance or a principle of law like those under discussion.

Without going further into the question as regards the deputy auditor, I am of the opinion that the action of council in giving such deputy auditor a term of office was at the very least not inconsistent with the law which would otherwise apply, whether it added anything to that law or not; so that the deputy auditor may be said to have a term of office.

The question is different as regards the deputy treasurer, for there is no express provision of law authorizing council to provide for a deputy for the city treasurer. It might be argued that because the legislature had seen fit to empower council to authorize the appointment of a deputy auditor by express provision the power to grant similar authority to the city treasurer is lacking. On the other hand, it might be argued that under the general section above quoted council might provide for a clerkship in the office of the treasurer which might be given the name of "deputy," whether the position would have all the legal attributes of a deputy or not. The argument on this side would say of section 4276-1 that the deputy therein provided for is a real deputy having authority to act for and in place of his principal; whereas, regardless of the name under which a similar position in the treasurer's office might be created it would not partake in law of the characteristics of a deputy.

I am inclined to the view that council has authority to create clerkships in the office of the treasurer, whether that office be regarded as one of the "departments" of the city government or not. If council may also, notwithstanding the lack of the express provision which exists with respect to the auditor's office, provide for the positions of real deputies in the office of the treasurer, then all that has been said respecting the answer to your question as it relates to the deputy auditor would apply also to the deputy treasurer.

If, however, it should be determined that the so-called "deputy treasurer," the position of whom is created by the ordinance under consideration, is not in reality a "deputy" within the meaning of the civil service law, then the question would arise as to whether or not, the position being within the classified civil service, it might be given a definite term. This question is similar to others which will be hereinafter considered in this opinion and will be postponed until all the positions which are in the classified civil service have been identified.

It is quite probable, however, that in the city about which you inquire the "de-

puty treasurer," if considered as a mere clerk, might be one of those subordinates whose position the treasurer might designate as in the unclassified service. If this is the case, the civil service question would not arise and the authority of council to fix a definite term for the position would exist as in the case of the mayor's clerk, hereinafter discussed.

The position of smoke inspector seems to be regarded as one existing independently of the department of public service. I can not find any express provision respecting this position in the Municipal Code. Municipalities are given general power to

> "regulate and prevent the emission of dense smoke, to prohibit the careless or negligent emission of dense smoke from locomotive engines, to declare each of the foregoing acts a nuisance, and to prescribe and enforce regulations for the prevention thereof; to prevent injury and annoyance from the same, * * * and to provide for the regulation of the installation and inspection of steam boilers and steam boiler plants." (Section 3650 G. C.)

This has been held in *Cincinnati* vs. *Gass,* 1 O. N. P. (n. s.) 169, to confer upon the council the authority to create as a separate department the position of supervising engineer to regulate and compel the proper consumption of smoke. It was evidently upon this theory that the position of "smoke inspector" was created.

Obviously, if the position is an independent one council may create it and in creating it may define a term of office for it, unless the civil service law prevents such action. However, complete provision for this position would necessitate designating the appointing power, and this ordinance, while providing that the salary of the smoke inspector shall be paid out of the general fund, thus indicating that the position was not within the department of public service or that of public safety, does not provide who shall appoint the smoke inspector, but says that all the officers named in the ordinance "shall be appointed * * * as provided by law." The appointing power of the mayor is found in section 4250 General Code. It provides:

> " * * * He shall appoint, and have the power to remove, the director of public service, the director of public safety, and the heads of the sub-departments of the departments of public service and public safety, * * *."

I assume, however, that there must be some other ordinance providing for the appointment of the smoke inspector, and I assume also that, being the head of an independent department, he is to be appointed by the mayor. Under the civil service law of the state, of course, such a position would be in the unclassified service as one of the "heads of departments appointed by the mayor" (section 486-8 G. C.). Therefore the civil service law does not in any way affect the question as to the smoke inspector; and the power of council in providing for this department of the city government to give the incumbent thereof a term of office is plenary—just as broad as the power to provide for the position at all may be. Assuming that the position is legally created therefore, I reach the conclusion that the position of smoke inspector is one for which the council may legally provide a fixed term.

The inspector of food products does not hold a position analogous to that of the smoke inspector. He is the head of a sub-department in the department of health, and the position is so recognized in the section providing the source of the payment of salaries which the ordinance creates. The statutory provision on this subject is that of section 4458 G. C., which provides that—

"The board of health may appoint, define their duties and fix the compensation of, such number of inspectors of * * * milk, meat, butter, cheese, and substances purporting to be butter or cheese, or having the semblance of butter or cheese, and such other persons as is necessary to carry out the provisions of this chapter, * * *."

This section is like that which relates to the positions in the department of public service, and all that I have said about the superintendent of waterworks and electric light plants applies to the food inspector, with the additional remark that council has not even the authority to fix the salary of the food inspector. It is very clear, therefore, that inasmuch as council has no authority whatsoever as to the position of food inspector, the answer to your first question in so far as it relates to this position is in the negative.

Assistant clerk of council is a position provided for under authority of section 4210 of the General Code, which provides as follows:

"Within ten days from the commencement of their term, the members of council shall elect a president pro tem, a clerk, and such other employes of council as may be necessary, and fix their duties, bonds and compensation. The officers and employes of council shall serve for two years, but may be removed at any time for cause, at a regular meeting by a vote of two-thirds of the members elected to council."

Here is a self-executing provision of the general law respecting the employes of council. In so far as the ordinance of council is inconsistent with this provision the general law, of course, controls. In strict accuracy council, of course, has no control whatever over the terms of its employes, such terms being fixed by law. I answer your first question, in so far as it relates to the assistant clerk of council, therefore, by saying that council has the authority to create the position but, strictly speaking, no authority to provide a fixed term for it; yet the position is one which is held subject to a fixed term because of the provisions of the general law.

In this connection, however, it may be that section 4210 itself must yield to the subsequently enacted civil service law of 1915, which will be hereinafter discussed. I can not positively decide this question because I have no means of knowing what duties were to be performed by the assistant clerk of council provided for in this ordinance. If his duties were "legislative" he would be in the unclassified service by virtue of subdivision 5 of section 486-8 of the General Code. If his duties, however, consisted of such activities as the serving of special assessment notices I suspect that he would not be within the section which I have just mentioned and would therefore hold a position in the classified service. To the extent that the provisions of the civil service law with respect to the tenure of incumbents of positions in the classified service conflict with previously enacted statutes providing for fixed terms, I would have no hesitancy in arriving at the conclusion that the civil service law would prevail. It is true that it is not every general law, though subsequently enacted, which controls a specific provision with respect to particular cases. Having regard to the peculiar nature of the subject-matter of the civil service legislation, however, I can reach no other conclusion than that its provisions were intended to supplant, and do supplant, all inconsistent provisions with respect to particular offices and positions which were in the law when the civil service law was passed and went into effect. While I have said, therefore, that the position of clerk of council is one which is held subject to a fixed term because of the provisions of the general law, I must add that if the duties of the position are not "legislative" it is, in spite of the general law which I have quoted, not held subject to a fixed term if the civil service law otherwise provides.

The position of clerk to the mayor is like that of deputy treasurer, if the latter be considered as a mere clerkship in the treasurer's office. That is to say, there is no specific provision for the creation of any such position; and if the mayor's office be not regarded as a "department of the city government," section 4214 can not be regarded as a grant of authority to council to act in the premises. However, I assume that council has authority to create a clerkship in the office of the mayor. I doubt, however, whether the provisions of the civil service law relating to the classified service would have application to this position in the ordinary city; because section 486-8 G. C. gives to all elective officers, other than state officers, the right to appoint in the unclassified service "two secretaries, assistant or clerks and one personal stenographer." I assume that in a city of average size the mayor would not require more than one clerk; and the ordinance gives rise to the inference at least that the mayor's clerk is the only person other than perhaps a stenographer in his office force in the particular city under consideration. If this is true, then, for reasons already stated, I would advise that council has unquestioned authority to define a term of office for the mayor's clerk. If, however, the facts are such that the person is not in the unclassified service, then the civil service question noted in the discussion of the question respecting the deputy treasurer would be raised. This question will be hereinafter discussed.

The trustees of the sinking fund, as such, have no direct statutory authority to employ a clerk. Section 4509 G. C. authorizes council to create a clerkship in this office. That being the case, council has the implied power to constitute a term of employment for this position, unless the civil service law dictates a contrary answer. I might say in this connection that this clerkship is not in the unclassified service; for the only "principal appointive executive * * * boards or commissions" who are entitled to any appointments outside of the civil service are those which are "authorized by law to appoint such secretary, assistant or clerk and stenographer." In my opinion, an ordinance of the city is not a "law" within the meaning of paragraph 8 of section 486-8 of the General Code.

The complete discussion of this question will therefore be postponed until the application of the civil serivce law, which is a point common to many of the questions raised by your letter, is reached.

The city solicitor is not authorized directly by law to appoint a clerk and stenographer. What I have said about the clerk to the mayor applies fully to this position in the solicitor's office. Council has undoubted authority, in my opinion, to create the position; indeed the power of council, whether under section 4214 G. C. or its general legislative power, to supply an office force for the solicitor is recognized in section 4306 of the General Code, which provides what may be done "when council allows an assistant or assistants to the solicitor." In a city of average size I imagine that the position of "clerk and stenographer" to the solicitor would be in the unclassified service, the solicitor being an "elective officer" and as such entitled to "two secretaries, assistant or clerks and one personal stenographer" in the unclassified service.

If the facts are otherwise, however, then the civil service question mentioned in several of the other cases which have been discussed will be raised, but for such question, however, it is clear that the council would have authority to provide a term for this position.

The police surgeon and fire department surgeon are both positions in the department of public safety. Council has express authority under sections 4374 and 4377, as well as section 4214 G. C., to create these positions. They are in the classified service, as indeed are the entire regular police and fire departments of any city. The question as to whether or not this fact precludes the council from annexing terms of office to the creation of the position is one which is perhaps even more

sharply raised in connection with these positions than in connection with others in which its presence has been noted. I pass therefore to the consideration of this question.

The question may be phrased thus:

> Where a term of office is not fixed by law, but the power to create a term of office for a municipal position may be otherwise fairly inferred from the grant of power to create the office or position which is reposed in council, is there anything in the civil service law which is so far inconsistent with the idea of a definite term as to reverse the inference in so far as positions in the classified service are concerned, and lead to the conclusion that council is without power to provide such a definite term for such classified civil service positions, leaving the tenure therein to be indefinite but subject to the provisions of the civil service law alone?

So far as the constitution of the state, which probably reflects itself in the provisions of the present civil service law as furnishing the intent which is to be imputed to the legislature when none has been expressed, is concerned, it must be said that there is nothing therein which would give rise to an inference of the kind under consideration, for the civil service amendment to the constitution, Article XV, section 10, deals only with "appointments and promotions" and not at all with tenure of positions of offices, nor even with removals.

Turning now to the civil service act itself I find that section 486-2 first enacts into law the requirement of the constitution, and then says that

> "thereafter (after the taking effect of this act) no person shall be appointed, removed, transferred, laid off, suspended, reinstated, promoted or reduced as an officer or employe in the civil service of the state, the several counties, cities and city school districts thereof, in any manner or by any means other than those prescribed in this act or by the rules of the state or municipal civil service commissions within their respective jurisdictions as herein provided."

Unless the word "removed" can be given some effect beyond its natural meaning so as to prohibit the creation of an office or position with a fixed term or tenure, it is obvious that this provision does not give rise to any inference of the kind for which we are now searching.

Section 486-17 General Code makes certain provisions as to reductions, lay-offs and suspensions which do not apply.

Section 486-17a provides, in part, as follows:

> "The tenure of every officer, employ (employe) or subordinate in the classified service of the state, the counties, cities and city school districts thereof, holding a position under the provisions of this act, shall be during good behavior and efficient service; but any such officer, employe or subordinate may be removed for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of the provisions of this act or the rules of the commission, or any other failure of good behavior, or any other acts of misfeasance, malfeasance or nonfeasance in office. * * *"

In my opinion this section not only gives rise to the inference for which we are seeking but is itself an express provision on the subject. It is the controlling law

of the state so far as cities subject to the general laws are concerned. In the face of this provision ordinances like the one submitted by you, in so far as they relate to positions in the classified service, are abrogated where they attempt to fix definite terms.

Now the ordinance enclosed by you was passed in 1912 when the section just quoted was not in effect. It has been in effect, however, since 1915, and I am assuming that your question relates not to the validity of the ordinance when it was passed but rather to its present effect. If I am in error as to this I shall be glad to consider the original validity of the ordinance further upon advice from you correcting me on this point. So far as the present force of the ordinance is concerned, however, it is clear that its provisions as to terms of office of positions in the classified service can have no present effect; for more than two years have elapsed since the civil service law has been in effect and there must have been appointments to each of these positions under the present civil service law. The tenure of office or employment under such appointments is referable to the civil service law, and not to the original ordinance, which is not wholly repealed but merely yields to the civil service law in this particular. At the present time, therefore, the positions which I have enumerated as being certainly or possibly within the classified civil service are positions with respect to which there is no fixed term of office.

Of course, the answer to your second question is dependent upon that to your first in each case. The mere fact that council has attempted to provide a fixed term is of no consequence. The question is as to whether there is actually a term of office for a given position—not whether council has attempted, though without authority, to establish such term of office. If a term of office or employment has been lawfully established by the council, then section 4213 of the General Code above quoted plainly dictates a negative answer to your second question. Section 4213 governs whether the term is one which is fixed by council itself or by the general law, as in the case of the employes of council.

I may add that I have not considered the civil service questions which exist with respect to the positions of superintendent of waterworks and electric light plant and inspector of food products. As regards the latter, it seems reasonably clear that the section which I have quoted from the civil service law affords another ground for denying validity to the action of council in fixing a term for it. With respect to the former the situation is not so clear inasmuch as the position may constitute the head of a sub-department in the department of public service. In an opinion of recent date I have advised you that the appointing power with respect to the positions of heads of sub-departments in the department of public service resides in the mayor. The fact that this is the case raises a question under subdivision 3 of section 486-8 G. C., which places in the unclassified service "all heads of departments appointed by the mayor," with a proviso that "nothing contained in this act shall exempt the chiefs of police departments and chiefs of fire departments * * * from the competitive classified service." The police and fire departments are sub-departments rather than departments proper, and the question is raised as to whether or not the whole paragraph has the effect of exempting all appointments by the mayor, as well of heads of sub-departments as of those of heads of departments proper, from the requirements of the provisions of the civil serivce law respecting the classified service. I do not decide this question because I have held that the action of council in attempting to fix a term for the position of superintendent of waterworks and electric light plants is wholly nugatory for other sufficient reasons, while the application of the civil service law to the case is involved in considerable doubt.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1466.

CLERK OF COURTS— TOWNSHIP CLERK—AUTHORIZED TO ISSUE HUNTER'S LICENSE TO MINOR UNDER SEVENTEEN YEARS. SECTION 12967 MAY BE VIOLATED EVEN THOUGH MINOR HAS HUNTER'S LICENSE.

1. *Under sections* 1421 *and* 1422 *G. C.* (107 *O. L.* 487) *the clerk of the court of common pleas or a township clerk is authorized in law to issue a hunter's license to a minor under seventeen years of age.*

2. *Under section* 12967 *G. C. any person selling a gun or ammunition to a minor under seventeen years of age, or knowingly permitting such minor to use his gun, is liable to prosecution under said section, even though such minor has a hunter's license.*

COLUMBUS, OHIO, September 20, 1918.

HON. CHARLES L. BERMONT, *Prosecuting Attorney, Mt. Vernon, Ohio.*

DEAR SIR:—I have your communication of September 7, 1918, in which you request my opinion as follows, your question arising under the provisions of sections 1422 and 12967 G. C.:

> "The clerk of common pleas court and the juvenile officer of this county have asked for my opinion upon a proposition and as the same condition probably prevails all over the state I desire your opinion upon it.
>
> It seems, by the provisions of section 1422 G. C., that the clerk is authorized to issue a hunter's license to a minor over sixteen years of age, but section 12967 G. C. does not permit a minor under seventeen years of age to use any sort of fire-arm.
>
> Is it your opinion that the clerks should issue license to minors under seventeen years of age and the juvenile officer should enforce the provisions of section 12967?"

In order to fully understand section 1422 G. C. (107 O. L. 487), we will consider the provisions of section 1421 G. C., which reads as follows:

> "Section 1421.—No person shall hunt, pursue or kill with a gun any wild bird or wild animal within this state without having first applied for and received a hunter's license and paid the fee, as required herein. Every applicant for a hunter's license who is a non-resident of the state of Ohio and who is a citizen of the United States of America, shall pay a fee of fifteen dollars to the officer issuing the same. Every applicant for hunter's license who is a citizen of the United States of America, and a resident of the state of Ohio, shall pay a fee of one dollar, provided that the owner, tenant or children of the owner, manager or tenant of lands within this state may hunt upon such lands without a hunter's license."

It will be seen that this section forbids any one to hunt, pursue or kill with a gun any wild bird or wild animal within this state, without having first applied for and received a hunter's license and paid the fee as therein required, irrespective of how young he may be.

Section 1422 G. C. (107 O. L. 487) adds another qualification which is as follows:

" * * * Persons under sixteen years of age shall not be allowed to hunt under the provisions of this act, unless accompanied by their parent or other person in loco parentis."

From all these provisions it is evident that no person can hunt without a license, whatever his age may be, and that all persons under sixteen years of age, in addition to having a license, must be accompanied by parent or other person in *loco parentis*, before he can hunt.

Section 1422 G. C. also provides as follows:

"Hunter's license shall be issued by the clerks of common pleas courts and township clerks. Every applicant for a hunter's license shall make and subscribe an affidavit, setting forth his name, age, occupation, place of residence, personal description, and citizenship, and the other officer authorized to issue licenses shall charge each applicant a fee of twenty-five cents for taking such affidavit, issuing such license and attaching his seal of office thereto, and clerks of common pleas courts and township clerks to whom such application is made are hereby empowered and required to administer the oath and to take and certify the affidavit herein required and to collect and receive the fees therefor as herein provided."

Under this section it would seem that it becomes the duty of clerks of common pleas courts and township clerks to issue licenses to all those persons who make application for the same in accordance with the provisions of the statute.

Section 12967 G. C. reads as follows:

"Whoever sells, barters, furnishes or gives to a minor under the age of seventeen years, an air-gun, musket, rifle, shotgun, revolver, pistol or other fire-arm, or ammunition therefor, or, being the owner or having charge or control thereof, knowingly permits it to be used by a minor under such age, shall be fined not more than one hundred dollars or imprisoned in jail not more than thirty days, or both."

Inasmuch as no person is permitted to sell any kind of a gun or ammunition to a minor under seventeen years of age, and no one is allowed to permit a gun to be used by a minor under such age, the question arises whether the clerks aforesaid are justified in issuing a license to a minor under seventeen years.

As said before, the provisions of the statutes, relative to the issuing of a license, are general and apply to all persons, irrespective of their age. I do not believe that the clerk would have the right to refuse to issue a license to any one, whatever his age may be, provided he complies with the provisions of the statutes. But the mere fact that a minor under seventeen years might have a hunter's license does not warrant any one in selling him a gun or ammunition or permitting such minor to use a gun owned by him.

Sections 1421 and 1422 G. C. relate to the party desiring to hunt, while section 12967 G. C. pertains to the party who sells a gun or ammunition to a minor under seventeen years or knowingly permits such minor to use a gun owned or under control of said party. For this reason I do not think there is any conflict between the provisions of these statutes.

A clerk has no authority to refuse to issue a license to a minor under seventeen years, provided he complies with the conditions of the statutes, but on the

other hand no one is permitted to sell a gun or ammunition to a minor under seventeen years, or knowingly permit him to use his gun, even though he should have a hunter's license. To be sure it seems absurd to issue a license to a minor under seventeen years, to hunt with a gun, when the criminal statutes provide that he can not secure the necessary implement and accessories with which to hunt, but such a course seems clearly warranted under the provisions of the sections above quoted.

Therefore in answer to your questions I will say that a clerk of the court of common pleas or township clerk is warranted in law in issuing a hunter's license to minors under seventeen years of age, and that a juvenile officer or any other person is warranted in enforcing the provisions of section 12967 G. C. against any one who sells a gun or ammunition to a minor under seventeen years of age, or who knowingly permits such minor to use his gun, even though said minor has a hunter's license.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1467.

STATE HIGHWAY COMMISSIONER—COUNTY COMMISSIONERS—NO AUTHORITY TO REMOVE OBSTRUCTIONS IN PUBLIC HIGHWAYS WITHIN A VILLAGE WITHOUT CONSENT.

Where the proprietor of an addition to a city located outside the corporate limits thereof files a plat showing a circular park located on the line of a previously established and existing state road, with curved driveways extending beyond the line of such state road, without at the same time initiating and carrying through proceedings for the alteration of the state road itself, the recording of such plat does not operate to vacate so much of the public highway as lies within the confines of such circular park. If, subsequently, curbing and other obstacles are erected within the bounds of the highway in order to form such park, such obstacles are unlawful. But where the territory of the subdivision subsequently becomes a part of an incorporated village, the duty to restore the public highway through the middle of such circular park and remove such obstacles belongs to the village authorities, and neither the state highway commissioner nor the county commissioners have any jurisdiction in the premises.

COLUMBUS, OHIO, September 20, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your letter of July 15, 1918, which is too lengthy to quote in full. However, the facts upon which you request an opinion are as follows:

The East Broad street road runs through the village of Bexley. In said village there is situated what is known as the Broad Street circle—a circular plot of ground around which the road (Broad Street) is diverted, instead of cutting through the center thereof. It is claimed that this condition is extremely dangerous to automobile traffic, and The Columbus Automobile Club has requested that you as State Highway commissioner take jurisdiction over the matter of causing the East Broad street road to go directly through this circular plot, instead of on either side thereof.

The question arises whether you have jurisdiction or authority to go within the confines of the village of Bexley and carry out the matter herein suggested. It is

your opinion that you have not such authority, and that of Hon. C. D. Saviers, attorney of the Automobile Club, that you have such authority.

I have carefully considered the letter addressed to you by the Automobile Club, bearing date July 12, and I know of no provision of law that would warrant your going into the village of Bexley and making the change suggested, unless said village first gives consent to your so doing.

The legislature seems to have manifested a definite and specific intention to the effect that no authority, whether state, county or township, shall go into a village for the purpose of making an improvement upon the roads located therein, unless they first secure the consent of the village.

If the state highway commissioner goes into the village and uses the money of the state for the suggested change, said money will have to be taken from the inter-county highway, main market road or the maintenance and repair fund. These are the only funds at your disposal for carrying out such work.

We will consider what provisions the legislature has made in reference to this matter. If you were to attempt to carry out the improvement as suggested, without the co-operation of the county commissioners or township trustees, you would be controlled by the provisions of section 1231-3 G. C., which reads in part as follows:

> "Section 1231-3.—The state highway commissioner may extend a proposed road improvement into or through a village when the consent of the council of said village has been first obtained, and such consent shall be evidenced by the proper legislation of the council of said village duly entered upon its records, and said council may assume and pay such proportion of the cost and expense of that part of the proposed improvement within said village as may be agreed upon between said state highway commissioner and said council. * * *."

From this section it is evident that the state highway commissioner can not assume jurisdiction over an improvement within a village, unless he first obtains the consent of the council of said village.

Suppose, on the other hand, that the state highway commissioner should assume jurisdiction over this improvement, with the co-operation of the county commissioners or township trustees. In that event he would be controlled by section 1193-1 G. C. (107 O. L. 123) which reads in part as follows:

> "Section 1193-1.—When, upon the application of county commissioners or township trustees and under the supervision of the state highway department, the improvement of an inter-county highway or main market road is extended into or through a village, or an improvement constituting an extension of an improved inter-county highway or main market road is constructed within a village, it shall not be necessary for the village to assume any part of the cost and expense of the proposed improvement. If no part of the cost and expense of the proposed improvement is assumed by the village, no action on the part of the village, other than the giving of its consent, shall be necessary: * * *."

Here again we find the specific provision made that the state highway commissioner can not construct an improvement into, within or through a village upon the application of the county commissioners or township trustees, unless the consent of the village is first given.

Suppose we consider the doing of the work suggested as a mere maintenance and repair, and not an improvement within the provisions of either section 1231-3

or section 1193-1; you would then be controlled by section 7467 G. C., which reads in part as follows:

> "Section 7467.—* * * The state, county or township or any two or more of them may by agreement expend any funds available for road construction, improvement or repair upon roads inside of a village or a village may expend any funds available for street improvement upon roads outside of the village and leading thereto."

From said provision it is evident that the course last mentioned could not be followed excepting by an agreement with the village authorities.

While your letter does not particularly call into question the jurisdiction of the county commissioners over matters such as suggested therein, yet when we turn to sections 6949 to 6953 G. C. (107 O. L. 107), we find that the county commissioners have no authority to construct an improvement into, within or through a village unless the council thereof first gives its consent to such a course. I cite this latter proposition with the idea of calling attention to the fact that it seems to have been the intention of the legislature not to permit the improvement or construction of roads within a village, whether by the state or county, unless the village gives its consent thereto.

Thus far we have been considering the question merely from the standpoint of the right of the state or county to go within the confines of a municipal corporation for the purpose of improving the public highways therein located.

We will now view the matter from the standpoint of the powers conferred upon the municipality, in reference to its authority over the streets of the same.

It is contended by those who argue that the state has authority to go within the village of Bexley and change the road so that it will run directly through the circle in question, that this circle was never legally established upon the public highway, and hence it is a nuisance and obstruction therein; that Logan M. Bullitt, in laying out this plat, did not follow the statutes pertaining thereto, and that he had on authority in law to place the circle in question within the limits of the highway and change the highway so as to pass around on either side of the circle. They argue that inasmuch as this is an obstruction and nuisance to public travel, never having been legally established, the state, notwithstanding the fact that same is now within the confines of the village of Bexley, has authority in law to remove it.

In East Portland vs. Multnomah Company, 6 Ore. 62, the court lays down two fundamental propositions in regard to the jurisdiction over the highways of the state. They are as follows (syllabus):

> "1. The paramount and primary control of highways in a state, and of streets in cities is vested in the legislature.
> 2. The state may transfer its control of streets to a municipal corporation by act of the legislature."

In the opinion (p. 65) the court say:

> "The primary and paramount control of the streets having been vested in the legislature, and that body having by special act and in general terms given up its jurisdiction thereof to the city, the city may and should control them. Any other conclusion than this, and the one already reached, would abridge the authority of the legislative assembly invested by Article II, section 2 of the Constitution, by preventing that body from investing municipal corporations with one of the very powers necessary to the end of efficient municipal government."

We have already investigated the powers which the legislature has seen fit to confer upon the state and the county, relative to the public highways located within municipalities.

Let us now turn to the powers granted to municipalities, as to their authority over the streets therein located.

Section 3714 G. C. reads as follows:

> "Municipal corporations shall have special power to regulate the use of the streets, to be exercised in the manner provided by law. The council shall have the care, supervision and control of public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts, within the corporation, and shall cause them to be kept open, in repair, and free from nuisance."

This section seems to confer complete power upon the municipalities of the state, in the supervision and control of the public highways and streets of the same, and I call particular attention to the latter part of said section, viz., that they "shall cause them to be kept open, in repair, and free from nuisance."

From this provision it is apparent that if the circle in question is a nuisance, the municipality of Bexley has been given exclusive jurisdiction to remove the nuisance from the highway or the street located within said village.

Section 3631 G. C. reads in part as follows:

> "To hold and improve public grounds, parks, park entrances, free recreation centers and boulevards, and to protect and preserve them. * *."

I quote this provision with the view that if this circle should be considered in the nature of a park, and the roads encircling the same considered boulevards, the municipality itself seems to be given the jurisdiction to protect and preserve them.

Dillon in his work on Municipal Corporations, section 1138, lays down a fundamental proposition which appears to control in this case. It reads as follows:

> "* * * It may, however, be said that, as a general rule, a grant to a city, incorporated village, or incorporated town of the power to control and regulate the streets confers exclusive authority over the streets; and that the creation of a city, village, or incorporated town, or the extension of its limits, *vests in the municipality the power and jurisdiction* to regulate and control highways which have hitherto been under the control of the county or township organization, and *transfer to the city,* village, or incorporated town the duty of maintaining and repairing them, unless the statute otherwise provides. * * *."

There are several decisions of our own courts which also throw considerable light upon the question which we have under consideration.

In Railroad Co. vs. Defiance, 52 O. S. 262, the court held as follows in the first branch of the syllabus:

> "Where a part of a county road is taken into a municipal corporation by the annexation of contiguous territory, it is subject to the control and supervision of the municipal authorities, who may improve it by grading, or otherwise, at the expense of the corporation. * * *."

In the opinion (p. 299) the court uses the following language:

> "The highways so brought within the corporate limits of the defendant, were removed from the control which the county commissioners theretofore had over them, and became subject to the control, supervision and care of the municipal authorities, like other streets and highways of the corporation. By express statutory provision, the council is given 'the care, supervision and control of all public highways, streets, avenues, alleys, sidewalks, public grounds and bridges within the corporation,' and is charged with the duty of causing 'the same to be kept open and in repair, and free from nuisance'. Section 2640, Revised Statutes. The duty thus devolved upon the council is attended with the power to do whatever may be necessary in the proper and lawful performance of the duty, including the power to improve such ways, or parts thereof, in any lawful manner, when, and as, the public convenience may demand. Grading a street, and changing its grade, when necessary for its convenient use by the public, are lawful modes of improving the street, and keeping the same open and in repair."

In City of Steubenville vs. King, 23 O. S. 610, the second branch of the syllabus reads as follows:

> "Where territory, including a public road connecting with the streets of a city, is annexed to the city, and the road continues to be used as a street or thoroughfare, it thereby becomes a 'public highway' of the city within the meaning of section 439 of the Municipal Code (66 O. L. 222), although it has never been 'accepted and confirmed by an ordinance specially passed for such purpose,' as provided in section 440."

In the opinion (p. 613) it is stated:

> "If the road in question was a legal public highway at the time of its annexation to the city, we think the simple fact of annexing it to the city, and its continuous subsequent use as a street, constituted it a 'public highway' of the city, within the meaning of section 439 of the code, and subjected it to the control and care of the city authorities."

Lawrence Railroad Co. vs. Commissioners of Mahoning county, 35 O. S. 1 is a case similar to the one now under consideration. In this case a railroad company had without authority of law taken possession of a certain public highway located outside the limits of the municipality of Youngstown and had erected and maintained thereon an obstruction and nuisance. Afterwards, this particular part of the public highway was annexed with other territory to the municipality of Youngstown. The question then arose as to whether the county commissioners of Mahoning county or the municipality of Youngstown would be the proper party to maintain an action against the railroad company for damages on account of said nuisance and obstruction.

The fifth branch of the syllabus reads as follows:

> "Where an obstruction is created in a state or county road, and the corporate limits of a municipal corporation are extended over a part of the road so obstructed, the county commissioners can not maintain an

action for the obstruction of that part of the highway which is within the limits of the corporation."

In the opinion (p. 9) the following language is used by the court:

"True, it was held in *Wells* vs. *McLaughlin*, *Butman* vs. *Fowler*, 17 Ohio, 99, 101, that the county commissioners might lay out, within or through a municipal corporation, a public highway. We do not decide that that may not still be done. But the Municipal Code of 1869 (66 Ohio L. 222, section 439), re-enacted in 1878 (75 Ohio L. 388), provided that 'the council shall have the care, supervision, and control of all public highways, bridges, streets, avenues, alleys, sidewalks, and public grounds within the corporation, and shall cause the same to be kept open and in repair and free from nuisance'. And see 66 Ohio L. 149, sections 8, 199. Under the act of 1873, the damages recovered must be appropriated by the commissioners in repairing the road or removing the obstruction; but as control of highways in the corporation is confided to the corporate authorities, the commissioners could not apply such moneys within the corporate limits. Hence, if an action for damages, sustained by reason of such obstruction within the corporate limits of Youngstown, can be maintained, the action must be prosecuted by the city, and the recovery of the plaintiffs in this case must be confined to injury to the road outside of the city limits.'

Hence, whether we consider the question from the standpoint of the power and authority granted by the legislature to the state and the counties thereof, to enter a municipality with the view of improving the public highways therein; or whether we view it from the standpoint of the authority granted to the municipalities of the state over their public highways and streets, the conclusion seems clear that the state, through the state highway commissioner, would have no jurisdiction to enter the village of Bexley to remove the circle in question and to improve the highway therein, unless it first obtains the consent of the council of said village.

In arriving at this conclusion I am aware that there are a few decisions of our courts which would tend to some extent in the opposite direction. These are:

Wells vs. McLaughlin et al., 17 Ohio Rep., 99; Lewis vs. Laylin, 46 O. S. 663; Railway vs. Cummins, 53 O. S. 683.

However, in view of the recent acts of the General Assembly, I am of the opinion that these decisions could not be so construed as to give the state authority to enter the corporate limits of the village of Bexley and carry out the work herein considered.

I may add that the information which I have before me seems rather clearly to indicate that there never has been a legal abandonment of the public highway as originally established through the middle of this circle. To be sure, no adverse private possession has been asserted as against the public right inasmuch as the proprietor of the subdivision dedicated the circle to the public. The curved driveways which form the circle were designated by him as public streets, and undoubtedly are such streets. As the situation then seems to be, there should be a public way through the middle of the circle; and, if my information is correct, such a public way now exists at that place. In that public way, however, are curbs, trees, poles, and perhaps other things which constitute obstacles to public travel along the line of the original road.

I have not verified the information which is before me by consulting the road

records of Franklin county. On the assumption that the information is correct, it seems that a situation exists at the place referred to which constitutes an unlawful state of affairs. Unless the public highway through the middle of the circle is properly vacated or altered by action of the public authorities who have jurisdiction in the premises, the obstacles to which I have referred should be, of course, removed in order to comply with the law as regards the rights of the public. But for the reasons which I have stated I am clearly of the opinion that the government of the village of Bexley is the only proper public authority to initiate measures which may bring relief.

Very truly yours,

JOSEPH MCGHEE,
Attorney-General.

1468.

MUNICIPAL BOARD OF HEALTH HAS NO AUTHORITY TO EXPEND FUNDS TO MAINTAIN WATERWORKS.

The board of health of a municipal corporation has no authority to expend funds under its control for the purpose of maintaining the operation of the municipal waterworks, the revenues of which are insufficient to maintain it, on the pretext of preventing an epidemic of disease; and council has no authority to borrow money for the use of the board of health under section 4450 *of the General Code for such purpose.*

COLUMBUS, OHIO, September 20, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I have your letter of recent date requesting my opinion as follows:

> "The rates in effect covering the waterworks of a municipality of this state are inadequate to produce sufficient revenue for the operation of the plant, which has occasioned a shortage in the funds of the waterworks. In view of this condition, the board of health declares the lack of funds in the waterworks and the necessity of running such waterworks an emergency under section 4460 G. C. and authorizes issuance of a certificate of indebtedness with the help of council, levy to be made at the next budget.
>
> This certificate was issued in December, 1917, payable March, 1919, against the public health fund, levy to be made in the health fund to pay the same, and the disbursements have been made by the board of health, not by the waterworks.
>
> QUESTION: Is such procedure legal?"

Sections 4450 and 4451 of the General Code provide as follows:

> "In case of epidemic or threatened epidemic or during the unusual prevalence of a dangerous communicable disease, if funds are not otherwise available, the council of a city may borrow any sum of money that the local board of health deems necessary to defray the expenses necessary to prevent the spread of such disease. Such money may be borrowed until the next levy and collection of taxes is made, at a rate of interest not to exceed six per cent, per annum. Thereupon the board may expend the amount so authorized to be borrowed, which amount, or so much thereof

as is expended, shall be a valid claim against the municipality from the fund so created."

Section 4451.—"When expenses are incurred by the board of health under the provisions of this chapter, upon application and certificate from such board, the council shall pass the necessary appropriation ordinances to pay the expenses so incurred and certified. The council may levy and set apart the necessary sum to pay such expenses and to carry into effect the provisions of this chapter. Such levy shall, however, be subject to the restrictions contained in this title."

As far as the merely formal requirements of these sections are concerned your statement of facts makes it evident that they have been complied with; in other words, the manner in which action was taken is proper.

The question which I have encountered, however, is whether or not the purpose for which the expenditure described by you was made is one within the purview of the sections quoted.

Without the order of the board of health or the ordinance of council described by you before me I must assume to raise the question which I shall discuss, that both are predicated upon the supposed fact that the cessation of the operation of the waterworks would cause an epidemic to be "threatened"; that is to say, I must presume that the measures which you describe were taken for the declared purpose of preventing a threatened epidemic by keeping the waterworks in operation when to allow them to cease would give rise to the menace or "threat" of an epidemic. Unless I make some such assumption I could not say that there is any question at all for me to decide, for section 4450 G. C. speaks of what may be done "in case of epidemic or threatened epidemic, or during the unusual prevalence of a dangerous communicable disease," and unless action taken under the assumed authority of its provisions is referable to one of these conditions it would be on that account alone invalid.

The assumption which I have made reduces the question to this: May a board of health for the purpose of avoiding a threatened epidemic make such expenditures as may be necessary to keep running municipal waterworks which for lack of sufficient revenues otherwise would have to cease operations for a time, and may the council borrow money to be expended by the board of health for this purpose?

Section 4450 G. C. considered by itself is broad in its terminology. It says that when the conditions which I have previously enumerated exist, and funds are not otherwise available, there may be borrowed and expended by the board of health

"any sum of money * * * necessary to defray the expenses necessary to prevent the spread of such disease."

But broad as this language is, its application is limited by the principle present in the statute and in both sections which I have quoted that "expenses necessary to prevent the spread of such disease" must be those which the board of health is authorized to incur for the purpose of preventing the spread of disease. The board of health is to expend the money (section 4450) and such expenditures are expressly designated as

"expenses * * * incurred by the board of health under the provisions of this chapter" (section 4451).

It is clear to me that the board of health cannot claim section 4450 as authority to engage in any enterprise or activity which its members may consider necessary

or expedient to prevent a threatened epidemic. It may make any expenditure which it sees fit for the purpose of carrying on such activities as it is authorized by law to carry on with a view to preventing the spread of communicable disease, but not otherwise.

In short, section 4450 must be read in connection with the other sections of the chapter relating to the powers and duties of the board of health; and unless we find in such other sections authority broad enough to enable the board of health virtually to take over the operation of the municipal waterworks when the agencies which exist under authority of the municipal code for the conduct of such waterworks are inadequate for financial reasons to maintain such operation, the answer to your question must be in the negative, for I think it is very clear that in effect the board of health in the case described by you did take over for a time the operation of the waterworks in the sense that that board supplied the funds therefor.

Among the other sections of the chapter relating to the power and duties of the board of health I find the following, which deserve consideration in this connection:

> *Section* 4413.—"The board of health of a municipality may make such orders and regulations as it deems necessary for its own government, for the public health, the prevention or restriction of disease, and the prevention, abatement or suppression of nuisances. Orders and regulations not for the government of the board, but intended for the general public, shall be adopted, advertised, recorded and certified as are ordinances of municipalities, and the record thereof shall be given, in all courts of the state, the same force and effect as is given such ordinances."

Here again is a very broad grant of power. The board of health may make such orders and regulations as it deems necessary for its own government and for the public health, and for the prevention and restriction of disease. However, these orders and regulations are of two kinds; those intended for the government of the board, and those intended for the government of the general public. There is no authority in this section for the board of health to issue and enforce orders relating to the conduct of any other branch of municipal government. Thus, though the board of health might deem it necessary for the public health, and for the prevention of disease, that a filtration plant be installed in connection with existing waterworks of a municipality, it could not claim authority under this section to compel the municipality to install such a plant.

In this connection sections 4414 and 4415 providing penalties may be considered.

I cannot, therefore, justify the proceedings described by you upon the theory that the board of health had power to order the municipality to continue the operation of its waterworks under section 4413 G. C.

The power of the board of health to do and perform by its officers and employes what the offending parties should have done, is mentioned in section 4422 of the General Code. This power, however, relates only to the abatement of nuisances, especially to the correction of unsanitary conditions existing on particular premises The group of sections in which section 4422 appears contains no provisions from which the inference may be drawn that the board of health has power to take over the operation of municipal waterworks on the ground of prevention of disease.

Sections 4425 et seq. of the General Code enumerate the particular powers of the board of health both "in time of epidemic and threatened epidemic." This is the particular group of sections in which section 4450 is found and the phraseology of the clause in which the condition of action under section 4450 is set forth is exactly the same as the first clause of section 4425 with the exception of one word.

Section 4425 recites what may be done by the board "in time of epidemic or threatened epidemic, or when a dangerous communicable disease is unusually prevalent."

Section 4450 tells how funds may be raised in case of epidemic or threatened epidemic or during the unusual prevalence of a dangerous communicable disease.

I find myself strongly impelled by this substantial verbal identity to the conclusion that section 4450 is available to procure funds only for the purposes set forth in section 4425 of the General Code. I do not feel that it is necessary to determine this question in the present case inasmuch as I have been unable to justify the expenditure under sections other than those beginning with section 4425.

In regard, however, to sections 4425 et seq. I find that they authorize the board of health to impose quarantine on public conveyances and means of travel (section 4425); to remove persons suffering with infectious or contagious disease to quarantine hospitals or other places of detention, (section 4428); to quarantine private houses where cases of contagious or infectious disease exist (sections 4429-4430); to employ persons necessary to execute its orders and properly guard any quarantined place, (section 4431); to disinfect rooms, clothing, bedding and other articles, and to appraise and destroy articles and buildings, (sections 4433 and 4434); involving the payment of compensation to the owner thereof, (section 4435); to furnish necessaries of life and medical attention to quarantined persons, to be paid for by the municipality except in certain cases (section 4436); to inspect and disinfect school buildings and to close schools (section 4448); to supply agents and afford inducements and facilities for gratuitous vaccination, (section 4449).

As will be observed, these powers and duties of the board of health to be exercised and discharged by it in case of actual or threatened epidemic, are specifically enumerated. In other words, the legislature has seen fit to say just what a board of health may do in case of threatened epidemic.

As previously intimated I incline strongly to the view that section 4450 is merely a means of procuring funds necessary to enable the board of health to do things which it is specifically authorized to do in such cases, but even if section 4450 were susceptible to a broader interpretation we have seen that it has no other or general authority sufficiently broad to enable it to do the thing which it has done with the money borrowed in the case described by you.

From what I have said relative to the purport of the sections which relate particularly to the prevention of epidemics, it is clear that such power could not be claimed under any of these sections.

I find no other provisions of the General Code giving any authority to the board of health with respect to the operation of a municipal waterworks. On the contrary, certain municipal institutions are brought directly within the control of the board of health; thus the contagion hospital (section 4452 et seq.) and the sewage disposal plant (section 4467 et seq. G. C.) are institutions with which the board of health has more or less to do.

The significance of these facts lies in the statement that if the board of health were intended to have a hand in the maintenance or operation of municipal utilities other than the contagion hospital and the sewage disposal works, the general assembly would have expressed such an intention.

But I have already said too much upon a subject that is really very simple. The claim of authority in the board of health to keep a waterworks running as a means of avoiding an alleged threatened epidemic is really too preposterous to be seriously considered. I doubt very much whether a case of actually threatened epidemic could be made out of the circumstances of the case which you state even if it could, to admit the power of the board of health to take action would be to introduce a very dangerous principle, for if the board of health can keep a waterworks running as

a means of preventing an epidemic, there is practically no limit to the extent to which the board of health may intermeddle with the proprietary functions of a municipality upon the same pretext.

It is, of course, obvious that the director of public service of a city or the board of trustees of public affairs of a village can at any time cause a municipal waterworks to produce sufficient revenue by the simple and just expedient of raising water rates. I may say, however, that I know of no authority in a municipal corporation to borrow money for the purpose of alleviating a temporary deficiency in the fund produced by the collection of water rents. However, my opinion is not invited upon the question as to what would have been the proper way for the municipality in question to meet the exigencies of the situation which confronted it.

I content myself, therefore, with the statement that the proceeding outlined by you was wholly unauthorized and illegal.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1469.

MUNICIPAL COURT OF CINCINNATI NOT ENTITLED TO FINES ASSESSED FOR VIOLATION OF STATUTES RELATING TO DEPARTMENT OF AGRICULTURE.

Fines and penalties collected in the municipal court of Cincinnati for the offenses defined in the chapter of the statutes relating to the department of agriculture are governed by the provisions of section 1177-14 *General Code, and are to be paid to the Board of Agriculture of the state.*

COLUMBUS, OHIO, September 20, 1918.

The Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—On August 7th you made a request to this department for an opinion as to the proper disposition of fines in cases prosecuted by the department of agriculture in the municipal court of Cincinnati. A letter has also been received from the law department of Cincinnati in reference to the same subject, anticipating such request. This letter enclosed contains a copy of the opinion of the assistant city solicitor to the effect that such fines are payable under section 1558-30 General Code to the city. Section 1177-14 of the General Code, which taken in consideration with the other section just referred to, relating to the question involved, is as follows:

> "All fines, fees and costs collected under prosecutions begun, or caused to be begun, by the secretary of agriculture, shall be paid by the court to the secretary of agriculture within thirty days after collection, unless error proceedings have been properly begun and prosecuted and in case the judgment of the justice of the peace is sustained the fine shall be paid within thirty days after such judgment or affirmance, and by the secretary paid into the state treasury to the credit of the general revenue fund."

Section 1558-30, which is in reference to the duties of the clerk of the municipal court of Cincinnati, requires him to pay over all moneys received by him as clerk to the proper parties, which requirement is followed by this language:

"he shall receive and collect all costs, fines and penalties; and shall pay all costs and subject to the provisions of section 3056 of the General Code, the balance of such fines and penalties monthly to the treasurer of the city of Cincinnati * * *."

Section 3056 referred to, is the provision for the payment of fines and penalties collected in police court to the Law Library Association. The opinion of the city solicitor contains the following:

"The statute under which the department of agriculture is calling upon you to account to it for fines collected by you in cases prosecuted by it is general in its nature, while the act creating our municipal court, and defining your power and duties as clerk thereof is a special law, nowhere providing that you shall act in accordance with section 1177-14, but on the contrary specifically providing and directing that you shall receive and collect all costs, fines and penalties and pay the same monthly to the city treasurer subject to the provisions of section 3056. Said section 1177-14 provides, as you will notice, that the *court* shall pay to the board all fines, etc., and justices of the peace appear to be the character of court referred to. You are not the *court* and therefore in view of that fact, and the provisions of the law defining your power and duties, my opinion is that you can not legally comply with the demand of the department of agriculture of Ohio in the premises."

A case decided by the circuit court is cited as authority.

State ex rel. Library Association vs. Henry, 23 O. C. C. (n. s.) 541.

Whether one agrees with this conclusion or not, it must be admitted that it indicates the real ground upon which the question must be decided.

The subject is within the general terms of two different statutes dealing generally with entirely different subjects, but both including the subject of disposition of these costs. The well known rule of construction requires both to be given effect if it be possible without doing violence to the language of either.

"Two or more statutes which are *in pari materia* must each be looked to in ascertaining the meaning and intent of each.

It is only where two statutes are so repugnant to each other that it must be presumed that the legislature intended that the latter should repeal the former, that a repeal by implication exists, and where there is a reasonable field of operation for both under a just construction, both will be given effect."

City of Birmingham vs. Southern Express Co. 164 Ala., 529.

"Statutes *in pari materia* are those which relate to the same person or thing, or to the same class of persons or things. In the construction of a particular statute, or in the interpretation of any of its provisions, all acts relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law. The endeavor should be made, by tracing the history of legislation on the subject, to ascertain the uniform and consistent purpose of the legislature, or to discover how the policy of the legislature with reference to the subject-matter has

been changed or modified from time to time. * * * So far as reasonably possible the several statutes, although seemingly in conflict with each other, should be harmonized, and force and effect given to each, as it will not be presumed that the legislature, in the enactment of a subsequent statute, intended to repeal an earlier one, unless it has done so in express terms; nor will it be presumed that the legislature intended to leave on the statute books two contradictory enactments.

Where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them, the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication."

36 Cyc., 1147.

The above quotations are made from the text of this digest because they are nothing more nor less than settled rules of construction upon the subject. These rules are all simply aids in arriving at the intention of the legislature, which is always to prevail. Each of the propositions above stated can be sustained by a multitude of authorities.

Applying these rules what are we to say was the intention of the legislature in passing section 1558-30? This section is found in a statutory provision creating a court and fixing its jurisdiction and procedure, and defining the duties of its judge and clerk. It in no sense was made to favor municipal corporations on one hand, nor affect the activities of the agricultural department on the other; nor does it contain any purpose to make a different ultimate disposition of fines and penalties than was already required by the existing law, but simply prescribed how and when the clerk who received these fines when assessed in this court should perform the duties already imposed upon him by express provision or necessary implication of other statutes of paying the same to the proper authority to receive them.

Section 1177-14 is in the law creating and regulating the department of agriculture, and is an evident provision to make the department supply funds for carrying on its activities, or rather to replace other funds used for that purpose. These two sections are perfectly capable of reconciliation by reading 1177-14 as an exception to the other. If there were an irreconcilable conflict, of course, the one last passed would prevail. Let us see how that is: Section 1177-14 was in force before the creation of the municipal court of Cincinnati in substantially the same form as at present. There is no indication from any source that the legislative purpose partially to reimburse the state in this manner has ever been changed; on the contrary this identical section was re-enacted March 21, 1917, indicating a consistent and steadfast purpose on the part of the legislature to devote these funds to that purpose.

107 O. L. 478.

Now, if the rule requires the very last utterance of the legislature to be a repeal of all older provisions, then this is the last in that sense. I do not contend for this effect of it, however, but do call attention to it as indicating the fixed legislative intent in reference to this subject. If the state is to receive these fines, what difference can it make in what court they are assessed, or is it to be presumed that the legislature intended the benefit to depend upon the mere accident as to what

court entertained a prosecution; or to state it in another form, and with an additional element of sanction, that the General Assembly by establishing a municipal court in Hamilton county intended that thereby fines for such offenses committed in that county should go to a different recipient than for those committed in other counties.

Stress is laid upon the clause requiring the payment to be made by the court to the secretary of agriculture, but if you are standing upon words rather than the ideas they express, it is sufficient to say that the word "court" is broad enough to include the municipal court. The fact is that this is the same language carried from one revision to another. The clerk is nothing but an officer of the court, and when he pays it the court pays it. The last clause of the section, it is true, mentions only the judgment of the justice of the peace, but it is to be said as to this that the last clause is unnecessary; that is, the requirements of the first clause could be fully carried out if the last were not enacted, and the only office performed by the last clause is to extend the time thirty days after the affirmance of the judgment. Inasmuch as the municipal court of Cincinnati succeeds to the jurisdiction of the justice of the peace there is no difficulty in giving effect to the latter clause in cases in the municipal court just the same as those before the justice. The real provision is that the payment shall be made within thirty days after the affirmance of the judgment. It may be that this conclusion is to some extent not in harmony with the decision of State ex rel. vs. Henry, supra, although the question arises upon the construction of a different statute.

I am informed that it was claimed or thought by the representatives of the state at the time that this case had not received as full consideration as it deserved, and that a motion was made for a re-hearing, and afterwards on account of some arrangement the motion was not insisted upon. I am not assuming to criticise the decision, but only claim that the conclusion arrived at in this opinion is founded upon the application of long settled elementary principles, and that by their application the real intention of the legislature is arrived at in the present case, and that this conclusion is fortified by authorities too numerous even to begin on. Even taking State ex rel. vs. Henry, supra, as a governing authority in this case the decision must be the same because the last act passed does give these fines to the department of agriculture for the benefit of the state.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

1470.

ASSIGNEE OF LIQUOR LICENSEE MAY NOT AS SUCH BECOME TRANSFEREE OF ANOTHER LIQUOR LICENSE.

One who, in the capacity of an assignee, has become the transferee of a liquor license may not in said capacity as assignee become the transferee of another liquor license and continue that business for the purpose of realizing upon assets belonging to the estate of the insolvent debtor of whom he is the assignee.

COLUMBUS, OHIO, September 23, 1918.

State Liquor Licensing Board, Columbus, Ohio.

GENTLEMEN:—You have asked me to advise you as to my opinion respecting the question submitted to you by the Summit County Liquor Licensing board, which is as follows:

"John A. Albertoni, a licensee in this county, made an assignment appointing Dean F. May as assignee and Mr. May is continuing the business. Among the debts (sic) was a chattel mortgage, held by Albertoni against William C. Marlot, also a licensee. Instead of Marlot making an assignment, he turned his fixtures, stock, lease and license over to Dean F. May, assignee for Albertoni, to satisfy this mortgage, and closed his place of business.

Now Mr. May wishes to have permission to continue the business of William C. Marlot until he has enough money to pay this mortgage.

Kindly advise whether we can allow Dean F. May to continue the business of William Marlot while he is also the assignee of John A. Albertoni."

This question invokes consideration of the following provisions of the Constitution and the State Liquor License law:

Constitution, Article XV, Section 9:

" * * * License shall not be granted to any applicant who is in any way interested in the business conducted at any other place where intoxicating liquors are sold or kept for sale as a beverage * * *."

Section 1261-34 General Code:

" * * * License shall not be granted to any applicant who is in any way interested in the business conducted at any other place where intoxicating liquors are sold or kept for sale as a beverage, * * *."

Section 1261-50 General Code:

"Upon the application of any licensee who desires to sell or transfer his business to another, joined with the application of the latter, and upon the payment of a fee of fifty dollars the county licensing board shall, unless the proposed purchaser or transferee shall not have the qualifications required by law of a licensee, endorse upon the license certificate of the original applicant the words: 'Transferred to_____,' inserting the name of the transferee with the date; and the person to whom the said license is transferred shall hold the license for the remainder of the said license year, and shall have all the privileges and obligations of the original licensee under the license. The said fee so paid to the county licensing board shall be immediately transmitted to the secretary of the state board, in the same manner as application fees heretofore provided for herein, together with a report of the transfer thereof.

The said transferee must, however, in the application for transfer, set forth all the facts required to be set forth by an original applicant. The said transferee shall be in all respects qualified by law as is an original applicant. * * *"

Section 1261-52 General Code:

" * * * If a guardian or a receiver or other officer of a court shall be appointed for a licensee or for one holding an interest in a license, or if in any way a licensee's business shall come under the control of any

court in the state, the said license or interest therein shall be treated by the court as personal property and the purchaser at any sale shall have all the privileges and duties of a purchaser in the case of the death of a licensee, as provided for herein.

In all cases the court shall, before ordering a sale or an assumption of a license, appoint three appraisers to appraise said license and the interest of the licensee therein, which said appraisers shall be sworn to appraise said interest according to its true value. Any creditor of the deceased or of the owners of the license shall have all rights with reference to the appraisement or sale and the distribution of the assets as any creditor has with reference to any personal property left by any decedent. No license shall be sold or assumed for a sum less than two-thirds of the appraisement. * * *"

The section last quoted provides expressly for the continuance of the business of a deceased licensee by his executor or administrator, who must within three days file an original application, without fees, and submit his qualifications as an applicant for the consideration of the liquor licensing board. The section also provides for the continuance of the business by survivors in interest in the license; but it does not expressly provide, as will be observed, for the continuance under similar conditions of the business of an insolvent licensee by his assignee in insolvency. It would appear, so far as the liquor license law is concerned, that an assignee in insolvency would have to be authorized to continue the business of his assignor through a joint application for transfer under section 1261-50, supra. It is true that the general statutes regulating proceedings in insolvency provide that the assignee may be authorized by the court, on written application of three-fourths in number and amount of the creditors of the assignor, to carry on "any business carried on by the assignor at the time of the assignment" (G. C. section 11125.). It is my opinion, however, that while this section may have to be complied with by the assignee of a person engaged under license in the business of trafficking in intoxicating liquors, the order of the probate court is not efficacious to vest the rights of a licensee in the assignee. At any rate, I assume that the assignee in the case stated by the Summit County Liquor Licensing board has complied with all relevant provisions of the law which would entitle him to continue the business of his assignor as a licensee. I am convinced that under favor of whatever statute the first of the two transactions referred to in the communication of the Liquor Licensing board was consummated, the assignee, if carrying on the business of the original assignor legally, must have qualified as a licensee under the state law.

It now appears that among the assets of the assignor was a chattel mortgage on the fixtures used by another licensee in the business of the latter. In proceeding to liquidate this asset the assignee is met by the proposition on the part of the debtor that the latter will turn over the fixtures, stock, lease and license to the assignee in satisfaction of the claim. Some question exists in my mind as to whether the assignee would be entitled to make such an arrangement under the insolvency laws; but that question is not properly before me and I feel obliged to eliminate it from consideration and assume that the point is not being contested and will not be raised.

Now in the case of the second transaction above referred to it is made clear by the statements in the letter of the county board that no assignment has been made, so that the assignee of the first insolvent debtor does not appear in the character of an officer of the court appointed for the *second* licensee. So far as this transaction is concerned it stands upon the same footing as it would if the claim against the second licensee had been pressed by the first licensee in person,

and the second licensee had attempted to deliver his personal property and assign his license to the first licensee.

It is perfectly clear that if the first licensee had applied to the County Liquor Licensing board with the second licensee for transfer of the second license, he, the first licensee, could not have qualified as the transferee of the second license; for he would then have held in his own right two licenses and the provision against the granting of a license to one interested in the business of selling liquors at another place, etc., would have been directly violated.

If the case at hand differs in its legal aspects from that just supposed, it does so only because the assignee's interest in the business which he is conducting as the successor of the first licensee may be said to be not within the intendment of the constitution and statutes, prohibiting the granting of a license to a person who is interested in the business conducted at another place.

As bearing upon this question, I call attention to the language of the statute and that of the constitution in this regard. The prohibition is against the granting of a license to an applicant "who is in *any way* interested in the business conducted at any other place," etc. Later on in the same provision of the constitution and in the same paragraph of the statute appears a prohibition against the granting of a license "unless the applicant or applicants are the only persons in any way *pecuniarily* interested in the business for which the license is sought. I can not assume that the word "pecuniarily" was carelessly introduced into the Constitution nor into the statute in the context in which it is found. The fact that it appears in connection with the second prohibition is, to my mind, evidence that it was not intended to be understood in connection with the first prohibition. Its use implies a limitation that does not exist when it is not used. The phrase "in any way pecuniarily interested" is of narrower scope than the phrase "in any way interested." It seems to me, therefore, that the kind of interest in a business conducted at another place which would preclude the issuance of a license to an applicant may be less direct than a pecuniary interest.

It would be rather difficult to define the exact scope of the phrase "in any way interested." I do not feel obliged to do so in considering this question. I do feel, however, that any person whose "interest" in a business conducted at a place is such that he must be the licensee for that place is thereby precluded from becoming the licensee for another place. It is true that nowhere in the liquor license law is there an explicit provision to the effect that no person may hold two licenses, and therefore it might be argued that a single person might hold one license in an individual or proprietary capacity and another license in a trust capacity, as the representative of others and not for himself. I do not even have to decide this question in the instant case because it appears that both licenses, if they could be held by the same person, would be employed by him in the same capacity or as trustee for the same ultimate beneficiaries, viz: the creditors of the first licensee. I feel sure that the statute which is now under examination prohibits this thing and precludes a single person in the capacity of an assignee from operating one place where liquors are retailed as the assignee of the original licensee for that place, and at the same time becoming the licensee for another place through succession in the capacity of assignee to the business at another place as an asset of the first insolvent debtor. In the eye of the law he would be attempting to exercise the privilege under both licenses in the same capacity, for to the extent that he is interested in one he is surely interested in the other.

I do not care to go further than this for the purpose of the present case. The question as to what constitutes an "interest" within the meaning of the section under consideration is not clear. I refer you to the Opinions of the Attorney-General for the year 1915, pages 290 and 883, in which certain questions submitted by

the State Liquor Licensing board along this line were considered and an unreported decision of the Court of Appeals of Lucas county was referred to. These opinions shed no light upon the present question but their examination will serve to illustrate the difficulty of attempting to lay down any general definition of the term the application of which is involved in the case under consideration.

For the reasons which I have stated, then, I am of the opinion that one who, in the capacity of an assignee, has become the transferee of a liquor license may not in said capacity as assignee become the transferee of another liquor license and continue that business for the purpose of realizing upon assets belonging to the estate of the insolvent debtor of whom he is the assignee.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1471.

APPROVAL OF BOND ISSUE OF FITCHVILLE TOWNSHIP RURAL SCHOOL DISTRICT—$4,750.00.

COLUMBUS, OHIO, September 25, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

Re: Bonds of Fitchville Township Rural School district, Huron county, Ohio, in the sum of $4,750.00 for the purpose of providing funds for the repair of a school house in said school district.

GENTLEMEN:—I have carefully examined the corrected transcript of the proceedings of the board of education and of other officers of Fitchville Township Rural School district, Huron county, Ohio, and find said proceedings to be in conformity to the provisions of the General Code of Ohio relating to bond issues of this kind.

I am therefore of the opinion that properly prepared bonds covering said issue will, when the same are executed and delivered, constitute valid and binding obligations of said school district.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1472.

BOND ISSUE—LEGISLATION MUST CONTAIN PROVISION FOR TAX LEVY. DISAPPROVAL OF BOND ISSUE OF OLMSTED FALLS RURAL SCHOOL DISTRICT, CUYAHOGA FALLS, O.—$10,000.00.

COLUMBUS, OHIO, September 25, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In Re: Bonds of Olmsted Falls Rural School district, Cuyahoga county, Ohio, in the sum of $10,000.00, for the stated purpose of funding

certain indebtedness which said school district because of its limits of taxation is not able to pay at maturity.

I have carefully examined the transcript of the proceedings of the board of education of Olmsted Falls Rural School district, Cuyahoga county, Ohio, relating to the above issue of bonds. From the examination made by me of said transcript I find that I am unable to approve the above issue of bonds for the reason that in its legislation providing for this issue of bonds, the board of education has made no provision for an annual levy of taxes for interest and sinking fund purposes with respect to said bonds as required by section 11 of Article XII of the State Constitution, which reads as follows:

> "No bonded indebtedness of the state, or any political subdivisions thereof, shall be incurred or renewed, unless, in the legislation under which such indebtedness is incurred or renewed, provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds, and to provide a sinking fund for their final redemption at maturity."

The provisions of the State Constitution above set out are obviously mandatory and the failure on the part of the board of education to observe the requirements of these provisions leaves me no discretion to do otherwise than to disapprove the bonds.

In addition to what is above stated, I note that the amount sought to be funded by this issue of bonds is a part of the contract price for the construction of a school building in said school district. The resolution providing for said issue of bonds finds and determines that said contract price, as well as the indebtedness to be funded, is a valid, subsisting and binding obligation of the school district. In view of the provision of section 5660 General Code, which requires the money necessary to pay for contracts of this kind to be in fund before the contract is let, it does not clearly appear how the contract price or any part thereof can be a valid, binding and subsisting obligation of the school district which said district would be required or authorized to fund under section 5656 G. C. as an indebtedness which it is unable to pay at maturity by reason of its limits of taxation. In other words, the school district would not be authorized to raise money by an issue of funding bonds under section 5656 General Code for the purpose of paying any part of the contract price for the construction of a school building when it at the time had in the proper fund sufficient money to pay such contract price, and under the provisions of section 5660, as before noted, the school district is required to have in fund the money necessary for the payment of the contract price before the contract is entered into.

Those observations sufficiently indicate the doubt in my mind with respect to the validity of the indebtedness for which these bonds are to be issued. As to this, however, I may say that the transcript contains no statement of facts touching this matter other than such as may be inferred from the recitals of the legislation providing for this issue of bonds, and in the absence of a fuller statement of such facts I am not disposed to express any final opinion so far as this particular question is concerned. The first objection above noted to this issue of bonds is, however, insuperable and I am compelled to advise you that you should not accept and purchase said issue of bonds.

I am herewith enclosing the transcript submitted, which you will please return to the clerk of the board of education. Very truly yours,

JOSEPH MCGHEE,
Attorney-General.

1473.

APPROVAL OF CONTRACT BETWEEN N. E. SHAW, SECRETARY OF AGRICULTURE, AND JOHN A. FEICK, SANDUSKY, OHIO.

COLUMBUS, OHIO, September 25, 1918.

HON. N. E. SHAW, *Secretary of Agriculture, Columbus, Ohio.*

DEAR SIR:—You have submitted to me contract entered into on the 21st day of September, 1918, between John A. Feick, of Sandusky, Ohio, and yourself for the construction of an addition to the Ohio State Fish Hatchery building at Put-in-Bay, Ohio, said contract calling for the sum of $7,100.00. At the same time you submitted a personal bond securing said contract, said bond being accompanied by an affidavit of the signers thereof as to their financial responsibility.

I have carefully examined the contract submitted and having received from the Auditor of State a certificate to the effect that there is money available for the purpose of said contract, have this day approved the same and filed the same, together with the bond, in the office of the Auditor of State.

I am herewith returning you the balance of the papers submitted.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1474.

APPROVAL OF ABSTRACT OF TITLE TO LOTS NOS. 29, 30, 31, 32, 44 AND 45 OF WOOD BROWN PLACE SUBDIVISION, COLUMBUS, FRANKLIN COUNTY, OHIO.

COLUMBUS, OHIO, September 25, 1918.

HON. CARL E. STEEB, *Secretary, Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—I am in receipt of an abstract of title covering the following lot of land located in the city of Columbus, county of Franklin and state of Ohio, and described as follows:

> Being lots Nos. twenty-nine (29), thirty (30), thirty-one (31), thirty-two (32), forty-four (44) and forty-five (45) of Wood Brown Place subdivision, as the same are numbered and delineated upon the recorded plat thereof, of record in plat book 5, page 196, recorder's office, Franklin county, Ohio.

I have examined said abstract and find no material defects in the chain of title to said premises as disclosed thereby.

Said abstract does not show any liens or encumbrances on said property except the taxes for the year 1918, which are undetermined and unpaid.

I am therefore of the opinion that said abstract disclosed on August 17, 1918 a good title in Donato and Maria Mirabelli, to the premises hereinbefore described.

I am returning herewith the abstract submitted by you.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1475.

APPROVAL OF SALE OF CERTAIN MARSH LANDS TO THE TOUSSAINT SHOOTING CLUB.

COLUMBUS, OHIO, September 26, 1918.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of September 17, 1918, in which you enclose record of proceedings leading up to the sale of certain marsh lands by the State of Ohio to The Toussaint Shooting club.

I have examined said proceedings, find them correct in form and legal and am therefore returning them to you with my approval endorsed thereon.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1476.

APPROVAL OF FINAL RESOLUTION FOR ROAD IMPROVEMENT IN SENECA COUNTY.

COLUMBUS, OHIO, September 26, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of September 24, 1918, in which you enclose, for my approval, final resolution for the following named improvement:

Tiffin-Fostoria Road—I. C. H. No. 270, section B-1, Seneca county, (type A).

I have carefully examined said resolution, find it correct in form and legal and am therefore returning the same to you, with my approval endorsed thereon in accordance with the provisions of section 1218 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1477.

APPROVAL OF LEASES OF CANAL LANDS TO MIAMI CONSERVANCY DISTRICT

COLUMBUS, OHIO, September 26, 1918.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of September 20, 1918, in which you enclose a certain contract, under and by virtue of which the state of Ohio leases to The Miami Conservancy District, for a period of five years, certain surplus waters to be taken from the Miami and Erie canal.

I have carefully examined this contract of lease and am of the opinion that it is correct in form and legal and have therefore endorsed my approval thereon.

Section 14009 G. C. (107 O. L. 418) provides as follows:

> " * * * said superintendent of public works may sell or lease the right to use such surplus water for hydraulic or other purposes, for any term not exceeding twenty-five years for a certain annual rental, or otherwise, as he may deem most beneficial for the interests of the state * *."

This might be construed to require a certain annual rental in money, but I do not feel that such a strict construction should be placed upon this section. Furthermore, the words "or otherwise" would seem to indicate that the superintendent of public works might lease surplus water upon some other consideration than an annual rental to be paid in money.

I will also call attention to section 14011 G. C. (107 O. L. 419), in which provision is made that any lease of water by the superintendent of public works "shall be subject to the rights of the state for purposes of navigation, and for the maintenance of the state reservoirs as public parks and pleasure resorts."

I note that the lease made by you is subject to the rights of the state for the purposes of navigation, but it is not made subject to the rights of the state "for the maintenance of the state reservoirs as public parks and pleasure resorts." In approving this lease I am therefore assuming that the water which is being leased by you is not essential for the maintenance of the state reservoirs as public parks and pleasure resorts.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1478.

COUNTY CORONER—INQUEST OVER RESIDENT OF ONE COUNTY DYING IN ANOTHER COUNTY.

1. *When a resident of one county meets with an accident in such county and is taken to a hospital in an adjoining county for treatment, in which county he dies, if there is ground for suspicion that death was due to violence or criminal negligence, the coroner of the county in which the death occurred should hold the inquest.*

2. *In such case the coroner of the county in which the death occurred and the inquest is held cannot compel the attendance of witnesses from the county in which the accident occurred, but if such witnesses attend the inquest they may be paid as provided by section* 3012 *G. C.*

COLUMBUS, OHIO, September 26, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I have your letter of August 5, 1918, which reads:

> "We respectfully request your written opinion upon the following matters:
>
> *First.* A resident of another county meets with an accident in his home county and is rushed to a Columbus hospital for treatment and dies

therein after a period of time. Is such body 'found within the county' within the meaning of section 2856 G. C., and is it within the province of the coroner of Franklin county to ascertain whether or not death was caused by unlawful means?

Second. If the coroner of Franklin county has jurisdiction in such cases, can he compel the attendance of witnesses from the foreign county at his office in Franklin county, and if so, what are to be their fees and by whom payable?"

In your first question you ask whether it is within the province of the coroner of Franklin county "to ascertain whether or not death was caused by unlawful means in a case where a resident of another county meets with an *accident* in his home county" and dies in Franklin county. I take it you mean to ask whether or not the coroner of Franklin county may hold a coroner's inquest in such cases. Before determining in which county the inquest should be held it is, of course, necessary to determine whether an inquest should be held at all.

Section 2856 G. C. reads:

"When informed that the body of a person whose death is supposed to have been caused by violence has been found within the county, the coroner shall appear forthwith at the place where the body is, issue subpoenas for such witnesses as he deems necessary, administer to them the usual oath, and proceed to inquire how the deceased came to his death, whether by violence from any other person or persons, by whom, whether as principals or accessories before or after the fact, and all circumstances relating thereto. The testimony of such witnesses shall be reduced to writing, by them respectively subscribed, except when stenographically reported by the official stenographer of the coroner, and, with the finding and recognizances hereinafter mentioned, if any, returned by the coroner to the clerk of the court of common pleas of the county. If he deems it necessary, he shall cause such witnesses to enter into recognizance, in such sum as may be proper, for their appearance at the succeeding term of the court of common pleas of the county to give testimony concerning the matter. The coroner may require any and all such witnesses to give security for their attendance, and if they or any of them neglect to comply with his requirements, he shall commit such person to the prison of the county, until discharged by due course of law."

From this section it will be seen that inquests are only to be held when the body has been found within the county and the death is supposed to have been caused by violence.

It was said by former Attorney-General Ellis, in an opinion rendered under date of October 6, 1905, found in Reports of the Attorney-General for that year, page 125; "of course if the coroner has knowledge that death was the result of a mere accident and not by criminal negligence" or violence, an inquest would be unnecessary.

It was held in the case of State ex rel vs. Bellows, 62 O. S., 307:

"Within the meaning of section 1221 Revised Statutes (now section 2856 G. C.) providing for inquests by the coroner, a dead body 'is found within the county' when it is ascertained to be in the county; and death is supposed to have been caused by violence whenever the coroner from obser-

vation or information has substantial reason for believing or surmising that death was caused by unlawful means."

If in the "accident" you refer to there is ground for a suspicion that death was caused by criminal negligence or violence, an inquest should be held.

As to the county in which this inquest should be held, whether in the county where the accident occurred or where the death occurred, the following is found in 13 C. J., 1248:

"An inquest is properly held in the territory of the coroner in whose jurisdiction the body is found, without regard to where the death occurred or where the injury was received."

A number of cases are cited in support of this statement. Among them is the case of Moore vs. Boxbutte county, 78 Nebr., page 561, in which it was held:

"Jurisdiction to hold an inquest is conferred upon a coroner by his finding and custody in his county of the body of a person who has apparently come to his death by violent, mysterious or unknown means, and such jurisdiction is not defeated by the mere fact that the violence was inflicted or the death occurred in another county."

In that case the court said at page 563:

"As to the latter contention, it seems to us sufficient to say that whether a death, caused by the conduct of another or of others, in this case the railway trainmen, is due to innocent accident, or to wrongful and unlawful negligence or malice, can only be ascertained, if at all, by inquiry more or less thorough, and that it is the principal function of coroners to make inquests for the purpose of discovering the facts in such cases. As respects the former of these objections, we think that, doubtless, when a coroner finds in his county the body of a person who has evidently come to his death by violent means, although he may have reason to suspect, or even may know, that the violence was inflicted outside his own county, he has a very wide discretion in determining whether the circumstances are such as to require an official investigation at his hands."

In the case of Pickett vs. Erie Co., 3 Pa. Co., 23, it was held:

"An inquest is properly held in the county where the body is found, without regard to where the death occurred."

The court at page 74 said:

"The evident meaning and intent of the law is that the coroner's inquest should be held where the body is found. It must be on view of the remains, and of course it would not be held in their absence, although an inquest should be summoned and met where the death occurred."

The statutes considered in these cases are much like our own and in answer to your first question I am of the opinion that if in such case you refer to there is ground for suspicion that death was due to violence or criminal negligence, the coroner of Franklin county should hold the inquest.

Section 2858 of the General Code reads:

"The coroner may issue any writ required by this chapter, to any constable of the county in which such body is found, or if, in his opinion the emergency so requires, to any discreet person of the county. Every constable, or other person so appointed, who fails to execute any warrant to him directed, shall forfeit and pay twenty-five dollars, to be recovered upon the complaint of the coroner, before any court having jurisdiction thereof. Any coroner who refuses or neglects to perform any duty herein required of him, shall, upon indictment and conviction in the court of common pleas and the proper county, be fined not to exceed five hundred dollars. All such forfeitures and fines shall be for the use of the county."

I can find no statute authorizing the constable or other person to go outside his county in serving subpoena for coroner's inquest, or do I know of any provision of statute which authorizes the service of such subpoena by a constable or other person of such other county. This being true, I am forced to the conclusion that the coroner, in holding an inquest concerning a death which occurred in some other county, cannot compel witnesses to attend from such other county. If they do attend, however, they may be paid under the provisions of section 3012 G. C., which section provides in part:

"Each witness in civil causes shall receive the following fees: * * *; for attending a coroner's inquest, $1.00 for each day and the same mileage allowed a witness in the taking of depositions, to be paid from the county treasury; * * *."

These fees are payable, as the section indicates, from the treasury of Franklin county. Sections 2856 and 2857 G. C. provide that the findings of the coroner are to be returned to the authorities of Franklin county. It is true that if any prosecution is to be had in the case to which you refer, such prosecution must be had in the other county where the accident occurred, and it might seem strange, in view of this fact, that Franklin county should pay the expense of the inquest. However, the duty rests upon the coroner of Franklin county and no provision is made for any reimbursement to Franklin county for the expense of the inquest by the county in which the accident occurred. Neither is there any machinery provided for the forwarding of any report of the coroner of Franklin county to the authorities of such other county. However, it would seem that in the interest of justice it would be the duty of the coroner of Franklin county to forward such information as he may obtain to the proper authorities of the county in which the "accident" or violence occurred.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1479.

STATE FIRE MARSHAL—APPROVAL OF FORMS OF AFFIDAVITS.

COLUMBUS, OHIO, September 26, 1918.

HON. T. ALFRED FLEMING, *State Fire Marshal, Columbus, Ohio.*

DEAR SIR:—Replying to your communication of September 18, I herewith submit

to you certain forms of affidavits which I deem correct, that you may have your printed forms follow:

FORM 1:

"Section 12433 G. C.—Arson.

AFFIDAVIT

State of Ohio, _____ County, ss:

Before me, _____, a _____ in and for said county of _____, State of Ohio, personally came _____ _____, who, being first duly sworn, says that one _____ _____, on or about the _____ day of _____, A. D. _____, at the county of _____, State of Ohio, aforesaid, then and there did unlawfully, wilfully and maliciously burn _____, the property of _____, of the value of $_____, contrary to the statute in such case made and provided and against the peace and dignity of the State of Ohio.

_____

Sworn to before me and in my presence subscribed by the said _____, this _____ day of _____, A. D. 19____.

_____

_____"

FORM 2:

"Section 12433 G. C.—Attempt to burn.

AFFIDAVIT

State of Ohio, _____ County, ss:

Before me, _____, a _____ in and for said county of _____, State of Ohio, personally came _____ _____, who, being first duly sworn, says that one _____ _____, on or about the _____ day of _____, A. D. _____, at the county of _____, State of Ohio, aforesaid, then and there did unlawfully, wilfully and maliciously attempt to burn a_____ the property of _____, of the value of $_____, contrary to the statute in such case made and provided and against the peace and dignity of the State of Ohio.

_____

Sworn to before me and in my presence subscribed by the said _____, this _____ day of _____, A. D. 19____.

_____

_____"

FORM 3:

"Section 12433 G. C.—Setting fire to anything to burn building.

AFFIDAVIT

State of Ohio, _____ County, ss:

Before me, _____, a _____ in and for said county of _____, State of Ohio, personally came _____ _____, who, being first duly sworn, says that one _____ _____, on or about the _____ day of _____, A. D. 19_____, at the county of _____, State of Ohio, aforesaid, then and there did unlawfully, wilfully and maliciously set fire to _____, in and near to a _____, with intent to burn it, the said _____, the property of _____, of the value of $_____, contrary to the statute in such case made and provided and against the peace and dignity of the State of Ohio.

_____

Sworn to before me and in my presence subscribed by the said _____, this _____ day of _____, A. D. 19____.

_____

_____"

FORM 4:

"Section 12433 G. C.—Attempting to set fire to anything to burn building.

AFFIDAVIT

State of Ohio, _____ County, ss:

Before me, _____, a _____ in and for said county of _____, State of Ohio, personally came _____ _____, who, being first duly sworn, says that one _____ _____ on or about the _____ day of _____, A. D. 19_____, in the county of _____, State of Ohio, aforesaid, then and there did unlawfully, wilfully and maliciously attempt to set fire to _____ in and near to a _____, with intent to burn it, the said _____, the property of _____, of the value of $_____, contrary to the statute in such case made and provided and against the peace and dignity of the State of Ohio.

_____

Sworn to before me and in my presence subscribed by the said _____, this _____ day of _____, A. D. 19____.

_____

_____"

FORM 5:

"Section 12434 G. C.—Burning to prejudice.

AFFIDAVIT

State of Ohio, ------------ County, ss:

Before me, ----------------, a ------------------- in and for ------ ------------, county of ------------, State of Ohio, personally came ------ --------------, who, being first duly sworn, says that one, --------------- on or about the ------ day of ------------, A. D. 19------, at the county of ------------, State of Ohio, aforesaid, then and there did unlawfully, wilfully and maliciously burn a ----------------, of the value of $--------, the property of him the said ----------------, with intent in so doing to prejudice, damage and defraud the -------------------, the insurer of said property, which said ----------------- was then and there insured against loss or damage by fire in the said ---------------- in the sum of $--------, by the said ----------------, by contract and policy of insurance duly executed by and between the said ---------------- and the said ----------------, contrary to the statute in such cases made and provided and against the peace and dignity of the State of Ohio.

Sworn to before me and in my presence subscribed by the said ---- ----------------, this ------ day of ------------, A. D. 19----.

--------------------------------------"

FORM 6:

"Section 837 G. C.—Failure to comply with order.

AFFIDAVIT

State of Ohio, ------------ County, ss:

Personally appeared before me, a ---------------- in and for said county, ------------------, who, being first duly sworn, deposes and says that on the ------ day of ------------, A. D. 19----, ----------------, ----------------, issued an order directed to ----------------, of the city of ------------ and county of ------------, the ---------------- of the premises known as ------------ street, ------------, Ohio, that said order directed the said ------------ within -------- days from date of service of said order to -- -- -- -- --; that said order was duly served upon the said ------------------- by registered mail, as provided by law, on the ------ day ------------, A. D. 19----, and that on the ------ day of ------------, A. D. 19----, and each day thereafter, the said ------------------ wilfully and unlawfully failed, neglected and refused to comply with said order of the said ---- ------------, as aforesaid, contrary to the statute in such cases made and provided and against the peace and dignity of the State of Ohio.

Sworn to before me and in my presence subscribed, this ------ day ------------, A. D. 19----.

------------------------ in and for

-------------------- County, Ohio.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1480.

STATE HIGHWAY COMMISSIONER—ROADS AND HIGHWAYS—MAINTENANCE AND REPAIR ON OWN MOTION LIMITED TO STATE ROADS—NO AUTHORITY TO USE AUTOMOBILE MONEY TO REPAIR AND MAINTAIN UNIMPROVED INTER-COUNTY HIGHWAYS.

1. *The jurisdiction of the state highway commissioner in the maintenance and repair of inter-county highways, upon his own motion, is limited to those parts of the inter-county highways which come within the classification of "state roads" as defined in section 7464 G. C.*

2. *Upon the application of county commissioners or township trustees for state aid, in the maintenance and repair of inter-county highways, the state highway commissioner has authority to use the funds derived from the registration of motor vehicles to pay the state's proportion of the cost and expense of such maintenance and repair.*

3. *The state highway commissioner has no authority in law to use the funds derived from the registration of motor vehicles, either upon his own motion or upon the application of the county commissioners or township trustees, to repair and maintain inter-county highways which have not been improved.*

COLUMBUS, OHIO, September 26, 1918

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of September 4, 1918, which reads in part as follows:

> "For your information I beg to quote the following from the Journal of the highway advisory board as of September 4, 1918:
>
> 'Greene County—I. C. H. No. 60, section "X". Authority requested for expenditure of $6,000.00 M. & R. funds. Matter referred to the Attorney-General.'
>
> A letter to Commissioner Cowen from Deputy Commissioner Hinkle was presented requesting authority for the expenditure of $6,000.00 maintenance and repair funds for the repair of section X, inter-county highway No. 60, Greene county, the request containing the following statements:
>
> 'Present type and condition of road: Gravel part of which is in very bad condition.
>
> Nature of improvement to be made: Complete resurfacing with waterbound gravel (perhaps about one mile) and general maintenance of the whole stretch of road as a waterbound gravel.
>
> This fund is not to be used in cooperation with county funds.
>
> Remarks: This work has cost considerably more than originally estiated by the resident engineer. I am hoping that the above requested funds will finish the resurfacing work and do the necessary maintenance work for the remainder of the year.'
>
> The secretary was authorized to submit the matter to the Attorney-General of Ohio for an opinion as to whether or not maintenance and repair funds may legally be expended on this road."

There is a statement of facts, made by Mr. A. H. Hinkle of your department, embodied in your communication. It will not be necessary to quote this in full, but it shows that the road in course of improvement is an inter-county highway, partly as said system was originally established and adopted and partly as a result of a changed location of the inter-county highway, which change was made necessary

in view of the establishing of the aviation field near Dayton, O., and also due to the fact that a change was made necessary to adapt the road to the Miami conservancy district.

I am assuming that the entire road in question is a part of the inter-county highway system of the State of Ohio, although there seems to be some uncertainty as to whether the state highway commissioner approved the part of the road which was re-located on a different line from that on which it originally ran.

In considering whether you would be authorized in using six thousand dollars of maintenance and repair money in the improvement of this particular highway, it will be well for us to bear in mind that inter-county highways are not necessarily state roads.

I will first take into consideration the provisions of section 6309 G. C., which forms a part of the law pertaining to the registration of motor vehicles and the payment of a license fee for the same. This section reads as follows:

> "Section 6309.—The revenues derived by registration fees provided for in this chapter shall be paid by the secretary of state weekly into the state treasury. Any surplus of such revenues which may remain after the payment of the expenses incident to carrying out and enforcing the provisions of this chapter shall be used for the repair, maintenance, protection, policing and patrolling of the public roads and highways of this state, under the direction, supervision and control of the state highway department."

I will direct your attention to two matters in connection with this section, as follows:

(1) Provision is specifically made that all the revenues derived by registration fees, after the expenses incident to carrying out the provisions of the chapter are defrayed, are to be "used under the direction, supervision and control of the state highway department."

(2) It is also therein provided that the revenues are to be used in the repair, maintenance, protection, policing and patrolling "of the public roads and highways of this state."

The provisions of this section are broad enough, if taken alone, to indicate that these funds might be used upon any road or highway of the state which is not a private road or highway. However, it must be remembered that this section is not a grant of power, and further that it must be taken in connection with other sections of the General Code.

Section 1221 G. C. (107 O. L. 131) reads as follows:

> "The state highway improvement fund produced by the levy hereinafter provided for, shall be applied to the construction, improvement, maintenance and repair of the inter-county and main market road systems as follows:
>
> 1. Seventy-five per cent of all the money paid into the treasury by reason of the levy for the state highway improvement fund shall be used for the construction, improvement, maintenance and repair of the inter-county highways as the same have been heretofore designated or as they may hereafter be established or located by the state highway commissioner in the manner provided by law, and for the maintenance of the state highway department, including the state's portion of the salaries of the county surveyors. Money appropriated or available for inter-county highways shall be equally divided among the counties of the state.

2. Twenty-five per cent of all the money paid into the treasury of the state by reason of the levy for the state highway improvement fund shall be used for the construction, improvement, maintenance and repair of the main market roads of the state as the same have been heretofore designated or as they may hereafter be established by the state highway commissioner in the manner provided by law. The money to the credit of the state highway improvement fund for use on the main market roads of the state as herein provided shall be so expended as to distribute equitably, as far as practicable, the benefits from such expenditure to the different sections and counties of the state.

3. The funds derived from the registration of automobiles shall be used for the maintenance and repair of the inter-county highways and main market roads of the state. The state highway commissioner may use part of said funds as may be necessary in establishing a system of patrol or gang maintenance on the inter-county highways and main market roads. and for that purpose may employ such patrolmen, laborers and other persons and teams and purchase or lease such oilers, trucks, machinery, tools, material and other equipment and supplies as may be necessary."

Here we find a provision that seventy-five per cent. of the proceeds derived from the state levy shall be used in the construction, improvement, maintenance and repair of the inter-county highways, twenty-five per cent. of the money so derived from the state levy shall be used in the construction, improvement, maintenance and repair of the main market roads of the state, and "the funds derived from the registration of automobiles shall be used for the maintenance and repair of the inter-county highways and main market roads of the state."

Based upon this latter provision, it will be necessary for us to branch off into two directions in order to fully understand the scope and extent of this provision. The first branch consists of the repair and maintenance of inter-county highways and main market roads by the state highway commissioner upon his own motion, and the second the repair and maintenance of inter-county highways and main market roads upon the application of the county commissioners or township trustees.

Let us consider now the first branch. Section 7464 G. C. reads as follows:

"The public highways of the state shall be divided into three classes, namely: State roads, county roads and township roads.

(a) State roads shall include such part or parts of the inter-county highways and main market roads as have been or may hereafter be constructed by the state, or which have been or may hereafter be taken over by the state as provided in this act, and such roads shall be maintained by the state highway department.

(b) County roads shall include all roads which have been or may be improved by the county by placing brick, stone, gravel or other road building material thereon, or heretofore built by the state and not a part of the inter-county or main market system of roads, together with such roads as have been or may be constructed by the township trustees to conform to the standards for county roads as fixed by the county commissioners, and all such roads shall be maintained by the county commissioners.

(c) Township roads shall include all public highways of the state other than state or county roads as hereinbefore defined, and the trustees of each township shall maintain all such roads within their respective townships; and provided further, that the county commissioners shall have full power and authority to assist the township trustees in maintaining all such

roads, but nothing herein shall prevent the township trustees from improving any road within their respective townships, except as otherwise provided in this act."

This section classifies the roads of the state and specifically provides that the state highway department must maintain state roads, the county commissioners the county roads, and the township trustees township roads. The roads coming within these classes are definitely described in said section.

Section 7467 G. C. reads in part as follows:

"The state, county and township shall each maintain their respective roads as designated in the classification hereinabove set forth; provided, however, that either the county or township may, by agreement between the county commissioners and township trustees, contribute to the repair and maintenance of the roads under the control of the other. * * *."

Here again we find a specific provision that the state is under obligation to maintain state roads, the county to maintain county roads and the township to maintain township roads.

However, the section of the General Code which more particularly than any other section confers power upon the state highway commissioner, in reference to the repair and maintenance of roads, is section 1224 G. C. (107 O. L. 133), which reads in part as follows:

"Section 1224.—The state highway commissioner shall maintain and repair to the required standard, all inter-county highways, main market roads and bridges and culverts constructed by the state, by the aid of state money or taken over by the state after being constructed. * * *."

Here too we find that the jurisdiction of the state highway commissioner, in the repair and maintenance of inter-county highways and main market roads, is limited to those inter-county highways and main market roads which have been constructed by the state or have been taken over by the state after being constructed. In other words, his jurisdiction is limited to what section 7467 G. C. defines as state roads.

There is one other provision of section 1224, supra, to which I might refer and that is as follows:

" * * * Nothing in this chapter shall be construed so as to prohibit a county, township or municipality or the federal government, or any individual or corporation from contributing a portion of the cost of the construction, maintenance and repair of said *state highways.* * * *."

Thus we see that while it is obligatory upon the state highway commissioner to maintain and repair state roads, a county, township, municipality, the federal government or any individual or corporation may voluntariy contribute toward this end, if they or any of them so see fit to do.

From all the above I think it is clear that the state highway commissioner upon his own motion has no jurisdiction in the repair and maintenance of roads other than those inter-county highways and main market roads which have been constructed or which have been taken over by the state after being constructed by a county or township; or, in other words, his jurisdiction in the repair and maintenance of roads is limited to state roads.

We will now consider the second branch herein referred to which is based upon section 1221, supra; that is, those cases in which the counties or townships make application to the state highway commissioner for state aid in the maintenance and repair of inter-county highways and main market roads.

Section 1191 G. C. (107 O. L. 121) reads in part as follows:

> "The commissioners of any county may make application to the state highway commissioner for aid from any appropriation by the state from any fund available for the construction, improvement, maintenance or repair of inter-county highways. Such application shall be filed prior to March first of the calendar year in which such appropriation may be made or become available. * * *."

This section further provides:

> "The board of county commissioners of any county or the board of township trustees of any township thereof shall, however, be authorized to make said application for aid from any appropriation by the state from any fund available for the construction, improvement, maintenance or repair of inter-county highways at any time after the first day of May of the calendar year in which such appropriation may be made or become available provided that at the time such application is made the state highway commissioner has not entered into any contract or incurred any obligations on behalf of the state involving the expenditure of the funds for which application is made. * * *."

It appears from this section that the county commissioners of any county or the township trustees of any township may make application to the state highway commissioner for state aid in not only the construction and improvement, but also in the maintenance and repair of inter-county highways. This section is also clear to the effect that the state highway commissioner has authority to grant state aid from any fund that is available for the construction or improvement or for the maintenance and repair of inter-county highways.

Under section 1221, supra, the funds derived from the registration of automobiles are to be used for the maintenance and repair of inter-county highways. So if the county commissioners of any county or the township trustees of any township under section 1191 G. C. should make application to the state highway commissioner for state aid in the maintenance or repair of inter-county highways, he would have authority, if he grants state aid under the application, to take the amount, so agreed upon by him as state aid, from the maintenance and repair fund of the department. Of course under these provisions the application for state aid would not be made in reference to those parts of the inter-county highways which come within the classification of state roads, because these the state highway commissioner must repair and maintain upon his own motion, as provided in sections 7464 and 1224 G. C.

The application for state aid in the maintenance and repair of inter-county highways would apply to other parts of inter-county highways than those which could be included under the class "state roads." This gives the provision set out in section 1221 G. C. its full force and effect. It provides:

> " *
>
> 3. The funds derived from the registration of automobiles shall be

used for the maintenance and repair of the inter-county highways and main market roads of the state. * * *."

The two branches above discussed give this its full force and effect; that is the state highway commissioner upon his own motion can use these funds only for the repair and maintenance of those inter-county highways and main market roads which can be brought within the classification of state roads; while upon the application of county commissioners or township trustees, under section 1191 G. C. he can grant state aid in the maintenance and repair of inter-county highways and main market roads other than state roads and supply the state aid from the funds derived from the registration of automobiles.

However, I do not wish it to be understood that the funds derived from the registration of automobiles may be used upon all parts of the inter-county highways and main market roads, even though county commissioners or township trustees should make application for state aid in said repair and maintenance. The very terms "maintenance" and "repair" indicate that a road has already been improved and brought up to a certain standard. You can not repair and maintain a road unless it has been improved. Hence an inter-county highway or main market road that has not been improved can not be maintained and repaired, because there is nothing to maintain or repair. This idea is brought out more fully when we consider the other terms used in subdivision 3 of section 1221, viz., "policing" and "patrolling." These same terms are also used in section 6309 G. C., above quoted. It can not be conceived that the legislature had in mind the patrolling and policing of mere dirt roads.

From all the above we can draw the following conclusions in reference to the use of the funds derived from the registration of automobiles.

1. The state highway commissioner must maintain and repair those parts of the inter-county highways and main market roads which come within the class of roads known as state roads, and his jurisdiction upon his own motion is limited to these roads. In maintaining and repairing these roads he uses the funds above indicated.

2. When county commissioners or township trustees under section 1191 G. C. make application for state aid in the repair and maintenance of inter-county highways or main market roads, the state highway commissioner may, if he so desires, grant state aid and take the sum granted as state aid from the said funds. Of course, under the provisions of subdivision 1 of section 1221 G. C. he could use money from the regular inter-county highway fund, in the maintenance and repair of inter-county highways, upon application of county commissioners or township trustees.

3. However, the principles laid down in the second conclusion herein could not be made to apply to those parts of the inter-county highways and main market roads of the state which have not been improved, the words "repair" and "maintenance" necessarily implying an improved condition of the road.

Therefore the answer to your question is readily given. You are upon your own motion attempting to repair a part of the inter-county highways of the state which can not be brought under the classification of state roads. Hence you have no authority in law to use for this purpose funds derived from the registration of motor vehicles.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1481.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN HARDIN, HAMILTON, JACKSON, VINTON, LORAIN AND CARROLL COUNTIES.

COLUMBUS, OHIO, September 26, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letters of September 19, 1918, in which you enclose the following final resolutions for my approval:

Bellefontaine-Kenton Road—I. C. H. No. 226, section A-1, Hardin county.
Harrison Road—I. C. H. No. 42, section B, Hamilton county.
Jackson-Pomeroy Road—I. C. H. No. 395, section F, Jackson county.
Jackson-McArthur Road—I .C .H. No. 396, section I, Jackson county.
Chillicothe-McArthur Road—I. C. H. No. 365, section J-2, Vinton county.
Oberlin-Elyria Road—I. C. H. No. 313, section t, Lorain county.
Canton-Steubenville Road—I. C. H. No. 75, section G, Carroll county.

I have carefully examined said final resolutions, find them correct in form and legal and am therefore returning the same to you with my approval endorsed thereon in accordance with the provisions of section 1218 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1482.

APPROVAL OF BOND ISSUE OF PHILLIPSBURG VILLAGE SCHOOL DISTRICT—$50,000.00.

COLUMBUS, OHIO, September 26, 1918.

Industrial Commision of Ohio, Columbus, Ohio.

GENTLEMEN:—

In Re: Bonds of Phillipsburg Village School district, in the sum of $50,000.00, for the purpose of purchasing a site for and erecting and equipping a school building in said school district.

I have carefully examined the corrected transcript of the proceedings of the board of education of Phillipsburg Village School district, Montgomery county, Ohio, relating to the above issue of bonds and find said proceedings to be in conformity to the provisions of the General Code of Ohio relative to bond issues of this kind.

I am therefore of the opinion that properly prepared bonds covering this issue will, when the same are properly executed and delivered, constitute valid and binding obligations of said school district, to be paid according to the terms thereof.

The bond form submitted is not entirely satisfactory and I am therefore retaining the transcript until proper bond form is submitted to me for approval.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1483.

APPROVAL OF BOND ISSUE OF NEW RICHMOND VILLAGE SCHOOL DISTRICT, CLERMONT COUNTY, OHIO.—$10,000.00.

COLUMBUS, OHIO, September 26, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In Re: Bonds of New Richmond Village School district, Clermont county, Ohio, in the sum of $10,000.00, for the purpose of funding certain deficiencies in the funds of said school district under the provisions of the Act of March 21, 1917, (107 O. L. 575).

I have carefully examined the corrected transcript of the proceedings of the board of education of New Richmond Village School district, Clermont county, Ohio, relating to the above issue of bonds and find said proceedings to be in conformity to the provisions of the General Code of Ohio relative to bond issues of this kind.

I am therefore of the opinion that properly prepared bonds covering this issue will, when the same are properly executed and delivered, constitute valid and binding obligations of said school district, to be paid according to the terms thereof.

No bond form for the bonds to be printed covering this issue was submitted and I am therefore holding the transcript until a proper bond form is submitted to me for approval.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1484.

APPROVAL OF ABSTRACT OF TITLE TO LOTS NOS. 26, 27 AND 36 OF WOOD BROWN PLACE SUBDIVISION, COLUMBUS, FRANKLIN COUNTY, OHIO.

COLUMBUS, OHIO, September 28, 1918.

HON. CARL E. STEEB, *Secretary, Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—I am in receipt of abstracts of title covering the following lots of land located in the city of Columbus, county of Franklin and State of Ohio, and described as follows:

Being lots Nos. twenty-six (26), twenty-seven (27) and thirty-six (36), of Wood Brown Place subdivision, as the same are numbered and delineated upon the recorded plat thereof, of record in plat book 5, page 196, recorder's office, Franklin county, Ohio.

I have examined said abstracts and find no material defects in the chain of title to said premises as disclosed thereby.

Said abstracts do not show any liens or encumbrances on said property, except the taxes for the year 1918, which are undetermined and unpaid.

I am therefore of the opinion that said abstracts disclosed on September 23, 1918, as to lots 26 and 27, and on September 25, 1918, as to lot 36, a good title in George H. R. Tyler, to the premises hereinbefore described.

I am returning herewith the abstracts submitted by you.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1485.

CITY OF ALLIANCE—COUNCIL HAS NO AUTHORITY TO APPROPRIATE MONEY TO PAY SUBSTITUTE JUDGE AND BAILIFF OF MUNICIPAL COURT.

Council of the city of Alliance has no authority to appropriate money in payment of services rendered by persons who served, respectively, as substitute judge of the municipal court of Alliance during the vacation of the regular judge and as substitute bailiff of said court during the vacation of the regular bailiff.

COLUMBUS, OHIO, September 28, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your letter of recent date in which you submit for my opinion the following question:

> "During the absence of the judge of the Municipal court of the city of Alliance on his vacation a substitute, appointed by the mayor, acted in that capacity.
>
> During the absence of the bailiff of said court on his vacation a substitute bailiff was designated and rendered services in that capacity.
>
> After these services were rendered the council of the city of Alliance in framing a semi-annual appropriation ordinance inserted therein an appropriation for the payment of certain compensation for the services thus rendered. Vouchers against such appropriation have been drawn and approved by the judge and clerk of the Municipal court. The city auditor doubts his authority to honor such vouchers. May he legally do so?"

The following provisions of the act establishing the municipal court of Alliance (107 Ohio Laws, 660) must be examined in connection with this question:

> *Section* 1. *Section* 1579-195 *General Code*:
>
> "That there be and hereby is created a court of record for the city of Alliance and the townships of Lexington and Washington, in the county of Stark, state of Ohio, to be styled 'The Municipal Court of Alliance, Ohio' * * * *."
>
> *Section 2. Section* 1579-196 *General Code*:
>
> "Said municipal court shall be presided over by one judge, to be designated herein as a 'municipal judge,' which office is hereby created, and whose term of office shall be for a period of four years, and said judge shall receive such compensation, payable out of the treasury of Stark county not

less than twelve hundred dollars per annum, payable monthly, as the county commissioners may prescribe, and out of the treasury of Lexington township, Stark county, Ohio, not less than two hundred dollars per annum, as the township trustees may prescribe, and out of the treasury of Washington township, Stark county, Ohio, not less than one hundred dollars per annum, as the township trustees may prescribe, and such further compensation, not less than fifteen hundred dollars per annum, payable in monthly installments out of the treasury of the city of Alliance, Ohio, as the council or legislative authority may prescribe. Said municipal judge at the time of his election or appointment, and during the continuance of his office shall be a qualified elector and resident of either the township of Lexington or the township of Washington, county of Stark, and State of Ohio, and have been admitted to the practice of law in the state of Ohio for not less than five years. * * *"

Section 29. *Section* 1579-223 *General Code*:

"The bailiff shall be appointed by the judge of such court and hold office during the pleasure of the court, and may be removed at any time by the judge of the Municipal court. Every police officer of the city of Alliance shall be ex-officio a deputy bailiff of the Municipal court and the chief of police shall assign one or more such police officers from time to time to perform such duties in respect to cases within the jurisdiction within said court as may be required of them by said court or the clerk thereof."

Section 30. *Section* 1579-224 *General Code*:

"One bailiff shall be designated as hereinafter provided for in this act. * * * Such bailiff shall receive such compensation not less than six hundred dollars per annum payable out of the treasury of the city of Alliance in monthly installments as the council may prescribe. * * *"

Section 35. *Section* 1579-229 *General Code*:

"Whenever the incumbent of any office created by this act, excepting the municipal judge shall be temporarily absent or incapacitated from acting, the judge shall appoint a substitute who shall have all the qualifications required of the incumbent of the office. Such appointee shall serve until the return of the regular incumbent, or until his incapacity ceases. In case said judge shall be incapacitated from sitting in any case, or by reason of absence or inability be unable to attend sessions of said court, the mayor of the city of Alliance may appoint some attorney having the qualifications required by this act, to act in his stead until said judge is able to resume his said position. Such appointments shall be certified by the court or mayor as the case may be and entered upon the record."

I find nothing in the act other than the provisions thereof which I have quoted which in any way bears upon the question under consideration. It is my opinion that the services of the substitute judge and the substitute bailiff about which inquiry is made were gratuitous. The positions are in no sense municipal offices. The council of the city of Alliance has, to be sure, full control over the finances of the corporation, for purposes, however, of discharging such functions as may be local and municipal, and such only, except in cases where it is expressly authorized or required by statute to appropriate money for other purposes. The conduct of

this municipal court is not an enterprise within the scope of the general corporate powers of the city of Alliance, as such. Such general corporate powers are those enumerated in the Municipal Code, and it is now well settled that municipal corporations subject to the Municipal Code have such corporate powers, and such only, as are conferred upon them by the statutory law of the state. Additional corporate powers can be obtained according to the trend of recent decisions of the Supreme Court of this state under favor of Article XVIII, section 3 of the Constitution only by the adoption of a charter. Whether by this means the city of Alliance might obtain authority to organize and conduct a municipal court or to contribute, beyond the scope of the act in 107 Ohio Laws, 660, to the support and maintenance of the Municipal court therein provided for, is a question which need not be considered because it does not appear that the city of Alliance has adopted a charter.

Not only is the organization and maintenance of a Municipal court not one of the ordinary functions of a municipal corporation, but in this case it is very clear that the particular court in question is not one for the maintenance of which the city of Alliance can claim general corporate power to raise money; for it is very clear from the statutes which I have quoted that the court is not even in a remote sense an organ of the government of the city of Alliance, but is rather an inferior local court established for the city of Alliance and certain adjoining townships as well. While the salary of the bailiff is to be paid by the city of Alliance, that of the judge is to be paid by the county, the city and the townships in prescribed shares.

From all the foregoing I arrive at the conclusion that the council of the city of Alliance has no authority to appropriate money in payment of any service rendered to or through the court established under the act referred to excepting that which may be found expressly conferred upon it by the terms of that act. No authority to allow any compensation payable from any source—whether from the treasury of the city of Alliance or from that of Stark county or those of the townships involved—to substitutes is found in the act. Such substitutes may be appointed as provided in section 35, but they are entitled to no compensation from any source for the services they may render—*a fortiori* it can not be said that they are entitled to compensation from the treasury of the city of Alliance; nor for the reasons above set forth can the council of the city of Alliance lawfully appropriate the funds of that city in payment of compensation for services rendered by substitute officers of the court on the theory that while such officers may have no enforceable claims against the city of Alliance, yet the council in the exercise of its control over the finances of that city may lawfully recognize a species of moral obligation in the premises and expend the public funds of the municipality in discharge thereof. For, as I have pointed out, the authority of the council of the city of Alliance to devote public moneys in the treasury of that city to the support of the court and its activities is limited to that which is found in the act creating the court, and can not be predicated upon the general powers of the council because the maintenance of the court is not one of the general corporate powers of the city of Alliance, and because, too, the court as established is not one of the organs of government of the city of Alliance.

For all these reasons I advise that, in my opinion, the city auditor of Alliance may not lawfully issue his warrants upon the vouchers which have been presented to him.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1486.

IN LUNACY PROCEEDINGS, SHERIFF MAY SERVE WARRANT ANY WHERE IN STATE BUT NOT OUTSIDE OF STATE—PROBATE JUDGE CANNOT HOLD INQUEST OUTSIDE OF COUNTY.

1. *When the probate judge issues a warrant to a sheriff or some other suitable person, under section* 1954 *G. C., to arrest and bring before him a person alleged to be insane, such warrant is authority for such sheriff or other suitable person to make the arrest anywhere in Ohio. If made by a person other than the sheriff, the expense of such arrest should be paid under section* 1981. *If made by the sheriff, such sheriff may be allowed his expenses, including railroad fare and livery hire under section* 2997. *He may also be allowed* $1.00 *for serving a warrant and* 8 *cents per mile for mileage under section* 2845 *G. C.*

2. *A warrant issued by the probate court to the sheriff or some suitable person, under section* 1954 *G. C., does not authorize such person or sheriff to make the arrest outside of Ohio and there is no provision for payment of any expense incurred in making the arrest in or returning such insane person from another state.*

3. *The probate judge of one county in Ohio may not hold an inquest of lunacy in any county but the county in which he is elected.*

COLUMBUS, OHIO, September 28, 1918.

HON. HOMER Z. BOSTWICK, *Probate Judge, Columbus, Ohio.*

DEAR SIR:—I have your letter of May 27, 1918, as follows:

> "Under sections 1954 and 1955 G. C., providing for the apprehension and examination of persons alleged to be insane, three questions present themselves for answer. The writer begs leave to submit these questions for your determination and respectfully asks an answer to each.
>
> 1. Has the probate judge authority to issue a warrant to the sheriff, commanding him to go into any other county of the state and arrest an alleged insane person and bring him before said probate judge for examination, said insane person having a residence in this county, but being temporarily absent?
>
> 2. Has the probate judge authority to bring a resident of this county back to this county for inquest of lunacy, when said resident of this county is absent from the state of Ohio and temporarily in another state?
>
> 3. Can the probate judge of any county in Ohio hold an inquest of lunacy outside his county, that is, in another county than the one for which he is elected?"

Section 1953 of the General Code, which provides the form of affidavit which a resident citizen of a county must file with the probate judge of the county in the commitment of an insane patient to the hospital, reads:

> "For the admission of patients to a hospital for the insane, the following proceedings shall be had. A resident citizen of the proper county must file with the probate judge of such county an affidavit, substantially as follows:

The State of Ohio, _____ County, ss:

_____the undersigned, a citizen of _____ county, Ohio, being sworn, says that he believes _____ is insane, (or, that in consequence of his insanity, his being at large is dangerous to the community.) He has a legal settlement in _____ township, in this county.

Dated this _____ day of _____, A. D. _____, (R. S. section 702.)"

Section 1954 G. C. provides:

"When such affidavit is filed, the probate judge shall forthwith issue his warrant to a suitable person, commanding him to bring the person alleged to be insane before him, on a day therein named, not more than five days after the affidavit was filed, and shall immediately issue subpoenas for such witnesses as he deems necessary, two of whom shall be reputable physicians, commanding the persons in such subpoenas named to appear before him on the return day of the warrant. If any person disputes the insanity of the party charged, the probate judge shall issue subpoenas for such person or persons as are demanded on behalf of the person alleged to be insane."

It will be noted that the probate judge may issue his warrant for the arrest of the person alleged to be insane to a "suitable person." This person may or may not be the sheriff of the county. I am of the opinion that when this warrant is issued to such suitable person, such warrant is authority for such person to take the alleged insane person into custody in any county in the state of Ohio, and the expense of arresting such insane person and bringing him before the court may be paid, if the person to whom the warrant was issued is a person other than the sheriff or deputy sheriff, under the provisions of section 1981 G. C., which section provides in part:

Section 1981.—"The probate judge shall make a complete record of all proceedings in lunacy. The cost and expenses, other than the fees of the probate judge and sheriff, to be paid under the provisions of this chapter, shall be as follows: * * * to the person other than the sheriff or deputy sheriff making the arrest, the actual and necessary expense thereof and such fees as are allowed by law to sheriffs for making arrests in criminal cases; * * *."

The statute seems to contemplate that the sheriff, if the court has issued the warrant to him, shall be paid according to the statutes relating to that office.

Secion 2845 G. C. provides in part:

Section 2845.—"For the services hereinafter specified, when rendered, the sheriff shall charge and collect the following fees and no more: For the service and return of the following writs and orders: * * * warrant to arrest, each person named in the writ, one dollar; * * * in addition for the fee for service and return the sheriff shall be authorized to charge on each summons, writ, order or notice, except as otherwise specifically provided by law, a fee of eight cents per mile going and returning, provided, that where more than one person is named in such writ, mileage shall be charged for the shortest distance necessary to be traveled; * * * *."

Section 2997 G. C. provides:

"In addition to the compensation and salary herein provided, the county commissioners shall make allowances quarterly to each sheriff for keeping and feeding prisoners, as provided by law, for his actual and necessary expenses incurred and expended in pursuing or transporting persons accused or convicted of crimes and offenses, in conveying and transferring persons to and from any state hospital for the insane, the institution for feeble-minded youth, Ohio hospital for epileptics, boys' industrial school, girls' industrial home, county homes for the friendless, houses of refuge, children's homes, sanitariums, convents, orphan asylums or homes, county infirmaries, and all institutions for the care, cure, correction, reformation and protection of unfortunates, and all expenses of maintaining horses and vehicles necessary to the proper administration of the duties of his office. The county commissioners shall allow the sheriff his actual railroad fare and street car fare expended in serving civil processes and subpoenaing witnesses in civil and criminal cases, and may allow his necessary livery hire for the proper administration of the duties of his office. Each sheriff shall file under oath with the quarterly report herein provided a full, accurate and itemized account of all his actual and necessary expenses, including railroad fare, street car fare and livery hire mentioned in this section before they shall be allowed by the commissioners."

It will be seen from these sections that the sheriff may be allowed one dollar for serving the warrant under section 2845 and mileage of eight cents per mile.

Section 2997 provides that the commissioners "shall allow the sheriff his actual railroad fare and street car fare expended in serving civil processes" and, "may allow his necessary livery hire for the proper administration of the duties of his office." While a warrant to arrest is ordinarily not looked upon as a civil process, yet a lunacy inquest is certainly not a criminal proceeding, and I am inclined to look upon the serving of a warrant in such cases as the "serving of civil process" within the meaning of this provision of section 2997, and am therefore of the opinion that the sheriff may be allowed all expense incurred for railroad fare in bringing a person charged with lunacy before the court, by reason of this section 2997 G. C. Any livery hire necessary to bring such person before the court may also be allowed by the county commissioners under this section.

Replying to your second question, I am of the opinion that a warrant issued by the probate court of a county in this state to the sheriff or some suitable person under the provisions of 1954 G. C., would not authorize such person or sheriff to make any arrest of any alleged insane person beyond the confines of this state, neither do I know of any provision of law for the arrest and return of such insane person, nor of any provision for the payment of any expense incurred in making such arrest and returning such insane person from without the state.

In reply to your third question, beg to advise that the probate judge must exercise his jurisdiction for and in the county in which he has been elected. When he leaves that county and goes into another county, he no longer continues to retain the powers and jurisdiction of the probate judge. I am of the opinion that the probate judge of any county in Ohio is without authority, therefore, to hold inquests of lunacy outside of his own county.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1487.

SCHOOL DISTRICTS—WHEN TERRITORY TRANSFERRED FROM ONE TO ANOTHER—DIVISION OF FUNDS UNDER 4692 G. C.

No particular form is provided by our school laws for the division of funds in process of collection when territory is transferred from one school district to another and an order from the county board, which instructs the county auditor to pay over "all money derived for school purposes from said territory at the December, 1918, distribution" is sufficient.

COLUMBUS, OHIO, September 28, 1918.

HON. HARRY M. RANKIN, *Prosecuting Attorney, Washington C. H., Ohio.*

DEAR SIR:—Your request for my opinion reads:

"The county board of education of this county of Fayette recently transferred a portion of the Jefferson Township Rural School district to the Union Township Rural School district, both of said districts being entirely within the Fayette county school district.

This transfer was made by virtue of section 4692 of the General Code. The resolution passed by the county board of education provided, among other things:

'That as equitable division of the funds and indebtedness of the transferred territory, the auditor of Fayette county, Ohio, be instructed to pay to the said Union township board of education all money derived for school purposes for said territory at the December, 1918, distribution.'

The auditor insists that this division should be made in a fixed amount so that there would not remain anything for him but to pay to the Union township board of education, the amount fixed by the county board of education. The taxes on the real estate in the transferred territory can be easily ascertained, but in order to determine the amount of personal tax paid in the transferred territory it would be necessary to go over the list of persons paying personal tax in the entire school district and pick out those residing within the transferred territory. This could only be done by information obtained from persons residing therein and who knew the residents residing within the detached territory.

I would appreciate your opinion as to the manner in which this 'division of funds,' etc., should be made and whether it has been properly done in the instant case."

Section 4692, under which the transfer of territory mentioned by you was made, reads, in reference to the division of funds, as follows:

" * * * The county board of education is authorized to make an equitable division of the school funds of the transferred territory, either in the treasury or in the course of collection. * * *."

In your case the board found that the equitable division of the funds of the transferred territory would be that amount of money which would be derived for school purposes from the territory so transferred. That is to say, the board in substance found that the funds which should be divided were the funds which would be collected and that there were either no funds in the treasury of the school district, or, if there were funds in the treasury of the school district, that

said funds should be applied on whatever indebtedness the district had, because no order is made in reference to any indebtedness and I believe it is only fair to assume that the district perhaps had no funds on hand and no indebtedness, and that it was the desire of the board that the district to which the territory was attached be the recipient of all taxes to be raised on the property and that the district from which the territory was detached should lose nothing except taxes upon the property so transferred. Your question is, can the county board order a distribution, the amount of which is to be ascertained say when the distribution of the December taxes is made, or must the board say that a certain sum in dollars and cents is the amount that one district shall receive from the other.

To divide means to sever into two parts; to cause to be separated; or to portion out. In the above instance the board did cause the fund to be severed into two parts; the part which was collected upon the territory transferred was one part and the part which was collected on the territory which was not transferred was the other part. The board also caused the fund to be separated, that is, that the amount collected in the territory so transferred was separated into one part—and the amount collected on the territory which was not transferred was separated into the other part. The board also caused the fund to be portioned out, that is, that the amount collected from the territory transferred was portioned to the district to which the territory was attached and the amount which was collected from the territory which was not transferred remained with the district for which the levy was made. So that it seems to me that every element of the definition of "divide" or "division" is fulfilled by the action taken by the county board.

I recognize it would be far less work for the county auditor to set over just a certain amount than to be compelled to make the division according to the taxes collected, but if the above plan is an equitable plan, that is to say, if the district to which the territory was transferred should in equity receive all the taxes upon the property of such transferred territory, whether the same be real or personal, then might it not be said that to do equity in that case the county auditor is in better position than is the county board of education to make the calculation that is required that the division be carried out. At any rate, there is nothing in the statute which requires the division to be made in any particular manner and I must conclude that the plan used by the county board in your case is sufficient.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1488.

APPROVAL OF BOND ISSUE OF SHELBY VILLAGE SCHOOL DISTRICT. $10,000.00.

COLUMBUS, OHIO, September 28, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In Re: Bonds of Shelby Village School district, in the sum of $10,000, for the purpose of funding present indebtedness of said school district.

I have examined the transcript of the proceedings of the board of education of Shelby Village School district in the issuance of the above described bonds, and find that such proceedings were in all respects in conformity to the provisions of the General Code and Constitution of Ohio, and that the bonds when duly executed

will constitute valid and binding legal obligations of Shelby Village School district, payable in accordance with the terms thereof.

The bond form has not been submitted to me. I am directing a letter to the clerk requesting that such form be submitted immediately.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1489.

APPROVAL OF BOND ISSUE OF HURON COUNTY, OHIO.—$25,000.00.

COLUMBUS, OHIO, October 1, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In Re: Bonds of Huron county, Ohio, in the sum of $25,000.00, for the purpose of providing additional funds for the construction of I. C. H. No. 289, section "K," road improvement, located in Lyme and Ridgefield townships, said county.

I have carefully examined the transcript of the proceedings of the board of county commissioners of Huron county, Ohio, relating to the above issue of bonds, and find said proceedings to be in conformity to the provisions of the General Code of Ohio relative to bond issues of this kind.

I am therefore of the opinion that bonds properly prepared according to bond form submitted will, when the same are properly executed and delivered, constitute valid and binding obligations of said county to be paid according to the terms thereof.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1490.

BOARD OF CHARITIES—GUARDIANSHIP OF WARDS TRANSFERRED TO THE OHIO SOLDIERS' AND SAILORS' ORPHANS' HOME—MAY NOT RETRANSFER CHILDREN RECEIVED FROM COUNTY, DISTRICT OR SOME PUBLIC HOME—MAY CONSENT TO ADOPTION, WHEN.

1. *In cases where the Board of State Charities transfers its wards to the Ohio Soldiers' and Sailors' Orphans' Home, the guardianship of the board, as provided in section* 1352-3 *G. C., does not cease.*

2. *When children are transferred from a county, district or semi-public children's home, or other institution, to the Board of State Charities, there is no provision of law whereby said children may be re-transferred by the Board of State Charities to the district home or other institution from which they came.*

3. The Board of State Charities is not authorized in law to give consent to adoption provided for in section 8025 G. C. But it would be authorized to give the consent under the conditions as provided for in section 8024 G. C.

COLUMBUS, OHIO, October 1, 1918.

Board of State Charities, Columbus, Ohio.

GENTLEMEN:—I have your communication of August 23, 1918, which reads as follows:

> "Section 1352-3 G. C. provides that the Board of State Charities shall under certain conditions receive as its wards dependent and neglected minors and states that the Board of State Charities is ipso facto vested with the sole and exclusive guardianship of such child or children.
>
> To what extent does this guardianship prevail in the event of the subsequent transfer of wards of the Board of State Charities to the Ohio Soldiers' and Sailors' Orphans' Home.
>
> In such case, is the Ohio Board of State Charities relieved from any further responsibility, or does said responsibility continue during the child's minority?
>
> Section 1352-3 G. C. provides for the transfer of children from county, district or semi-public children's homes or other institutions to the guardianship of the Ohio Board of State Charities for placement in foster homes.
>
> If the children thus transferred are found ineligible for placement in foster homes, is there any provision of law by which this guardianship may be vacated and such children returned to the guardianship of the institution from which they were originally transferred?
>
> Dependent children transferred to the Ohio Board of State Charities from county, district or semi-public children's homes are placed in foster homes for legal adoption; under such conditions, is the Ohio Board of State Charities competent to give consent as provided for in section 8025 G. C. for the legal adoption of said children?"

Your communication naturally divides itself into three different questions, the first of which may be stated as follows:

> In the event that the Board of State Charities transfers one of its wards to the Ohio Soldiers' and Sailors' Orphans' Home, does the guardianship of the board cease at that time and they no longer have any responsibility in reference to the child so transferred?

In answer to this question I will say that there is no direct provision of law which warrants the transfer of a ward of the Board of State Charities to the Ohio Soldiers' and Sailors' Orphans' Home. In so transferring the wards the Board of State Charities undoubtedly assumes that it has authority so to do from the provisions of the section above noted, and it is my opinion that the provisions of said section are broad enough to warrant the Board of State Charities in so transferring its wards. The question then is as to whether the transfer of a ward causes the guardianship of the Board of State Charities to cease and the same pass to the Ohio Soldiers' and Sailors' Home.

It is my opinion that the guardianship of the Board of State Charities does not so cease. It is provided in section 3252-3 G. C. that the board shall retain the guardianship of children under its charge during their minority; while the provis-

ions of section 1933 G. C., having to do with the Ohio Soldiers' and Sailors' Orphans' Home, provide that said home shall be warranted in discharging the children under its care when they become sixteen years of age. This section reads as follows:

> "Unless for good cause sooner discharged all children admitted to the home shall be supported and educated until sixteen years of age. The trustees may retain such children until they arrive at the age of eighteen years, and members of a graduating class may be retained until the close of the school year."

I do not feel that the Board of State Charities would lose its guardianship over its wards when transferred to the said home any more than itwould lose its guardianship over its wards when they are placed in the care and charge of a private family, and I, therefore, answer your first question to the effect that the guardianship of the board follows the wards that are placed in the home.

In reference to this matter I might note the provisions of section 1943 G. C., which section reads as follows:

> "When pupils are discharged, the trustees through the superintendent, so far as practicable, shall keep in communication with them to enable the trustees to report to the governor and general assembly in regard to these children of the state.
>
> To that end the trustees or superintendent shall encourage and provide for the holding of annual reunions of the ex-pupils at the home and invite them to attend as the guests of the home and state, and shall keep a record showing the names, addresses and occupations of those who attend. Such reunions shall be held during the children's regular vacation season, when the holding thereof will not interfere with the management of the home, and the ex-pupils who attend shall be under the same control and receive the same accommodations as the children and officers of the home."

This section places a certain duty upon the trustees of the home in reference to keeping in communication with children discharged from the home, but this, I feel, would in no wise conflict with the guardianship of the said children to be exercised by the Board of State Charities.

Your second question might be phrased as follows:

> When the Board of State Charities receives children from a county, district, or semi-public children's home, or other institution, transferring the guardianship to said board, could the board by agreement, or is there any provision by which the board might again transfer said children back to the institution from which they were received?

I find no such provision of law. In fact the provisions of section 1352-3 G. C. seem to infer that when the board has assumed jurisdiction over children it must make provision for them notwithstanding the fact that they may not be eligible for placement in private homes. For example, this section provides that

> "The board shall thereupon ipso facto become vested with the sole and exclusive guardianship of such child or children"

That is, when a child is transferred from a home to the board the sole and

exclusive guardianship of such child passes to the board. This section further provides that when necessary,

> "any children so committed or transferred to the board may be maintained by it in a suitable place until a proper home is found."

It further provides that

> "Children from whom on account of some physical or mental defect it is impracticable to find good, free homes, may be so placed by the board upon agreement to pay reasonable board therefor not to exceed $3.50 per week."

From these provisions it seems to have been the intention of the legislature to give full control and guardianship over the children, when transferred, to the board, no difference what their physical or mental status might be. From these provisions which seem to negative the fact that the children might be returned to the institution from which they came, and from the fact that there is no provision of law whatever made for such re-transfer of the children, it is my opinion that the board could not transfer children who have come under its jurisdiction back to the home from which they originally came.

Your third question is as to whether the Ohio Board of State Charities is competent to give consent in the matter of the adoption of children as provided for in section 8025 G. C., which section reads as follows:

> "When such child is an inmate of an orphan asylum, or children's home, organized under the laws of this state, and has been previously abandoned by its parents or guardians, or voluntarily surrendered by its parents or guardians to the trustees or directors of such asylum, or children's home, then the written consent of the president, or in his absence, or disability, the vice-president, of the board of trustees or directors of such asylum, or children's home, shall be received by the probate court in place of the consent of the parents or guardians."

It is to be noted from a reading of this section that it is only the trustees or directors of an orphans' asylum or children's home organized under the laws of this state who are given the authority to consent to the adoption of a child. I do not believe that the Board of State Charities is of such a nature that it could be brought within the terms "orphans' asylum" or "children's home," and, therefore, it could not give its consent to the adoption of a child under the provisions of section 8025 G. C.; but in connection with your question 1 desire to call attention to the provisions of section 8024 G. C., which section reads as follows:

> "Any proper person not married, or a husband and wife jointly, may petition the probate court of their proper county, or the probate court of the county in which the child resides, for leave to adopt a minor child not theirs by birth, and for a change of the name of such child. A written consent must be given to such adoption by the child, if of the age of fourteen years, and by each of his or her living parents who is not hopelessly insane, intemperate, or has not abandoned such child, or if there are no such parents, or if the parents are unknown, or have abandoned the child, or if they are hopelessly insane or intemperate, then by the legal guardian, or if there is no such guardian, then by a suitable person appointed by the court to act in the proceedings as the next friend of the child."

We note here that if there are no parents living, or if the parents are unknown, or if they have abandoned the child, or if they are hopelessly insane or intemperate, then the consent may be given by the legal guardian of the child. It is my opinion that the board becomes the legal guardian of a child transferred to it under the provisions of section 1352-3 G. C., and therefore if the conditions obtain as set out in section 8024 G. C., then the board might give its consent, it being the sole and exclusive guardian of the child and being its legal guardian. But if it has parents living who are not hopelessly insane or intemperate, or who have not abandoned the child, and they are not unknown, then the parents would have to give the consent to the adoption of the child, even though it was at the time under the jurisdiction of the Board of State Charities.

In answering this question I might refer to the provisions of section 1672 G. C. I do not believe that the legislature had in mind the Board of State Charities when it used the term "association, corporation or individual" as found in said section, and therefore am of the opinion that the provisions of this section do not authorize the Board of State Charities to consent to the adoption of a child.

In connection with the answers given to your first questions, I will call attention to an opinion rendered by my predecessor, Mr. Turner, found in Volume II, Opinions for the Attorney-General for 1917, p. 1038. I think Mr. Turner's opinion was correct and that the jurisdiction of the Board of State Charities is at all times to be modified by the jurisdiction given the juvenile court as set out in the opinion above referred to.

In passing I might say that in considering the question of guardianship in this opinion I am merely referring to the guardianship of the child and not of the estate of a child. I note this distinction because section 1946-3 G. C. makes the superintendent of the Ohio Soldiers' and Sailors' Orphans' Home the guardian of the estate of all minors under the age of sixteen years, duly admitted and residing in said home, providing the father is deceased and the child has no other legal guardian.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1491.

COUNTY COMMISSIONERS—AUTHORITY TO BORROW MONEY TO COMPLETE ROAD ON DEFAULT OF CONTRACTOR.

1. *When the county commissioners have issued bonds to the amount equivalent to the estimated cost and expense of a road improvement, and it is afterwards ascertained that, owing to the fact of the failure of the original contractor to complete the improvement, it will cost more than the estimated cost and expense, the county commissioners are authorized to issue and sell additional bonds up to an amount which equals the increased cost as estimated by the county surveyor.*

2. *If the county commissioners recover, from the contractor and his surety, the difference between the contract price and the total cost and expense of the improvement, or any part of the same, it would be placed in the special fund, from which, under section 5654 G. C., it would be transferred to the sinking fund or the debt fund of the county, to be used in the redemption of the outstanding bonds of the county.*

COLUMBUS, OHIO, October 2, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I have your letter of August 15, 1918, in which you enclose a

letter received by you from the auditor of Columbiana county, Ohio. His letter reads as follows:

> "Please advise as to the following:
>
> Columbiana county issued bonds to the amount of $39,500.00 to construct the Thomas road; contract was let to M. P. Connelly & Son. They partially completed their contract and failed. The county commissioners then took over the road and are endeavoring to complete the contract, but it will require probably an amount in excess of $8,000.00 above the amount the bonds were sold for to complete the road.
>
> Have the county commissioners a right to borrow money for this purpose, with the expectation of collecting it in the future from the bonding company?"

You request that I render an opinion upon the question submitted by the county auditor. My opinion must be based mainly upon the provisions of section 6929 G. C. (107 O. L. 101); but before noting the provisions of this section, I will call attention to other sections which are to some extent, at least, related to and connected with section 6929.

Section 6911 G. C. (107 O. L. 96) provides that when the board of commissioners has determined that any road shall be constructed, it "at the same time shall order the county surveyor to make such surveys, plans, profiles, cross-sections, estimates and specifications as may be required for such improvement." So it will be seen that before the improvement is begun, the county surveyor must make an estimate of the cost and expense of the proposed improvement.

Section 6919 G. C. (at p. 98 of 107 O. L.) provides in part as follows:

> "The compensation, damages, costs and expenses of the improvement shall be apportioned and paid in any one of the following methods, as set forth in petition:" (Here are four methods set out, any one of which may be set forth in the petition and adopted by the county commissioners).

I call particular attention to the fact that under this section it is not the estimated cost and expense of the improvement which is to be borne by the township, the county and abutting property owners in certain proportions, but the total cost and expense that is to be apportioned among these different units and paid for according to the method directed.

The next thing I will consider is how the county and the township make provision for their respective shares of the cost and expense of an improvement.

Section 6926 G. C. (107 O. L. 100) provides as follows:

> "The proportion of the compensation, damages, costs and expenses of such improvement to be paid by the county shall be paid out of any road improvement fund available therefor. For the purpose of providing by taxation a fund for the payment of the county's proportion of the compensation, damages, costs and expenses of constructing, reconstructing, improving, maintaining, and repairing roads under the provisions of this chapter, the county commissioners are hereby authorized to levy annually a tax not exceeding two mills upon each dollar of the taxable property of said county. * * *."

Section 6927 G. C. (107 O. L. 101) reads as follows:

"For the purpose of providing by taxation a fund for the payment of the proportion of the compensation, damages, costs and expenses of such improvement to be paid by the township or townships interested, in which such road may be in whole or part situated, the county commissioners are hereby authorized to levy a tax not exceeding three mills in any one year upon all the taxable property of such township or townships. * * *."

Under these two sections the county's as well as the township's share of the cost and expense of an improvement may be paid from a fund to be created by the levying of a tax by the county commissioners, or the county's share may be paid from any fund available therefor.

Section 6929 (107 O. L. 101) makes provision that the county commissioners may anticipate the collection of the taxes which are levied by them from time to time and issue bonds to take care of the cost and expense of an improvement. The provisions of this section, in so far as they relate to the matter at hand, are as follows:

'Section 6929.—The county commissioners, in anticipation of the collection of such taxes and assessments, or any part thereof, may whenever, in their judgment it is deemed necessary, sell the bonds of said county in any amount not greater than the aggregate sum necessary to pay the estimated compensation, damages, costs, and expenses of such improvement. Such bonds shall state for what purpose they are issued and shall bear interest at a rate not to exceed five per cent. per annum, payable semi-annually, and in such amounts and to mature at such times as the commissioners shall determine, subject to the provision however that said bonds shall mature in not more than ten years. * * *."

Let us keep in mind now, in placing a construction upon this section, that the township, the county and the abutting property owners are obligated to pay the total cost and expense and not merely the estimated cost and expense of an improvement, and that the county and township would be authorized, if the money were already in the fund, to pay the total cost and expense therefrom, whether said total cost and expense should be less or more than the estimated cost and expense of the improvement.

So if Columbiana county and the township interested in the improvement under consideration had money in the funds which are created by a levy of taxes, there is no question whatever that the county and township would be authorized to take the additional $8,000.00, required for the completion of the improvement, from these respective funds. However, from the communication of the county auditor I take it that there is no money in these funds which can be used for the completion of this improvement by the county commissioners.

Under section 6929, supra, the bonds which are issued in anticipation of the collection of taxes are to be issued in an amount "not greater than the aggregate sum necessary to pay *the estimated compensation, damages, costs, and expenses of such improvement.*"

Here, now, is where the difficulty arises. The county surveyor made an estimate of the cost and expense of the improvement. The contract was let for an amount not greater than the estimated cost and expense, but owing to the fact that the county commissioners were compelled to complete this contract under force account, the total cost and expense is going to exceed the estimated cost and expense. Under

these circumstances, can the county commissioners issue bonds to take care of the increased cost and expense?

If we place a fairly strict construction upon the language used in section 6929, it is doubtful whether the county commissioners could issue bonds in excess of the estimated cost and expense of the improvement as made by the county surveyor. But I do not feel that such a construction should be placed upon this section. The object of the legislature evidently was to prevent the county commissioners from issuing bonds in an amount greater than would be necessary for completing the improvement, and inasmuch as the contract could not be awarded for a greater sum than the estimated cost and expense of the improvement, it was undoubtedly thought best by the legislature that the county commissioners should be limited in their power to issue bonds to the estimated cost and expense of the improvement. But as said, the primary thought no doubt was to prevent the county commissioners from issuing bonds in excess of the amount which would provide for the actual cost and expense.

The county surveyor evidently now estimates that it will cost an additional $8,000.00 to complete this improvement. This would be the only basis upon which the county auditor could make a statement that it will cost approximately $8,000.00 over and above the original contract price to complete it.

Hence it is my opinion that if the county surveyor will report to the county commissioners that in his opinion it will require $8,000.00 over and above the amount heretofore realized from the sale of bonds, the commissioners would have authority in law to issue an additional $8,000.00 of bonds under the same terms and conditions as the former bonds were issued; for it must be borne in mind that taxes will have to be levied to take care of the total cost and expense of the improvement, which would include this $8,000.00 as well as the former sum, and if taxes must be levied, bonds may be issued in anticipation of the collection of the taxes.

I have not taken into consideration, in the above reasoning, that the original contractor gave a bond for the faithful performance of his contract. If this improvement is fully completed and the county commissioners recover from the original contractor and his surety, the difference between the contract price and the total cost and expense of the improvement, the sum so realized would be placed in this special fund, for the completion of the road, and as it would no longer be needed for that purpose, the same would be transferred, under section 5654 G. C., to the sinking fund or the debt fund of the county, for use in the redemption of the bonds which had been issued by the county commissioners.

In passing I might suggest that the highway laws as they pertain to the jurisdiction of the county commissioners are very uncertain in reference to the course which should be followed by the county commissioners in those cases wherein the original contractor fails to carry out his contract. While the laws pertaining to the jurisdiction of the state highway commissioner are perfectly clear in reference to conditions such as suggested, yet there is no provision whatever made as to how the county commissioners should proceed under such circumstances. We must decide this entirely by analogy to other provisions of the statutes. The county commissioners of Columbiana county, when the original contractor failed, proceeded to complete the contract under force account. The only provisions of the statute which would warrant the county commissioners in so proceeding are found in section 6948-1 G. C. which reads as follows:

> "If the county commissioners deem it for the best interest of the public they may, in lieu of constructing such improvement by contractor, proceed to construct the same by force account."

The provisions of this section evidently were not especially intended to apply to a case wherein the original contractor failed. The intention of the legislature in enacting this section evidently was to give the county commissioners in the matter of a road improvement the right to proceed in one of two different ways; either to proceed to advertise and award the contract under the general provisions of our statutes or to construct the improvement under force account. But I am of the opinion that courts would hold by analogy that in those cases wherein the original contractor failed the county commissioners might proceed either to again advertise for bids and award the contract for completing the improvement to the lowest responsible bidder, or they might proceed under the provisions of section 6948-1 G. C. to complete the improvement by force account, as the county commissioners did in the matter now under consideration.

In passing there is a second matter to which I desire to call attention and that is the course which the county commissioners ought to pursue in those cases in which the original contractor fails to complete his contract and there is not sufficient money in the fund with which to complete the same. It is my opinion that the county commissioners by a proper resolution should order the county surveyor to make an estimate of the cost and expense of completing the improvement over and above the amount which was realized from the sale of the bonds for the improvement. The county surveyor should make a report to the county commissioners of his estimate. The county commissioners should then approve his estimate and proceed under section 6929 to issue the additional bonds necessary to complete the improvement, not in excess, however, of the estimate made by the county surveyor. It will be immediately noticed that this procedure is not outlined by statute but must be drawn by analogy from the provisions of the statutes having to do with the construction of roads by county commissioners.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1492.

APPROVAL OF BOND ISSUE OF TRUMBULL COUNTY, OHIO.—$10,000.

COLUMBUS, OHIO, October 2, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

In Re: Bonds of Trumbull county, Ohio, in the sum of $10,000.00 in anticipation of the collection of taxes to pay the respective shares of said county and of Brookfield township of the cost and expense of improving the Warren-Sharon I. C. H. No. 329 road under the provisions of section 6909-6956 G. C.

GENTLEMEN:—I have carefully examined the corrected transcript of the proceedings of the board of county commissioners of Trumbull county, Ohio, of the board of township trustees of Brookfield township in said county, and of other officers, relating to the above issue of bonds and to the improvement for which said bonds are issued. I find said proceedings to be in conformity to the provisions of

the General Code of Ohio relating to bond issues of this kind and I am therefore of the opinion that properly prepared bonds covering the above issue will, when the same are properly executed and delivered, constitute valid and binding obligations of said county to be paid in accordance with the terms thereof.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1493.

DISAPPROVAL OF BOND ISSUE OF WEST UNITY VILLAGE SCHOOL DISTRICT, WILLIAMS COUNTY, OHIO.—$80,000.00.

COLUMBUS, OHIO, October 2, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—.

In Re: Bonds of West Unity Village School district, Williams county, Ohio, in the sum of $80,000.00, for the stated purpose of building, enlarging and improving school facilities in said school district (consisting of purchasing a site and building and furnishing a new school building.)

I have carefully examined the transcript submitted of the proceedings of the board of education and other officers of West Unity Village School district, and as a result of such examination I regret to say that I am unable to approve the proceedings relating to this issue of bonds. This issue of bonds is one by the board of education of the above named school district under the assumed authority of sections 7625 to 7628, inclusive, of the General Code, on a vote of the electors of the school district, and this issue of bonds is disapproved specifically for the reason that the resolution of the board of education under date of June 25, 1918, providing for the submission of the bond issue proposition to the vote of the electors is not legally sufficient for the purpose. Under the provisions of section 7625 General Code before a board of education can submit to the electors of the school district the proposition of issuing bonds for the purpose of purchasing a site for and erecting a school house or houses, to complete a partially built school house, to enlarge, repair or furnish a school house, or to purchase real estate for playground for children, or do any or all of such things, such board of education must *determine* that for the proper accommodation of the schools of the school district, it is necessary to do one or more of the things mentioned in the statute, *and that the funds at its disposal or that can be raised under the provisions of sections 7629 and 7630 are not sufficient to accomplish such purpose.* Within a certain stated limitation as to amount a board of education is authorized under the provisions of section 7629 General Code to issue bonds for the purpose of obtaining or improving school property without the vote of the electors, and under the provisions of section 7625 General Code before such board of education can provide for an issue of bonds under this section and those immediately following, it must affirmatively appear by the determination and finding of the board of education that the funds at the disposal of the board or that can be raised under the provisions of section 7629 General Code are not sufficient for the purpose. In other words, this determination and finding by the board of education is jurisdictional to the exercise

of the power of the board of education to provide for an issue of bonds on a vote of the electors under the provisions of sections 7625 to 7628, inclusive. The resolution adopted by the board of education of West Unity Village School district providing for the submission of this bond issue proposition to the vote of the electors of the school district contains no such determination or finding, and for that reason fails to show any authority in the board of education to submit the question to the vote of the electors.

In addition to the defect in the proceedings above noted an examination of the transcript discloses one other defect sufficient to negative any authority on your part to purchase this issue of bonds at the present time. The financial statement of the school district attached to and made a part of the transcript shows that the school district now has an outstanding bonded indebtedness of $8,100.00. It likewise appears from the statement of the clerk of the board of education that the school district has no board of sinking fund commissioners. Under the provisions of section 7614 General Code, however, inasmuch as it appears that the school district has an existing bonded indebtedness, it is the mandatory duty of the board of education of the school district to provide for the management of the sinking fund of the school district by a board of sinking fund commissioners, to be appointed or designated in the manner required by said section, and under the provisions of section 7619 General Code the board of education is required to offer the proposed issue of bonds to such board of commissioners of the sinking fund of the village school district before otherwise disposing of said bonds; while under the provisions of section 1465-58 General Code you are authorized to purchase only such school bonds as shall first have been offered to the board of commissioners of the sinking fund of the school district and by such board rejected. Were there no other defect in the proceedings relating to this issue of bonds I would not be disposed to disapprove the issue on the ground just stated, without affording the board of education an opportunity of providing for the appointment and qualification of a board of commissioners of the sinking fund of the school district and of offering the proposed issue to such board.

In conclusion I note two other defects in the proceedings which, though perhaps not of such nature as in themselves to defeat the validity of the bonds, are sufficient to show that the statutory provisions relating to school districts and legislation necessary to the issue of school bonds were not correctly appreciated and applied. In the first place, I note that the legislation and proceedings of the board of education relating to the issue of these bonds up to the resolution providing for the issue of the bonds pursuant to the vote of the electors were carried on in the name of "West Unity Special School District." This is manifestly erroneous for the reason that there is now no such classification of school districts as special school districts, inasmuch as all the school districts of the state are now either city school districts, village school districts, rural school districts or county school districts (See section 4679 General Code). The resolution of the board of education providing for this issue of bonds in some places speaks of the school district as "West Unity Village School District" and in other places as "West Unity Rural School District." In this connection it is sufficient to observe that the legal name of the school district is "West Unity Village School District."

The other objection that I have in mind with respect to the proceedings relating to this issue of bonds is the stated and declared purpose of the issue, as set out in the resolution providing for the submission of the bond issue proposition to the vote of the electors of the school district. In this resolution it is recited that the board of education has determined that for the proper accommodation of the pupils of said school district "it is necessary to improve the building and property of said school district," and the resolution provides for the submission of the question

of issuing bonds of said school district in an amount of $80,000.00 "for the purpose of building, enlarging and improving school facilities." The purpose stated is exceedingly indefinite, and it is sufficient to say in this connection that an issue of bonds under the authority of section 7625 General Code should be for one or more of the specific purposes mentioned in said section.

By reason of the defect first above noted herein I am compelled to advise you that the proposed issue of bonds of this school district is invalid and that you should not purchase the same.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1494.

APPROVAL OF SALE OF CERTAIN ABANDONED CANAL LANDS IN NEWARK, OHIO, TO THE PHARIS TIRE AND RUBBER COMPANY OF NEWARK, OHIO.

COLUMBUS, OHIO, October 3, 1918.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of June 5, 1918, in which you enclose record of proceedings (in duplicate) leading up to the sale of certain abandoned canal lands in Newark, O., to The Pharis Tire and Rubber Company of Newark. These are proceedings had under an act passed by the General Assembly on March 21, 1917.

After a careful examination of said act, it is my opinion that the option rests with the lessees of said abandoned canal lands to surrender their leases and then receive a deed from the State of Ohio on condition that they pay into the treasury of the state the appraised value of said lands as fixed by the superintendent of public works.

The proceedings had in reference to the sale of a part of said canal lands to The Pharis Tire and Rubber Company seem to be regular and in conformity with the provisions of said special act and I therefore approve the same and consent to the sale of the lands therein described.

I am of the opinion that when said The Pharis Tire and Rubber Company surrenders the lease which it now holds from the state and pays the sum of six thousand dollars, the company would be entitled to a deed from the state.

I am forwarding said record of proceedings to the Governor of Ohio for his consideration.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1495.

FEES—MARSHAL—ON COMMITMENT IN STATE CASE TO WORKHOUSE IN ANOTHER COUNTY.

Where defendants are committed in a state case by the mayor of a village in one county to a workhouse in another county, by reason of an agreement under section 12384, *the marshal may be paid the fees prescribed by section* 12835 *of the General Code. Special provision having been made by statute for fees in such*

cases, the decision of the court of appeals in the cases of Haserodt vs. State, 6 Ohio App., 654, has no application. These fees are paid, as provided by section 12385, out of the general revenue fund of the county on the allowance of the county commissioners.

Section 12385 does not authorize the payment of any other fees in the case to the marshal, nor any fees to the mayor for his services in the case.

COLUMBUS, OHIO, October 4, 1918.

HON. C. M. CALDWELL, *Prosecuting Attorney, Waverly, Ohio.*

DEAR SIR:—I have your letter of September 14, 1918, as follows:

"We have had several cases under the so-called 'Tramp Law,' section 13409, General Code. In four cases defendants were sentenced to the Columbus workhouse by the village mayor. The prosecutions were all under the statute and not under ordinance.

In view of the decision of the court of appeals, as announced in circular No. 347, September 19, 1917, by the Bureau of Inspection and Supervision of Public Offices, holding that a chief of police is not entitled to fees in state cases, the question arises whether our village marshal is entitled to fees for transporting these prisoners to the workhouse.

The bureau plainly states that no fees can be taxed for either a chief of police or marshal.

1. Does this decision in any way affect the fees prescribed by statute for conveying to workhouse?

2. The offense being under the statute (section 13409) and not under an ordinance, can the marshal be allowed the fees prescribed by section 4132, General Code? And can they be paid out of the county treasury? Or, must they be paid from the village treasury? Or from the township treasury? You will note the mayor here is acting as ex-officio justice of the peace.

3. The defendants, in the aforesaid cases, having been convicted, and sentenced and transported to the workhouse, can the county commissioners, *in any event,* allow the fees of mayor and marshal, to be paid from the county treasury?

4. There being no constable available, if the mayor, acting as ex-officio justice of the peace, should appoint the marshal as special constable for that particular case, would the marshal be entitled to the fees of constable, and could the commissioners allow and pay them from the county treasury?"

The decision in the case of Haserodt vs. State, 6 Ohio App. Rep., 354, had reference to the general provisions of the statute regarding the fees of chiefs of police in state cases, and only affected the fees of marshals in state cases in so far as these fees were based upon the same general provisions of the statute. However, special provision is made in the statutes for fees in connection with the transportation of prisoners in such a case as submitted by you.

Section 12384 of the General Code provides:

"The commissioners of a county, or the council of a municipality, wherein there is no workhouse, may agree with the city council, or other

authority having control of the workhouse of a city in any other county, or with the board of district workhouses having a workhouse, upon what terms and conditions persons convicted of misdemeanors, or of the violation of an ordinance of such municipality having no workhouse, may be received into such workhouse under sentence thereto. The county commissioners, or the council of a municipality, are authorized to pay the expenses incurred under such agreement out of the general fund of the county or municipality, upon the certificate of the proper officer of such workhouse."

I take it that some agreement exists under this provision of law by virtue of which the prisoners referred to in your communication are committed to the Columbus workhouse by the village mayor.

Section 12385 G. C. provides:

"The sheriff, or other officer, transporting a person to such workhouse shall have the following fees therefor: Six cents per mile for himself, going and returning, and five cents per mile for transporting each convict, and five cents per mile going and coming for the services of each guard, to be allowed as in penitentiary cases, the number of miles to be computed by the usual routes of travel, to be paid in state cases out of the general revenue fund of the county on the allowance of the county commissioners, and, in cases for the violation of the ordinances of a municipality by such municipality on the order of the council thereof."

It will be noticed that this section makes specific provision for the fees of the transporting officer. There is nothing indefinite about it like was found in the general provisions of the statutes regarding the fees of chiefs of police and marshals in the case of Haserodt vs. State, supra, and therefore this section is not disturbed by that decision. However, attention might be called here to the fact that this statute only covers cases like you present, viz., those where the prisoner is being transported from one county to a workhouse in another county.

Section 4132 G. C., to which you refer in your second question, reads as follows:

"The officer having the execution of the final sentence of a court, magistrate, or mayor, shall cause the convict to be conveyed to the workhouse as soon as practicable after the sentence is pronounced, and all officers shall be paid the fees therefor allowed by law for similar services in other cases. Such fees shall be paid, when the sentence is by the court, from the county treasury, and when by the magistrate, from the township treasury."

This is a general provision concerning the fees of an officer for conveying prisoners to the workhouse, and is without application to the situation you present, in view of the provisions of section 12385, above set out. It will be noted, too, that since the prosecutions to which you refer are made under state statute, the fees of the marshal are to be paid out of the general revenue fund of the county on the allowance of the county commissioners, as provided in section 12385 G. C.

Answering your third question, beg to advise that while in such cases the fees of the marshal for transporting a prisoner to a workhouse in another county are to be paid out of the county treasury, this section does not warrant the payment to the marshal or the mayor of any other fees in connection with the prosecution. This department has heretofore held, as the Bureau of Inspection and Supervision of Public Offices has ruled, following the case of State vs. Haserodt, supra, that

the marshal can collect no fees in state cases, and in prosecutions such as those set out by you this would be true. The fees of the mayor are to be governed by the other provisions of the statute the same as in other state cases.

I take it that your fourth question is asked with a view to securing the payment of fees to the marshal for transporting prisoners to the workhouse in such cases as you refer to, and on the assumption that no provision is directly made by statute therefor. In view of the provisions of section 12385, to which reference has heretofore been made, it would seem unnecessary to give consideration to this last question.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1496.

FEES—PROBATE JUDGE—APPROVING BOND UNDER SECTION 5906.

No fees may be charged by the probate judge for approving sureties on a bond under section 5906 for the manufacture or storage of explosives. Neither is such approval of the probate judge required to be entered upon the journal of the court.

COLUMBUS, OHIO, October 4, 1918.

The Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I have your letter of recent date as follows:

> "May a probate judge legally tax any fees for approving sureties on a bond under section 5906 G. C., or any other section of the law that states he may or shall approve such sureties? Is such approval an official action required to be entered upon the journal of the court, and, if so, is same to be indexed?"

Section 5906 of title 2, chapter 7, relative to explosives, reads:

> "A person, partnership or corporation shall not manufacture such explosives or store more than one hundred pounds thereof without giving bond in the sum of five thousand dollars in each county in which such explosives are manufactured or stored, to the county commissioners of such county, with such surety or sureties as is approved by the judge of the probate or common pleas court of such county, conditioned for the payment of all damages that may be caused to persons or property by reason of an explosion of any of such substances and without filing with the chief inspector of workshops and factories a sworn statement that such bond has been approved and filed."

The fees of the probate judge for the services rendered by him are set out in sections 1601 and 1602 of the General Code. In neither of these sections can be found any fee for such service as the judge performs under section 5906, above set out.

Section 1603 provides:

> "For other services for which compensation is not otherwise provided by law, the probate judge shall be allowed the same fees as are allowed the clerk of the court of common pleas for similar services."

The fees of the clerk of the common pleas court, to which reference is made in section 1603, just quoted, are provided for in sections 2900 and 2901 G. C. I can find no provision in these sections covering any such service as is rendered by the probate judge under section 5906 G. C. It is true that section 2900 provides that the clerk shall receive "for taking undertaking, bond or recognizance, twenty-five cents." It has been suggested that this service is perhaps similar to that rendered by the probate judge under section 5906, but I am not inclined to this view. It seems to me that the service of the clerk, to which reference is made in section 2900, is quite different from that rendered by the probate judge, and after careful examination of the statutes I can find no provision authorizing the payment to the probate judge of any fee for his approval of the bond under section 5906 G. C., and must therefore conclude that no fee may be allowed him for this service.

Answering your further inquiry as to whether or not the approval of the bond under section 5906 is such an official action as should be placed upon the journal, Section 1594 G. C. provides in part:

> "Section 1594.—The following books shall be kept by the probate court: * * * *.
>
> "5. A journal in which shall be kept minutes of official business transacted in the probate court, or by the probate judge, in civil actions and proceedings.
>
> " *
>
> "11. A record of bonds, in which shall be recorded bonds of executors, administrators, guardians, trustees and assignees which have been taken and approved by him."

I do not believe the approval of the explosive bond under section 5906 should be entered on either of the above records, nor do I know of any other provision requiring or authorizing any record of such action to be made. The approval of the bond itself would seem a sufficient record of such act by the probate judge.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1497.

APPROVAL OF BOND ISSUE OF CLAYTON TOWNSHIP RURAL SCHOOL DISTRICT, PERRY COUNTY, OHIO.—$5,000.00.

COLUMBUS, OHIO, October 7, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

> In Re: Bonds of Clayton Township Rural School district, Perry county, Ohio, in the sum of $5,000.00, under the authority of section 7630-1 General Code, for the purpose of constructing and equipping a new school building to replace building destroyed by fire.

I have carefully examined the corrected transcript of the proceedings of the board of education of Clayton Township Rural School district, Perry county, Ohio, relating to the above issue of bonds and find said proceedings to be in conformity to the provisions of the General Code of Ohio relative to bond issues of this kind.

I am therefore of the opinion that bonds properly prepared according to bond form submitted will, when the same are properly executed and delivered, constitute valid and binding obligations of said school distrtict, to be paid according to the terms thereof.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1498.

MUNICIPAL CORPORATION—LIABLE TO CONTRACTOR FOR OBSTRUCTION OF WORK, WHEN—HOW MAY BE ADJUSTED.

Where a municipality enters into a contract for the improvement of a street and then fails to permit the contractor to proceed with said improvement according to the terms of the contract, said contractor would have a claim against the municipality for damages on account of said failure. To adjust this claim for damages the council of the municipality by ordinance or resolution may authorize the city solicitor or the director of public service to adjust said claim for an amount specified by council in its ordinance or resolution.

COLUMBUS, OHIO, October 7, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I have your communication of August 29, 1918, which reads as follows:

> "We are enclosing herewith several communications between this office and Mr. W. F. MacQueen, city solicitor of Niles, Ohio, and respectfully request your written opinion upon the following matter:
> May the $3,200.00 additional legally be paid the contractor?"

To said letter a number of communications are attached which are too long to quote in full, but, briefly stated, the facts upon which you desire my opinion are as follows:

On September 2, 1916 the director of public service of the city of Niles entered into a contract with James DeJute, for the improvement of a part of South Main street of said city. The contract provided that the work was to be completed in the spring of 1917, one clause of the contract reading:

> "It is further agreed that the necessary fill shall be made immediately after the completion of this contract, and that the balance of said contract shall not be performed until after the weather conditions permit the completion thereof in the spring of 1917."

The necessary fill was made in the fall of 1916, but it afterwards developed that the county commissioners of the county in which Niles is located began the construction of a bridge located upon this same street and upon that part of the street which was to be improved under the terms of the contract. This made it impossible for the contractor to carry out the conditions of the contract and the director of public service of the city of Niles requested the contractor to discontinue his work until after the bridge was completed. This continued until June 1, 1918.

Owing to the increased cost of labor and material, the contractor objected to proceeding with the improvement under the consideration set out in the contract. The officers of the city of Niles were willing that the contractor should be given an additional consideration and the council upon motion authorized the director of public service to enter into a supplemental contract, by virtue of which the contractor was to receive thirty-two hundred dollars additional compensation. This supplemental contract was entered into and under it the contractor proceeded to complete the improvement according to the plans and specifications upon which the original contract was let.

The question now is as to whether the city of Niles under the circumstances is warranted in law in paying said contractor the additional sum of thirty-two hundred dollars, as provided in the supplemental contract. I am of the opinion that the director of public service had no authority in law to enter into the supplemental contract with the contractor.

You suggest in a communication to the city solicitor of Niles, under date August 29, 1918, that the director of public service had no authority to enter into the supplemental contract with Mr. DeJute, for the reason that it did not comply with the provisions of section 4328 G. C. This section provides in short that the director of public service enter into no contract in which the consideration exceeds five hundred dollars, unless such expenditure shall first be authorized and directed by ordinance of council.

In the case submitted by you, the council gave authority to the director of public service to enter into the supplemental contract, but only upon motion, and not by ordinance. However, it is my opinion that section 4328 G. C. does not apply to the contract under consideration. This contract was a supplemental one and section 4328 applies only to original contracts or agreements. This was distinctly held by the court in Burke vs. Cleveland, 6 O. N. P. (N. S.) 225. The decision of the court of common pleas was affirmed without report by the supreme court of the state and hence is entitled to considerable weight. Notwithstanding the fact that the supplemental contract did not run counter to the provisions of section 4328 G. C., it is my view that the same is void and of no effect for the reason that no certificate had been made by the proper municipal officer, stating that the money required to carry out the obligations of the contract was in the treasury of the city of Niles. For this reason we can entirely lay aside the consideration of this supplemental contract. The contractor could not recover by virtue of the contract; neither has he, or the city, any rights arising from the same.

You further ask whether there is any method under and by virtue of which the city of Niles could legally pay the contractor for damages he suffered because of the failure of the city to deliver the street to him at the time provided for in the contract. The contractor undoubtedly had the right to assume that he would be given possession of the street and be permitted to carry out the terms of his contract in the fall of 1916 and the spring of 1917.

The city of Niles made a specific and definite contract with DeJute, to the effect that he might perform the obligations of the contract to be performed by him in the fall of 1916 and the spring of 1917. If the city had desired this part of the obligation dependent upon any other conditions whatsoever, it should have embodied such stipulations in the contract.

It is true the city of Niles did not directly interfere with the progress of the work by the contractor. This interference was caused by the acts of a third party, namely, the commissioners of the county of Trumbull. Notwithstanding this, I am of the opinion that the city of Niles is responsible for the acts of the county commissioners. This street was in the possession of the city. The contractor had

no authority whatever over this street and he could not be held, like the city itself, to be bound by the acts of the county commissioners.

In support of this view I will call attention to a decision or two of the courts.

In The Ross Road Machine Co. vs. M. S. Forbus, 23 W. L. B. 217, the court rendered a decision in reference to a matter very similar to the one under consideration, the decision being rendered by the superior court of Cincinnati. In this case the plaintiff, the Ross Road Machine Co., entered into a contract with the defendant, M. S. Forbus, to perform all the labor in the rolling required on certain streets in Cincinnati. Mr. Forbus had entered into a contract with the city of Cincinnati for the improvement of said streets and the plaintiff then entered into a contract with Mr. Forbus to do all work necessary for the rolling of the streets. The plaintiff rolled a number of the streets but the defendant prevented it from rolling certain other streets provided for in the contract between the plaintiff and defendant.

The plaintiff brought action against the defendant for damages due to a breach of contract. The defendant set up, by way of answer to the petition

> "that without fault on the part of the defendant, but solely through the fault of the city of Cincinnati, they (the defendants) have been unable to perform his said separate contract for the improvement of Vine street, and that no rolling has been required or done by plaintiff or defendants on said street."

In other words, the city had intervened and had prevented Mr. Forbes from improving Vine street, and inasmuch as the same had interfered with him, he was not able to carry out his part of the contract with the plaintiff, The Ross Road Machine Co., in so far as the contract applied to Vine street. The plaintiff in the case demurred to the answer of Mr. Forbus on the ground that it did not state facts sufficient to constitute a cause of action. The court held the demurrer to be well taken and sustained the same. It held that Mr. Forbus had entered into an absolute agreement to employ plaintiff to roll Vine street and that, impliedly at least, such agreement included an agreement that the city would allow such contract to be performed, and if the city did not do so, it became a breach of contract upon the part of the defendant. The court held that if the defendant had not desired to stand responsible for a possible interference upon the part of the city, he ought to have embodied such a condition in his contract.

This case is very similar to the one we are considering. The city of Niles entered into an absolute agreement with Mr. DeJute, for the improvement of a certain street. Over this street both the city and the county have certain rights. If the city desired to relieve itself from any acts which might be performed by the county, in reference to said street, it ought to have embodied such a condition in the terms of its agreement with Mr. DeJute.

I will also direct your attention to the case of Pennsylvania Rd. Co. vs. Reichert, 58 Md. 261. In this case the Pennsylvania Rd. Co. had agreed with Casper Reichert to construct for him a ditch or trestle which would connect with the Cumberland & Pennsylvania Rd. Co. It afterwards developed that the Cumberland & Pennsylvania Rd. Co. refused consent to the Pennsylvania Rd. Co., to construct said trestle under the terms of its agreement.

Reichert brought action for damages against the Pennsylvania Rd. Co. The defendant defended on the ground that it was prevented from carrying out the terms of its contract because of interference upon the part of the third party. The court held this defense not to be well taken; that the Pennsylvania Rd. Co. had entered into an unconditional agreement or undertaking to build said trestle and that it was bound so to do or be answerable in damages for not so doing; that if

it had desired to be relieved from its undertaking or agreement upon certain conditions, those conditions should have been embodied within the terms of its contract with Mr. Reichert.

Hence from the above and other decisions which might be noted, I am of the opinion that the city of Niles is answerable in the case submitted to me, for the acts of the commissioners of said county. It seems to be agreed upon the part of the city of Niles and the contractor that he was greatly delayed in the performance of his contract on account of the acts of the county commissioners; that in the meantime the price of labor and material necessary for the improvement of said street had greatly increased and that therefore the contractor was damaged because of the fact that the commissioners interfered with his completing the contract according to its terms and specifications and that he was damaged without any fault whatever upon his part. If this be true, the conclusion evidently is that the contractor has a right of action against the city for damages suffered by him in the improvement of said street.

That the contractor would have a right of action against the city, if he were unreasonably delayed in performing the part of the contract to be performed by him, seems to be clearly held by the court of appeals for Delaware county in City of Delaware vs. The Metropolitan Construction Co., 21 C. C. (N. S.) 137. The first branch of the syllabus reads as follows:

> "Whether or not a contractor was hindered, to his damage, in the completion of a street improvement by the action of the city engineer in suspending the work at times and by obstruction of the street by the building of a bridge and failure to cause railway tracks to be removed, are questions for the jury under the evidence, and a finding by the jury in favor of the contractor upon such an issue will not be disturbed by a reviewing court where not manifestly against the weight of the evidence."

In the opinion on p. 142 the court say:

> "The ground of recovery as claimed by said contractor was based upon the allegations in said amended second cause of action of the defendant in error that said contractor was unnecessarily and wrongfully obstructed, delayed and hindered in the prosecution of carrying out said contract within a reasonable time by the action of the plaintiff in error, and that as a result thereof said contractor suffered loss and damage as claimed in said cause of action. It need scarcely be remarked that the rights of the parties hereto are to be governed by the provisions of said contract, of which the specifications attached thereto form a part. As is usual in such cases, the specifications point out the manner in which the work of the improvement shall be done, the kind of material to be furnished and the prices to be paid therefor, and in this instance no time limit was named for the completion of said improvement. One of the streets to be improved was represented to be one of the main thoroughfares of said city and it was undoubtedly the intent and purpose of the contracting parties that the work thereon should be done in a reasonable time after the work was commenced to avoid inconvenience to the traveling public and other resulting disadvantages to the inhabitants of said city. It is sufficient to say that in the absence of a time limit being fixed for the performance of the contract the implication is that a reasonable time for performance is intended."

Further on in the opinion (p. 143) the court lays down the following principle of law:

"As already stated, no time limit having been fixed in said contract for the completion of said work, said city would have reason to expect that said improvement would be completed within a reasonable time, and in the absence of intervening causes over which the contractor had no control, the contractor would be liable for a breach of such contract, and, on the other hand a corresponding obligation would rest upon said city not to unreasonably delay the contractor in the prosecution of his work, for one party to a contract may make it impossible to perform the contract, or may delay the performance, or if a contractor has himself suffered damage by reason of such delay he may recover damages."

The case I am considering is considerably stronger to the effect that the contractor would have a right of action for damages against the city because of the fact that in this case the contract specifically provided that Mr. DeJute was to complete it in the spring of 1917, while in Delaware vs. Construction Co., supra, there was no time limit set out in the contract.

If the city is liable for damages to the contractor, the question then arises as to whether the city might adjust this claim for damages and settle the same amicably. It is my opinion that it can do so.

Dillon in his work on Municipal Corporations, section 822, lays down the following proposition:

"As a general proposition, municipal corporations have, unless specially restricted, the same powers to liquidate claims and indebtedness that natural persons have, and from that source proceeds *power to adjust all disputed claims,* and when the amount is ascertained to pay the same as other indebtedness. It would seem to follow therefrom that a municipal corporation, unless disabled by positive law, *could submit to arbitration* all unsettled claims with the same liability to perform the award as would rest upon a natural person, provided, of course, that such power be exercised by ordinance or resolution of the corporate authorities. * * *."

In the City of Shawneetown vs. Baker, 85 Ill. 563, the court laid down the following proposition in the second branch of the syllabus:

"As a general proposition, municipal corporations have the same power to liquidate claims and indebtedness that natural persons have, and from this proceeds the power to adjust all disputed claims, and, when the amount is ascertained, to pay the same, as other indebtedness."

The court in its opinion fully sustains the principle set forth in the syllabus.

In Kane vs. City of Fon du Lac, 40 Wis. 495, the court lays down this proposition in the syllabus:

"A city, unless restricted in that respect by its charter, may submit a disputed claim against it to arbitration; and the common council of the defendant city had the right, in such a case, to entrust the selection of the arbitrators to the city attorney."

It would seem to be clearly logical that inasmuch as the municipal corporation has the power to sue and to be sued, it would also have the power to adjust claims against it. It would be a peculiar doctrine to hold that a city might be sued and yet could not avoid the necessity of a suit by adjusting the claims which might be

brought against it. In other words, the power to be sued carries with it the power to adjust. This appears to be the theory upon which the courts and text writers have based their findings.

In Springfield vs. Walker, 42 O. S. 543, the court in its opinion quoted with approval the following from Dillon on Municipal Corporations (p. 546):

> "As a general proposition, municipal corporations have the same powers to liquidate claims and indebtedness that natural persons have, and from that source proceeds power to adjust all disputed claims, and when the amount is ascertained, to pay the same as other indebtedness. It would seem to follow, therefore, that municipal corporations, *unless disabled by positive law,* could submit to arbitration all unsettled claims with the same liability to perform the award as would rest upon a natural person, provided, of course, each power be exercised by ordinances or resolution of the corporate authorities."

Hence from all the above I am of the opinion that the city of Niles can at this time adjust the matter of damages with Mr. DeJute. The council could adopt an ordinance designating one of the city officials—either the city solicitor or perhaps the director of public service—to adjust this claim with the contractor, fixing a limit beyond which he could not go in said adjustment.

If the contractor and the officer so designated by the council can agree upon the amount of damages which should be paid to him by the city, whether it be thirty-two hundred dollars or some other amount, the officer so designated could make his report to the council and the same could be paid. Of course the city would have to make provision for the payment of the amount agreed upon. However, I am making no suggestions as to this matter, as it is not referred to in your communication.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1499.

MUNICIPAL CORPORATIONS—CHARTER—NON-CHARTER—POWER TO ADOPT AND ENFORCE POLICE OR SANITARY REGULATIONS—MAY NOT PASS ORDINANCE PROHIBITING DRIVING OF MOTOR VEHICLES WITHOUT LICENSE.

A non-charter municipality to which, by the General Code, power has been delegated to adopt and enforce particular police or sanitary regulations, may exercise this power by passing ordinances making such regulations, even though similar regulations are provided by the general statutes of the state; and may punish violations of such ordinances by fines, which, when recovered, belong to the municipal treasury.

Such municipal regulations may be identical with, more drastic than, or more lenient than those of the state law, and may prescribe different penalties for their violation, without necessarily conflicting with the general law. Only when they purport to affirmatively authorize something which the general law prohibits or to prohibit something which the general law purports affirmatively to authorize, can there be said to be a "conflict" between them and the general law; but in case such conflict is established, the general law controls and the municipal ordinance must be regarded as invalid.

Such a municipal corporation may not, under favor of such a specific grant, merely make the violation of the state law a municipal offense and annex a penalty to the commission of that offense, which, if a fine, is upon recovery to belong to the municipal treasury. The municipal power is that to "regulate" and unless the power to enforce the state regulation has been specifically granted, such power to regulate must be exercised by prescribing substantive rules of conduct.

In cases in which the municipal code grants to municipal corporations police powers in very general terms, such as "to provide for the public health," or "to preserve the public peace," a "conflict" between an ordinance passed in the exercise of such power and the state law upon the same subject more readily appears. In such case it may be deemed to have been the intent of the General Assembly that its enactment should be exclusive and amount to an exception to the general grant. Where this is the case a municipal ordinance on the same subject as that of the state law may be held invalid.

The case of Fremont vs. *Keating, 96 O. S. 468, is authority for the conclusion that all municipal corporations, both charter and non-charter, have power emanating directly from Article* XVIII, *section 3 of the Constitution, as amended, to adopt and enforce within their limits such local police and other similar regulations as are not in conflict with the general law. If this grant of power be looked to as the source of the authority of the municipality to adopt a particular police regulation, the question of conflict with the general law must be solved by determining whether or not it attempts to sanction something which is prohibited by general law applicable throughout the state, or to prohibit something which for reasons existing generally throughout the state has been sanctioned by the general law. If either of these conditions exist the ordinance will be invalid.*

Under existing charters which have been examined, it does not appear that there is any perceptible difference between the powers of charter municipalities and those of non-charter municipalities with respect to the adoption of police regulation. The same may be said as regards powers of municipalities which have adopted additional laws passed by the General Assembly.

A municipality may not pass an ordinance prescribing in effect a municipal penalty for the violation of the state law covering the driving of automobiles without a license. Any municipality may, however, require of its residents a license for the operation of motor vehicles or other vehicles upon its streets, and may punish by fine the violation of such ordinances.

Any municipality may adopt and enforce by fine an ordinance prohibiting the standing or driving of vehicles on its streets without lights.

There is great doubt as to the power of any municipality to adopt and enforce an ordinance prescribing and punishing the offense of resisting an officer.

COLUMBUS, OHIO, October 7, 1918.

The Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I have your letter of recent date in which you submit for my opinion the following:

> "We respectfully call your attention to court decision 96 O. S., 468, Article XVIII, section 3, Constitution of Ohio, Opinion of the Attorney-General No. 1080 under date of March 16, 1918, and Opinion No. 2063, found in Opinions of the Attorney-General for 1916, page 1839, and respectfully request your written opinion upon the following matters:
>
> *Question* 1.—Can a non-charter governed city pass ordinances covering driving automobiles without license (see section 12,620 G. C., allowing ma-

chine to stand without lights. See section 12,614-3 G. C., 107 O. L., 58, resisting and obstructing an officer. See section 12,858 G. C.) and try such cases under ordinance and cover the fines into the municipal treasury?

Question 2.—Can a charter governed city proceed as set forth above?"

You have verbally advised me that the ordinances mentioned by you are intended as illustrations or examples merely and what you particularly desire is a reconsideration of the opinion of 1916, in the light of the decision of the Supreme Court cited by you, and with regard to the powers of non-charter and charter cities respectively.

The opinion of 1916 is so short that I feel it will not unduly burden this opinion to quote it in full:

"COLUMBUS, OHIO, November 27, 1916.

The Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your letter of November 15, 1916, wherein you ask the following question:

'In cases in which the state laws provide fines and penalties for violation of state laws, and further provide, either specifically or by general statute, that such fines when assessed in municipal courts, police courts, mayors' courts, or other courts, shall be paid into the treasury of the county, may the council of a municipality legally pass ordinances covering the same points, try such cases under said ordinances, and thereby divert the fines into the treasury of the municipality?'

Your question is so general that I shall not undertake to answer same except generally. The rule of law in Ohio is that a municipality, within the limits of the powers granted to it, may enact ordinances to punish the same acts as are punished by state laws, and having done so may punish the offenders under said ordinances. A prosecution under the ordinance, however, would not bar a prosecution under the state statutes.

See Koch vs. State, 53 O. S., 433.

In cities other than charter cities it has been held, prior to the amendment of section 3664 G. C., 103 O. L., 168, that an ordinance could not be passed punishing assault and battery.

Wellsville vs. O'Connor, 1 O. C. C., n. s., 253.

The case of in Re Smith, 14 N. P. n. s., 497, decided that an ordinance could not be passed punishing the act of resisting a person called to assist an officer.

In Hughes vs. Cincinnati, 14 N. P., n. s., 494, it was held that drunkenness not amounting to a disturbance of the peace could not be punished by ordinance.

Jeffries vs. Defiance, 25 W. L. B., 68; in re Fitzsimmons, 13 N. P., n. s., 104.

It would seem from the foregoing decisions that the power of council of non-chartered cities to pass ordinances prescribing a punishment is limited to the powers conferred on municipalities by the legislature, but that in certain cases council may pass ordinance punishing the same acts as would constitute misdemeanors under state laws.

Answering your question, therefore, I am of the opinion that council of non-chartered municipalities may legally pass ordinances within the powers granted to them by statute covering the same acts as are covered by the penal statutes of the state, try such cases under said ordinances and cover the fines collected thereunder into the treasury of the municipality."

The decision referred to by you is that in the case of The City of Fremont vs. Keating, the citation of which you have given. The syllabus in that case is as follows:

"1. Section 6307, General Code, is in direct conflict with the provisions of section 3 of Article XVIII of the Constitution of Ohio, authorizing municipalities to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws, and is therefore unconstitutional and void.

2. Where imprisonment may be imposed as a punishment for the commission of an offense, the accused is entitled to a trial by jury.

3. In such case, the fact that imprisonment was not actually included as a part of the punishment imposed by the sentence of the court cannot affect the right of the accused to a jury trial."

The opinion of Donahue, J., is as follows:

"Section 3 of Article XVIII of the Constitution of Ohio, as amended September 3, 1912, provides among other things that municipalities shall have authority to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

Section 12604, General Code, provides that 'Whoever operates a motor cycle or motor vehicle at a greater speed than eight miles an hour in the business and closely built-up portions of a municipality or more than fifteen miles an hour in other portions thereof or more than twenty miles an hour outside of a municipality, shall be fined.' etc.

This statute is a police regulation, and, under the section of the constitution above referred to, the municipality has the right to adopt and enforce within the limits police regulations in regard to the same subject matter, not in conflict with this statute.

Notwithstanding this right conferred upon municipalities by the constitution of Ohio, section 6307, General Code, specifically provides that local authorities shall not regulate the speed of motor vehicles by ordinance, by-law, or resolution. It is sufficient to say that the general assembly of Ohio cannot deprive a municipality of its constitutional rights. This section is clearly in violation of section 3 of Article XVIII of the Constitution of Ohio, and void.

Section 17 of the ordinance under which this prosecution was brought provides that no vehicle shall be operated at a greater speed than eight miles per hour in the business or closely built-up portions of the city, or fifteen miles an hour in any other portion of the city, excepting bicycles, which are provided for under another ordinance.

This section of the ordinance is not in conflict with the provisions of section 12604, General Code, and was passed by the council in the exercise of its constitutional authority, and is therefore a valid and subsisting ordinance of the city of Fremont, Ohio.

It is claimed, however, that this ordinance is in conflict with the general law on the same subject matter, for the reason that it prescribes a different punishment than that prescribed by the statute of the state.

This question is not important in the disposition of this case, for even if it were conceded that a municipality has the authority under the provisions of section 3 of Article XVIII of the Constitution of Ohio, as

amended September 3, 1912, to prescribe a different punishment than provided in the statute covering the same subject matter, nevertheless this ordinance in question provides that imprisonment may be a part of the penalty. In such case, the accused is entitled to a jury, and it is the right of the defendant to be so tried, regardless of whether the sentence imposes a term of imprisonment or not. Inwood vs. State, 42 Ohio St., 186; Thomas vs. Village of Ashland, 12 Ohio St., 124, and Summons vs. State, 75 Ohio St., 346, 350, 351.

It does not appear from the record that the defendant waived a jury, and without such a waiver the mayor had no authority to hear or determine the guilt or innocence of the defendant, and for this reason the judgment of the court of appeals is affirmed."

Obviously this decision, in so far as it holds or assumes that councils of municipalities have power, springing directly from the constitution, to adopt such local police, sanitary and other similar regulations as are not in conflict with general laws and hence have no means of express delegation of such power by the General Assembly, whether they have adopted charters or not, is inconsistent with the opinion of 1916, which held, it will be observed, that the council of such a city would have to look to the General Code for authority to adopt police regulations pertaining to particular subjects.

So far as non-charter cities are concerned, however, it is obvious that the opinion of 1916 fully covers such cases as may be dealt with by statute conferring police powers upon municipal corporations, and nothing in that opinion to that effect is impaired by the decision cited. That is to say, in so far as the opinion holds, in the language of its concluding paragraph, that "councils of non-charter municipalities may legally pass ordinances within the powers granted to them by statute covering the same acts as are covered by the penal statutes of the state, try such cases under said ordinances and cover the fines collected thereunder into the treasury of the municipality," this conclusion stands unimpaired by anything decided in Fremont vs. Keating, supra. It is only the conclusion of the immediately preceding paragraph of the opinion, to the effect that "the power of council of non-charter cities to pass ordinances prescribing a punishment is limited to the powers conferred on municipalities by the legislature," that appears to be shaken by the general trend of the opinion and syllabus in the Fremont case.

I might make the same criticism of the question you now submit as was made respecting the question submitted in 1916. It is so general that I must answer it in very general terms. I may say, however, that even a general treatment of the question raises problems that have seemingly given rise to the greatest difficulty in the courts of this state and of other states having similar constitutional provisions, and I am bound to say that some of the conclusions which I shall reach cannot be advanced with much assurance in the present state of the law on these subjects.

My investigation leads me to divide the first general question, which you say you wish to have considered, into several parts as follows:

(1) Where the legislature of the state has by explicit enactment delegated regulatory or police powers to municipal corporations with respect to particular subject matters, and there is a general law of the state embodying general regulations applicable within the territory of municipal corporations respecting the same subject matters, may the council of a non-charter municipality adopt a code of regulations regarding such subject matters, as is covered by state law, and provide for the enforcement of the same by penalties in the nature of fines, which when recovered are to go into the municipal treasury?

This question in turn is divisible into three parts, as follows:

(a) May the municipal regulations thus to be enforced prescribe more rigid standards of conduct than those of the state law?

(b) May such regulations prescribe exactly the same standards of conduct as those prescribed by the state law?

(c) May such regulations impose less stringent standards of conduct than those prescribed by the state law?

(2) Under the same conditions as those set forth in the general part of the first question, may a municipal council, without setting up any local code of regulations, merely annex a municipal penalty to the violation of the state code within the territorial jurisdiction of a municipality, and thus bring prosecutions for the violation of the state code within the class of ordinance cases, and receive fines therefor into the municipal treasury? As an example of what I mean here, let your first question be interpreted so as to relate to a supposititious ordinance to the following effect:

> Be it ordained by the council of the city of _____:
>
> Section 1: No person shall operate a motor vehicle in the streets or alleys of the city of _____ without first securing a license therefor, as provided by the general laws of the State of Ohio.
>
> Section 2: Any person violating section 1 of this ordinance shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not to exceed ten dollars and costs, to be paid into the city treasury.

(3) Where the General Assembly has delegated police powers to municipalities, subject to general laws, i. e., non-charter cities, in general terms, relating to some subject matter, and the state laws contain specific police regulations operating within the municipal corporation, pertaining to the same subject matter, may the councils of such cities adopt specific regulations of any of the three characters mentioned in stating the first question as I have stated it, relating to the matters dealt with by the state law?

(4) Where the General Assembly of the state has not delegated any police power to non-charter municipal corporations, respecting a given subject matter, but has regulated such subject matter for the state at large, including municipal corporations, by enactments of its own, may the councils of such cities take such action as is described under the three headings in stating the first question?

(5) Your question does not require me to consider the power of a municipality, governed by the municipal code, to adopt and enforce within its limits local police, sanitary and other similar regulations, in the absence of any legislative delegation of authority to do so with respect to a given subject matter, and also in the absence of any state legislation with reference to the same subject matter. It is obvious, however, that the answer to the fourth general question, as I have phrased it, will suggest the answer to such a question.

The general part of the first of these questions, as I have phrased them, was dealt with in the opinion of 1916, which has been quoted in full. That opinion, however, did not go into detail by considering the three possible aspects of such municipal legislation as I have outlined them. I have previously stated that nothing in the decision or opinion in Fremont vs. Keating, supra, impaired the effect of so much of the opinion of 1916 as dealt with this question, and but for the appropriateness of going into detail, as I have suggested, I could rest a general affirmative answer to the first question upon the authority of the opinion of 1916. However, the detailed classification which I have suggested arises from the necessity of con-

sidering the validity of municipal regulations adopted under specific statutory authority as against the claim that they conflict with the general law on the same subject. At the present time Article XVIII, section 3, of the Constitution is in force and on its face purports to grant to municipal corporations " the power to adopt and enforce within their limits such local police, sanitary and other similar regulations, *as are not in conflict with general laws.*" Without at this time considering whether this provision is self-executing and applies to all municipalities, whether they have adopted charters or not, and assuming for the moment that it might be held to apply to non-charter cities, at least to the extent that the General Assembly had delegated power to pass particular police, sanitary and other similar regulations to such cities, its effect as to such non-charter cities may be considered as in the nature of a limitation prohibiting such cities from acting under their legislative powers in such manner as to conflict with the general law.

However, as applied to such non-charter cities in this way, I do not believe that Article XVIII, section 3, adds anything to the law as it would be if the section were not in force. That is to say, in the absence of a grant of power emanating from the constitution, or any limitation in the constitution upon the local police powers of a municipality, it would, I think, necessarily be true that local police regulations, though adopted under favor of legislative delegation and authority, would have to yield to general laws when in actual conflict therewith. It must be admitted that cases on this point are not numerous in this state, for most of the cases which have held ordinances invalid as in conflict with state laws are those in which the ordinances were adopted under favor of statutory authority which either expressly or by implication was limited to the adoption of such regulations as might not be inconsistent with the state law.

City of Canton vs. Nist, 9 O. S., 439.

See the varying results in the following liquor cases:

Ackerman vs. Lima, 7 N. P. (n. s.) 93; Columbus vs. Schaere, 5 O. D. N. P., 100; Emory vs. Elyria, 8 N. P., 208; Edis vs. Butler, 8 N. P., 183.

The case which comes perhaps nearest to laying down the principle stated is that of State vs. Prendergast, 8 C. C., 401, in which a regulation of the department of health in Cincinnati, relative to qualifications for practicing medicine in Cincinnati was held to be inconsistent with the state law regulating the practice of medicine, which the court regarded as by inference authorizing all who might comply with its terms to practice medicine anywhere in the state. The following language is quoted from the opinion in the case:

> "The General Assembly itself having assumed to legislate upon the subject, and by general law, made provision as to the persons who are authorized to practice medicine in the state, unless specific and express power has been conferred upon the municipal corporation to impose additional restrictions upon, and deprive them of the right to do so, unless with the consent and approval of an officer of the city, to be enforced by fine and imprisonment, such regulations cannot be upheld, and we think no such power has been conferred."

Upon a moment's reflection it will appear that the operation of the principle now under consideration may be regarded as purely academic, for in all cases where the legislature has dealt with a given subject by passing police regulations, and has

at the same time delegated to municipal corporations the same power to enact similar police regulations respecting the same subject, the first question to be considered must necessarily be as to whether or not the General Assembly intended its general regulations to impose any limitation upon the power of the municipality to act under the authority which it had delegated to the municipality. If the answer to this question were in the affirmative, then the municipal regulations would be held invalid, because not within the grant of power which was subject to the implied limitation; if in the negative, then the municipal regulations would be upheld because the General Assembly would be deemed to have intended that its general law should be supplemented by local action under its delegation of powers to municipal corporations. In neither event would a "conflict" appear. Moreover, some of these cases come more appropriately within the third general class above set forth and must be discussed in that connection, and, as will appear from a discussion of the three subdivisions in which I have divided the first general question, cases in which a conflict might be claimed would necessarily be very rare. Therefore, with the intention of returning to this general question, after having discussed the three subdivisions thereof, I pass immediately to the subdivisions.

The second of these subdivisions may be immediately disposed of as a question of Ohio law. It has been laid down by the Supreme Court of this state in several cases, among them Koch vs. State, supra, and as late as Fremont vs. Keating, that where a municipal corporation is given power to deal specifically with a given subject matter by way of police regulation, and chooses to set up such regulations as prohibit the doing of an act already prohibited by the general law of the state, making such action a violation of its ordinances, there is no "conflict" with the general law and the ordinance is valid. Indeed, this reasoning runs through the entire gamut of the cases in Ohio, the Nisi Prius liquor cases, in which ordinances were held invalid, being predicated upon the ground that invalidity followed from the fact that the municipal ordinances did not conform to the state law.

In this connection, however, I note the existence of a line of authorities in California, and perhaps elsewhere, in which a contrary result was reached under constitutional grant of authority to local communities, couched in exactly the same terms as are now found in Article XVIII, section 3, of the Ohio constitution. California has had this provision in her constitution for a number of years and undoubtedly Ohio may be said to have borrowed the provision from the constitution of that state in 1912. It is, of course, familiar law that when the people or the legislature of one state adopt a constitutional provision, or enact a statute which has previously received a judicial interpretation in another state, it will be deemed to have done so with full knowledge of such judicial interpretation and to intend that the same meaning shall be given to the provision, constitutional or statutory, as has been given to it by adjudication in the state from which it was adopted. This rule being settled, I find myself obliged to take cognizance of the decision in Re Sic, 73 Calif., 142, to the effect that under constitutional grant of authority, to make and enforce within its limits all such police, sanitary and other regulations as are not in conflict with general laws, a city cannot pass an ordinance to punish the identical offense which is punishable by statute applicable to the state generally. However, I find the following in the opinion of the court in that case, at page 148:

> "It would seem that an ordinance must be conflicting with the general laws which may operate to prevent a prosecution of the offense under the general law. The constitution provides that no one shall be twice put in jeopardy for the same offense. If tried and convicted or acquitted under the ordinance, he could not be again tried for the same offense under the

general law. The contrary doctrine has been held in some states, but this conclusion seems more in consonance with reason and justice."

It appears from this language that the California court worked out the idea of "conflict" upon the basis of the assumption that a person convicted of offending against an ordinance could not be convicted of the same act as an offense against the state law. The contrary, however, was held in Ohio in Koch vs. State, supra, overruling the dictum in Wightman vs. State, 10 O. 452. We are therefore obliged to work out a result by applying two principles which in this case operate in different directions. On the one hand, the principle that decisions under the constitutional provisions, adopted from another state, will be regarded as applicable to the adopted constitutional provision in the adopting state, must be taken into account; while on the other hand the fact that the decision in the state from which the adoption was made is based upon a principle which does not hold good in the adopting state must be given due weight. It is my opinion that in Re Sic does not state the law in Ohio, and whatever may be the effect of Article XVIII, section 3, upon the powers of any class of municipalities in Ohio, Koch vs. State controls on the point as to the existence of a supposed "conflict" between a municipal ordinance and the state law, both punishing the same act.

For all these reasons, then, I am of the opinion that where a non-charter municipal corporation is authorized by general law to pass police regulations upon a particular subject, and there is in force a state law embodying similar regulations respecting the same subject, the council of the municipal corporation may lawfully enact an ordinance identical in substance, though perhaps different in penalty, with the state law.

This conclusion calls for a consideration of the other two questions suggested in connection with the first of the five propositions which I have set up for discussion. Admitting that a municipality may, without conflicting with the state law, prohibit the same acts as are prohibited by the state law, or in general set up the same standard of conduct by way of police regulation as is required by the state law, does it follow that the municipality may, by its ordinance, enacted under favor of statutory authority to regulate the subject matter, set up standards of conduct which are either more drastic or more lenient than those of the state law?

This question has been likewise considered by the Suprme Court of California in Re Hoffman, 155 Calif., 114, wherein it was held that a municipal ordinance which prescribed a higher standard of purity for milk than that prescribed by state statute was not in conflict therewith and so not void under the constitution of that state. The court stated that if the city had provided that milk might be vended which contained a less percentum of butter fat than that exacted by the state law, there would be presented a plain case of conflict, as the municipality would be endeavoring to legalize that which the state had declared to be unlawful. But what the city had in fact done, the court said, was to impose not fewer but additional qualifications upon the milk which might be vended to its consumers.

On the other hand, it was held in St. Louis vs. Klausmeier, 213 Mo., 119, that an ordinance fixing a lower standard of milk than that prescribed by statutes is not in conflict with the latter, or the reasoning of the court that the legal effect of such an ordinance was not to authorize the sale of dairy products which did not equal the standard fixed by the state, but merely to impose a penalty for selling the products that did not come up to the standard fixed by the city, and thereby in no manner interfere with the state law.

There is some conflict of authority in the several states on these points and I have by no means exhausted the catalog of decisions. See 1 L. R. A., n. s., 382; 17 L. R. A., n. s., 49 (note); see also the Ohio cases above cited. However, without

going exhaustively into this subject it seems to me that the recent cases which I have just cited, together with the principles which may be deduced therefrom, afford the basis for framing principles which may safely be followed in all cases. Those principles may be stated thus:

A prohibition in the state law against the doing of an act, without complying with certain conditions, may or may not be coupled with an express or implied grant of authority to do the act when the conditions are complied with. If no such grant of authority is expressed or may be implied, then a municipal ordinance passed under legislative or other power, to regulate the subject matter, does not conflict with the state law if it imposes additional restrictions upon the doing of the act—indeed in some cases if it prohibits the doing of the act altogether. The relation between the state and the municipality in this respect is something like that between the Federal government and the state with regard to the enforcement of the Federal revenue law. The Federal government may enact for the purpose of enforcing its revenue measures that it shall be an offense against that government to sell intoxicating liquors without paying a license tax. This being interpreted as not conferring any authority to do the business when the tax has been paid, either regulation or entire prohibition of the traffic by the state does not conflict with the Federal law. License tax cases, 5 Wallace, 462.

On the other hand, a municipal ordinance prohibiting the doing of the act, except upon certain conditions, and passed under favor of the legislative authority to regulate such acts, may be interpreted as not intending to authorize the doing of those acts within a municipality, when those conditions have been complied with; and if so interpreted, does not of course conflict with the state law.

Now in very few cases, if any, would a court come to the conclusion that a police regulation, negative in terms, was intended to authorize as against all other appropriate legislation, the doing of the thing regulated. Especially is this true when two given regulations are those of distinct legislative authorities and constitute distinct offenses which may be separately prosecuted. The milk cases referred to afford splendid illustrations of this. The state prohibits the sale of milk for human food containing less than six per cent butter fat. One city, having the power to regulate the sale of milk by general law, charter or self-executing constitutional provision, adopts an ordinance prohibiting the sale for human food of milk containing less than four per cent butter fat; another city passes a similar ordinance prohibiting the sale of milk within the city for human food containing less than eight per cent butter fat. There is no conflict in either of these cases between the state law and the municipal ordinance unless one can say, in the one case, that the municipal ordinance attempted to authorize milk to be sold in the city as against the requirement of the state law if it contained more than four per cent butter fat; and unless in the other case one can say that the state law intended to authorize as against any municipal enactment the sale of milk for human food containing more than six per cent butter fat. Neither of these inferences would be possible in most cases. It follows that under a state of the law like that laid down in Koch vs. State, a sale of milk containing three per cent butter fat only would violate both the state law and the municipal ordinance and could be prosecuted under both; whereas a sale of milk containing five per cent butter fat would be a violation of the state law and could be prosecuted under it but would not be a violation of the municipal ordinance; so, also, in the second city, a sale of milk containing seven per cent butter fat would be a violation of the ordinance but not of the state law, and the fact that it is not a violation of the state law would not prevent its prosecution under the ordinance, as the defendant could not claim any affirmative rights under the state law.

Not only may the municipality set up different standards of conduct from those enjoined by the state law, but in my opinion it may annex different penalties. Without going deeply into this subject I may say that no sufficient reason has suggested itself to me for denying to municipalities, having the power to regulate, the right through their councils to define the punishment that shall follow the violation of their regulations. Some restraint might be imposed by the general law in this particular, but at least in the absence of such restraint my opinion would be as stated.

For the foregoing reasons, then, I advise that municipal ordinances of the classes described in subdivision (a) and subdivision (c) of the first branch of the first question would not be invalid as conflicting with state laws on the same subjects on account of the differences which I have described, unless by express provision of the state law or the ordinance, or inferences necessarily to be drawn from either, the one or the other, as the case might be, should purport to authorize affirmatively the doing of something which the other prohibits, and moreover to extend that authority as against the prohibition of the other legislation.

But I have been unable to find any reported case dealing with an ordinance of the kind described in the second subdivision of your first question as I have framed it. Yet your first question seems to suppose the existence of some such case. I shall, therefore, deal with such case on principle.

The constitutional authority which cities, whether charter or non-charter, can claim under favor of Article XVIII, section 3, is limited to the passage of local police regulations and to the right to exercise powers of "local self-government." Neither of these grants of power would seem to authorize a municipality to annex penalties of its own to the infraction of substantive rules of conduct set up by the state legislature. Thus the police power is said to be the power to pass laws imposing restrictions and compulsions upon human conduct.

Freund, Police, section 3, et seq.

The standard of conduct is the substance of the regulation and the penalty is merely the sanction by which it is enforced. To enact that whoever violates the state law within the limits of the corporation shall be punished as for an offense against the corporation, does not set up any standard of conduct other than that set up by the state law itself, and hence is not a "local regulation." Putting it in another way, the power to punish, even though conferred upon municipalities by express provision of statute, is but an incident to the power to restrain conduct.

It would seem, therefore, that where the municipal legislation has no substantive provision of its own, but merely attempts to annex penalties to acts made illegal by state law *and by that law only*, such municipal legislation would not be within the purview of the power to "regulate." You will note that I do not say that it is not possible for the legislature of the state to confer upon municipal corporations power to do this very thing. The question with which I am dealing is as to whether or not that power is included in a grant of power to adopt local "regulations" upon a given subject matter. As I have said, there are few if any authorities on this point. Many cases are cited in texts to the effect that municipal corporations, when properly authorized, may annex penalties of their own to the commission of acts made illegal by state law. But most of these cases, when examined, appear to be those in which the substance of the state law was incorporated in the ordinance making it a complete piece of municipal legislation in and of itself.

I have found one dictum to the effect that such municipal legislation as I am considering would be within the purview of a delegated power to license or regulate. Robinson vs. Mayor, 1 Humph. (Tenn.), 156. I have also found one case in which legislation of this sort was inferentially condemned, Moran vs. Atlanta, 102 Ga., 840.

In that case the legislature had conferred upon municipal corporations the power to license and regulate places where intoxicating liquors were sold and in the same general law had provided that any person found guilty of selling liquor without such municipal license as might be provided by local legislation, should be punished in a certain way. The city of Atlanta exercised the power to license saloons and attempted to annex a penalty of its own to the act of conducting such a business without a municipal license. The court held that the offense was a state one and the local courts had no jurisdiction of it. The force of this decision as a precedent is weakened by the fact that the rule in Georgia with respect to the power of a municipal corporation to pass local legislation upon a subject covered by the state law, and with respect to what constitutes a "conflict" between the state law and a municipal ordinance on the same subject is much more restricted than the rule in Ohio appears to be. On reason then, and without the satisfaction of any precedents in point, I express the view that unless some state statute expressly confers upon an Ohio municipality the authority to punish state offenses by municipally defined penalties, the power to do so does not exist in an Ohio municipality. Such a conclusion necessarily decides that whatever may be the force of Article XVIII, section 3 of the Constitution respecting charter cities and non-charter cities, as distinct classes, the general grant of power therein is not specific enough to authorize any Ohio municipality to predicate thereon an ordinance of the kind now under discussion. Additional reasons for this conclusion will appear in the discussion of the next subdivision of your first question.

Thus far I have been assuming that the municipal ordinance of the kind under discussion has been adopted under favor of an express grant of specific authority to legislate upon particular subject matters emanating from the General Assembly. As examples of what I have in mind, I refer you generally to the enumeration of powers of municipal corporations found in Title 12, Division 2, Chapter 1, Part 1st, of the General Code, being sections 3615, et seq., thereof, and particularly sections 3628, 3632 to 3641 inclusive, 3650, 3651, 3657, 3659 to 3663 inclusive, 3664 et seq., and 3669 to 3676 inclusive. All these sections grant specific authority to deal with particular subjects save section 3628, which gives to municipalities general power to make the violation of ordinances a misdemeanor and to provide for the punishment thereof by fines or imprisonment, or both. Thus section 3632 G. C. grants authority to municipal corporations,

> "To regulate the use of carts, drays, wagons, hackney coaches, omnibuses, automobiles, and every description of carriages kept for hire or livery stable purposes; to license and regulate the use of the streets by persons who use vehicles, or solicit or transact business thereon; to prevent and punish fast driving or riding of animals, or fast driving or propelling of vehicles through the public highways; to regulate the transportation of articles through such highways and to prevent injury to such highways from overloaded vehicles, and to regulate the speed of interurban, traction and street railway cars within the corporation."

This section is still in force so far as express repeal is concerned. The effect upon it of the passage of the state automobile license law and the subsequent adoption of Article XVIII, section 3, of the Constitution, is a question with respect to the solution of which the case of Fremont vs. Keating, supra, is suggestive. When I come to deal with the specific examples given by you I shall have to decide this question. At the present, however, it is sufficient to note the specific character of the powers granted to municipal corporations by sections like section 3632. Over against sections of this character may be set such general grants of power as are

found, for example, in Article XVIII, section 3, of the Constitution (without now deciding whether this section is self-executing and applies to non-charter cities); and also certain other sections found in the same chapter of the General Code and clearly applicable to non-chartered cities. I refer, for example, to section 3646, which grants authority to municipal corporations "to provide for the public health, to secure the inhabitants of the corporation from the evils of contagious, malignant and infectious diseases, * * *," and, section 3658 of the General Code, which grants authority to prevent riot, gambling, noise and disturbance, indecent and disorderly conduct or assemblages and *to preserve the peace and good order,* and to protect the property of the corporation and its inhabitants."

Section 3664 of the General Code, already mentioned, as belonging in the other class, may in part be classed with the provisions of the kind now being enumerated. In its present form it authorizes municipal corporations "to provide for the punishment of the persons disturbing the good order and quiet of the corporation, by clamor and noise in the night season, by intoxication, drunkenness, fighting, using obscene or profane language in the streets and other public places to the annoyance of the citizens, *or otherwise violating the public peace* by indecent and disorderly conduct, or by lewd or lascivious behavior. * * *" This section is further supplemented by sections 3665 et seq., conferring independent authority to impose and collect fines or to punish by imprisonment.

I have thus classified the grants of power which appear in the General Code (although I have not made exhaustive enumeration of them even by section) because of what is said in a very frequently cited passage in Dillon on Municipal Corporations, 5th edition, Volume 2, section 632, as follows:

> "In view of the somewhat strict construction of grants of corporate powers, elsewhere explained and illustrated, and of the subordinate nature and purposes of by-laws, the following rules, although seeming to rest on sound principles, are, in view of the decisions, stated with some distrust of their entire correctness: 1. A general grant of power, such as mere authority to make by-laws, or authority to make by-laws for the good government of the place, and the like, should not be held to confer authority upon the corporation to make an ordinance punishing an act—for example, an assault and battery—which is made punishable as a criminal offense by the laws of the State. The intention of the State that the general laws shall not extend to the inhabitants of municipal corporations, or that these corporations shall have the power, by ordinance, to supersede the State law, will not be inferred from grants of power general in their character; nor will such authority in the corporation be held to exist as an implied or incidental right. 2. Where the act is, in its nature, one which constitutes two offenses, one against the State and one against the municipal government, the latter may be constitutionally authorized to punish it, though it be also an offense under the State law; but the legislative intention that this may be done ought to be manifest and unmistakable, or the power in the corporation should be held not to exist. 3. Where the act or matter covered by the charter or ordinance, and by the State law, is not essentially criminal in its nature, and is one which is generally confided to the supervision and control of the local government of cities and towns, but is also of a nature to require general legislation, the intention that the municipal government should have power to make new, further, and more definite regulations, and enforce them by appropriate penalties, will be inferred from language which would not be sufficient were the matter one not specially relating to corporate duties, and fully provided for by the general laws. * * *."

In one of the series of elaborate notes to this section and preceding sections the learned author calls attention to a line of cases which places the offenses, which by the laws of the state are indictable, that is, felonies, in the class of those the authority of the municipal corporation to prescribe which must rest upon a more specific grant.

McQuillin on Municipal Ordinances, sections 498 and 499, after stating the problem, makes the following comment:

> "The decisions on this subject are numerous and conflicting. Perhaps on no single topic of municipal corporation law have there been so many discordant utterances even by the same courts and the same individual judges. But the best considered cases, especially the more recent ones, have properly extended the sphere of activity of the municipal corporation in dealing with police offenses. * * *
>
> Under the usual grant of municipal powers, which, *in general terms,* includes the authority to enact all necessary ordinances to preserve the peace and advance the local government of the community, the local corporation cannot provide by ordinance for the punishment of an act constituting a misdemeanor or crime by state statute. * * * It may only exercise such powers as legitimately belong to the local and internal affairs of the municipality. In the performance of such functions much latutude is often permitted. But it is entirely competent for the legislature to confer in express terms such powers as will enable the local corporation to declare by ordinance any given act an offense against its authority, notwithstanding such act has been made by statute a public offense and a crime against the state. And where a regulation of a *specific matter* has been thus expressly * * * given to the local corporation, whether it be *intrinsically state or local,* the corporation may exercise the power so conferred * * * until such time as it is legitimately withdrawn by the state. * * * The true doctrine appears to be that whether the city may exercise control of state offenses must be determined by the legislative intent. * * *."

These two comments may be pieced together into a rule to the effect that the whole problem is one of legislative intent, i. e., did the General Assembly of the State or the people, in adopting a constitutional provision, intend to give to municipalities the power to adopt local regulations upon a subject already covered by state law, or to enforce a previously adopted municipal regulation as against a subsequently enacted state law covering the same subject matter? If the grant to the municipal corporation is specific, then this question of intent is easily solved in favor of an affirmative answer; but if the language of the grant is in very general terms like, for example, "to adopt and enforce within its limits such *local* police, sanitary and other similar regulations as do not conflict with general law," or, "to preserve public peace," or "to provide for the public health," it is presumed that such a grant was limited to the making of regulations upon subjects not covered by the state law, or at least peculiar to the congested territory of the municipality and not existing generally throughout the state.

Both the learned authors whom I have quoted put forward their statements rather as conclusions respecting the general trend of the cases, or their own ideas as to what the law should be, than as statements of principle supported by an unvarying line of decided cases. However, it must be conceded that in the Nisi Prius cases in Ohio these principles have been, to some extent, acted upon. Thus in Wellsville vs. O'Connor, cited in Mr. Turner's opinion, Burrows, J., quotes with approval the section which I have quoted from Dillon on Municipal Corporations.

He had before him for interpretation what are now General Code sections 3658 and 3664, which I have quoted, and the question as to whether or not, under favor of the former, a municipality might pass an ordinance defining and punishing the offense of assault and battery. He held that the latter of these two sections was a limitation upon the general power conferred by the former and that at any rate the power to punish what would otherwise be, technically, breaches of the peace, if granted generally by what was then section 1692 of the Revised Statutes (now 3658 General Code), would be limited to such breaches of the peace as might be peculiar to municipal corporations.

After citing Dillon on Municipal Corporations, he says:

> "In this state, it seems, the legislature may in its discretion allow municipalities to duplicate all misdemeanors that are not required to be prosecuted by indictment.
>
> Whatever disagreement may exist as to the propriety or legality of this duplication of punishment, it can not be denied that its necessity is doubtful and that in practice it may be made vexatious and oppressive.
>
> Certainly the fact that assault and battery is punished by the state precludes the city from claiming the right to enact this ordinance on the ground of necessity. We venture the opinion that whenever a claim is made in behalf of a corporation for the exercise of superfluous and unnecessary power it should be supported by a legislative grant so explicit in its terms as to leave no reasonable doubt or question.
>
> The argument that to preserve the peace is to prevent breaches of the peace, and that assault and battery is always in law, if not in fact, a breach of the peace, * * * would give a municipal corporation the power to copy and pass into ordinances the whole body of state misdemeanors. * *
>
> If the legislature had granted the power to prevent assaults and batteries in section 1692 and had not elsewhere in the statute limited the exercise of the power thus conferred, then a different question would be presented, * * *."

Judge Laubie, dissented in a vigorous opinion, which is equally notable for the extent of the research embodied in it. Indeed, comparison of the two opinions, both of which are distinguished for ability, but shows the difficulty of the question under discussion and the unsatisfactory state of the authorities thereon. Inasmuch, however, as Judge Burrows' decision has been cited with approval in other cases, some of which are cited in Mr. Turner's opinion, I do not feel that I would be justified in dealing with the general question which you submit, without mentioning the fact that Judge Dillon's rule has been followed, to some extent at least, in this state, and that as a result thereof it seems that the power of the municipal corporation, to pass an ordinance prohibiting and punishing an act also prohibited and punished by general law of the state, is much more doubtful where the ordinance is adopted under the assumed authority of a general grant of power like that to preserve public peace, or the public health, than it is where the ordinance is passed under an express grant of power such as that to regulate gambling, or the like.

Within the limits of this opinion this is as far as I feel called upon to go in discussing the third branch of your first general question. I may say, however, that I am unable to discern any distinction between an ordinance passed under a general grant of power upon a subject covered by state law, which defines a different substantive offense from that defined by the state law, though of one and the same essential character, and one which simply makes a municipal offense out of exactly

the same act which is prohibited by the state law, with respect to the possibility of conflict between state law and local ordinance.

In dealing with the third subdivision of your first question, I conclude that if the municipality may act at all under a general grant of power upon such a subject, it may define its offense in different terms from those used in the state law, as well as in the same terms as may be used in the state law.

I wish to say also that though I have mentioned Article XVIII, section 3, in the course of the discussion in which I have just indulged, I do not mean to express a definite opinion to the effect that the rule of strict interpretation is to be applied to that constitutional provision. I simply state Judge Dillon's principle, showing that it has been followed to some extent in Ohio, and point out that section 3 of Article XVIII of the Constitution is most general in its phraseology.

It is the fourth subdivision of your first question which invokes a reconsideration of that part of Mr. Turner's opinion, which held that "the power of the councils of non-charter cities to pass ordinances prescribing a punishment, is limited to powers conferred upon municipalities by the legislature," in the light of what has emanated from the Supreme Court with respect to the effect of Article XVIII, section 3, of the Constitution. Difficult as are the questions which have previously been discussed in this opinion, their difficulty does not compare with the one now raised.

We must first ascertain whether Article XVIII, section 3, has any application at all to non-charter cities—a question not easy in itself; if it be decided that it has some application, we must determine whether a general grant of power of the kind embodied in Article XVIII, section 3, extends to the adoption of regulations upon subjects of a general nature with respect to which state laws might appropriately be passed, i. e., whether such subjects are "local" in character; then having ascertained the answer to this question, we must still decide under what circumstances "a *local* police, sanitary or other similar regulation" may be held to conflict with general law.

I may say at the outset that the question now to be discussed is, in my opinion, more or less academic. The police or regulatory powers granted to municipalities by the municipal code are so broad that any grant emanating from the constitution could scarcely enlarge them in any perceptible degree, except by giving municipal ordinances precedence over state laws in cases of conflict, which the constitution does not do. There may conceivably be a case, however, in which the power to deal with a given subject matter by way of police regulation is granted in neither specific nor general terms to municipal corporations, subject to the municipal code. Without examining the statutes and exercising the imagination to ascertain whether or not there is such a case, I pass to a discussion of what was decided in Fremont vs. Keating, as bearing upon the constitutional powers of municipal corporations which have not adopted charters. I may say, however, that Fremont vs. Keating certainly decides that an attempt on the part of the legislature to *take away* local regulatory power is ineffectual because of the constitution.

As a matter of first impression, it would seem that Article XVIII, section 3, applies to all municipalities; for it says in rather unambiguous language that:

> "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

The grant is in terms not limited to municipalities which have exercised the powers conferred by section 7 of the same article "to frame and adopt or amend a

charter for its government" and, subject to the provisions of section 3 of this article, "to exercise all powers of local self-government." If the people had intended to limit their grant of power to such municipalities as might adopt a charter, there would seem to have been no necessity for the adoption of section 3, the right of charter cities to "exercise all powers of local self-government" being expressly conferred in section 7. However, prior to the decision in Fremont vs. Keating, supra, the Supreme Court had apparently held in several cases that Article XVIII, section 3, was not self-executing but applied only to cities which had adopted charters, and then only to the extent that the charter so adopted might provide for the exercise of the powers thus granted. Inasmuch as none of these prior decisions were overruled or even so much as mentioned in Fremont vs. Keating, it would seem that some way of reconciling the last mentioned decision with those preceding ought to be found, for it is certain that the expressions in the syllabus and opinion of Fremont vs. Keating are inconsistent, to some extent at least, with the statement just made as to the holdings in the previous cases.

I find myself, therefore, under the necessity of examining critically all the cases decided by the Supreme Court in any way affecting the interpretation of Article XVIII, section 3, with the view to reconciling them, if possible, and, if not, with the view to stating my conclusion as to what the law may now be said to be on this subject.

The first decision in point of time, and the one which, by more or less frequent citation, may be said to have attained to the dignity of the leading case, is State ex rel. vs. Lynch, 88 O. S., 71. The syllabus in that case is as follows:

> "1. The provisions of the eighteenth article of the constitution as amended in September, 1912, continue in force the general laws for the government of cities and villages until the 15th day of November following, and thereafter until changed in one of the three modes following: (1) By the enactment of general laws for their amendment, (2) by additional laws to be ratified by the electors of the municipality to be affected thereby, (3) by the adoption of a charter by the electors of a municipality in the mode pointed out in the article.
>
> 2. Whether a municipality acquires authority 'to exercise all the powers of local self-government' by adopting a charter, or adopts a charter as an indispensable mode of exercising the authority, the powers to be exercised, being governmental, do not authorize taxation to establish and maintain moving-picture theaters."

Nothing in this syllabus expressly holds that Article XVIII, section 3, is, as a whole or as to any part of it, not self-executing. In referring to the continuance in force of the previously existing "general laws," the court must have had in mind laws passed by the legislature and it is only by extending the holding of the syllabus beyond its words that one could claim that it decides that the common law rule, to the effect that municipal corporations have only such powers as are granted to them in affirmative terms by the legislature, was perpetuated as to non-charter municipalities.

On the other hand, the inclusion in the syllabus of the point dealt with in the second branch thereof would seem to have been predicated upon the assumption that Article XVIII, section 3, might be regarded as in a sense self-executing; for it would have been unnecessary for the court to define the phrase "powers of local self-government," as it did in this second branch, if the court had meant to decide the case on the ground that non-charter municipalities did not possess such powers.

It must be admitted, however, that the opinions of Judges Shauck and Wilkin,

speaking for the majority of the court in that case, go somewhat further than the syllabus upon the question now under consideration. Judge Shauck is very guarded in his statements and comes no closer to deciding anything with respect to Article XVIII, section 3, than to say that "it *seems* * * * to be entirely beyond doubt that since the city of Toledo had not by a vote of its electors approved any additional law passed by the general assembly, and that its electors had not adopted a charter, the municipality and all of its departments have only such powers as were conferred by the general law; that is, such power only as it had prior to the 15th of November." Judge Shauck follows up this cautious statement by considerable discussion of the meaning of the phrase "all powers of local self-government," which as I have pointed out could not be regarded as a question in the case, if one could say that the court had definitely decided that Article XVIII, section 3, did not afford to the city of Toledo the right to claim the privilege of exercising "all powers of local self-government." Judge Wilkin is somewhat more outspoken with respect to his view of Article XVIII, section 3, than is Judge Shauck, but his argument, a hint of which is found in the opinion of Judge Shauck, is to the effect that Article XVIII, section 3, if self-executing at all, grants power to the people of the municipality and does not distribute the granted powers among any existing agencies of the municipality, i. e., agencies existing under the general laws for the government of municipalities as they were prior to the adoption of the constitutional amendment. He therefore arrives at the conclusion that whatever be the effect of so much of Article XVIII, section 3, as he was considering, upon the theoretical powers of the city of Toledo, the section did not go so far as to add anything to the powers of the council of that city.

It hardly seems conceivable that Judges Shauck and Wilkin, who expressed the view just stated with varying degrees of positiveness, meant to say that municipal councils are, under the municipal code, in all respects bodies of limited powers analogous to agents for particular purposes. All municipal councils have, under the General Code, the full legislative power of the municipality, sections 4206 and 4215, G. C. Their particular legislative powers are not enumerated. The contrary is true on the side of what may be termed the proprietary or strictly municipal side of the corporate organization and powers, and in this connection it is, I believe, tremendously significant that State vs. Lynch, which involved the right of the council of the city of Toledo to provide by ordinance for the establishment and operation of a municipal moving-picture theater, called in question not the governmental powers which the city might claim, but its proprietary capacity. The second branch of the syllabus, concurred in by a majority of the court, makes this very plain; but even one of the dissenting judges expresses the same view. Thus Judge Wanamaker, at page 135, divides Article XVIII, section 3, into two parts: (1) that which confers upon municipalities the authority to "exercise all powers of local self-government," and (2) that which confers upon them the authority to "adopt such local police, etc., regulations," as shall not conflict with the general law. Of the former he says it is a grant of municipal power in the exact sense; of the latter he says it is a delegation of the police power of the state, originally a power in no sense municipal but committed to the local government as a matter of convenience by the legislature of the state, in which sovereignty it naturally resides.

I find nothing in the opinion of Judges Shauck and Wilkin which denies the validity of this distinction. If it is valid it tends to limit the actual decision and all reasonable inference therefrom to the interpretation and application of the first part of Article XVIII, section 3.

Further ground for this distinction appears in the fact, not overlooked by the writer of the majority opinion in State vs. Lynch, that section 7 of Article XVIII, says that municipalities which have adopted charters may thereunder "exercise all powers of local self-government," thus affording an inference in line with what has been previously said about Article XVIII, section 3, to the effect that complete and effectual exercise of the "powers of local self-government" by a municipality is conditioned upon the adoption of a charter. But, section 7 does not say that a municipality which has adopted a charter may, under it, "adopt and enforce such local police, sanitary and other similar regulations as are not in conflict with the general law." So that it could not, with as much assurance, be said of section 7, in connection with section 3, that the adoption and enforcement of local police, sanitary and other similar regulations is conditioned upon the adoption of a charter, as it could be said that the exercise of the powers of local self-government, i. e., peculiarly municipal functions, is dependent upon the adoption of a charter.

Again, consideration of the principal arguments of Judges Wilkin and Shauck, with respect to the interpretation of that part of Article XVIII, section 3, to which their attention was directed, brings out still another reason for distinguishing between the two parts of the section. They point out that the grant of power in the first part of the section is to municipalities and consists of the right to exercise all powers of local self-government. They say that the grant is not directly to the councils and does not reach the councils through the municipalities because the power granted is or may not be one within the natural scope of the power of a municipal council. Carrying this argument further, but in no wise going beyond the scope of Judge Wilkin's argument, for example, one might say that "all powers of local self-government" includes administrative, executive and judicial powers as well as legislative powers on the one hand, and, referring as it does to municipal functions in the peculiar sense, embraces by another classification various kinds of proprietary powers.

It is not so with respect to the latter part of Article XVIII, section 3. The power to "adopt regulations" of a police character is essentially and purely a legislative power and the power to enforce them is purely and simply an executive power. The language "to adopt and enforce" is more specific than the language "to exercise." It points out certain branches or departments of the municipal government as the necessary recipients of the powers granted, while the phrase "to exercise" does not. It is therefore seen that the argument of Judge Wilkin, however valid it may be, does not apply, with equal force at least, to the latter part of section 3 of Article XVIII; so that, knowing as we do that he was thinking about the first part of that section, we cannot say that his reasoning must necessarily be applied to the last part of it.

Judge Donahue concurred in the judgment of this case but dissented from the reasons given for it in the opinion of Judge Shauck, giving it as his view that Article XVIII, section 3, was self-executing in *toto*.

Judge Wanamaker was of the same opinion, but, as has been seen, he also argued for a distinction between the character of the grant in the first part of Article XVIII, section 3, and that of the grant in the latter part of the same section.

In this connection I refer, without quoting them, to expressions of Judges Shauck and Wilkin with respect to the expenditure of public monies for new, and therefore unknown, municipal purposes. This language could not apply to the adoption and enforcement of police regulations and tends further to emphasize the point already brought out that these judges were thinking about the assumption of

new proprietary powers of municipalities and did not have their attention directed to the possibility of reliance on section 3 of Article XVIII as a source of enlarged governmental power emanating directly from the state.

On the whole I do not feel that State ex rel. vs. Lynch decides anything with respect to the interpretation of the latter part of Article XVIII, section 3.

The next case which must be examined is Fitzgerald vs. Cleveland, 88 O. S., 388. This case must be distinguished from the present question by the statement that it involved the right of a charter city and pertained to the framework of the city government. In it, however, Judge Johnson, who had been silent save for a mere notation of his dissent from the second branch of the syllabus in State vs. Lynch, clearly states at page 334 that it was his understanding that section 3 of Article XVIII is not self-executing, but awaits the adoption of a charter. This language, taken by itself, would, of course, apply to all parts of Article XVIII, section 3, but in the context in which it is found and in the case in which it was uttered it was a mere dictum—an interpretation of what the court had decided in another case. It cannot be authority for anything with respect to the latter part of Article XVIII, section 3, when nothing with respect to that part of the constitution was before the court in either case. I might say that it was argued in the Cleveland case that local legislation therein involved was in the nature of a police regulation, which would yield, in case of conflict with the general law, but the "majority" of the court (the three judges who voted for affirmance), speaking through Judge Johnson, and others, had already denied the validity of this argument and thus eliminated the latter part of Article XVIII, section 3, from the case.

Wanamaker, J., was one of the "majority" judges in the Cleveland case. He repeats in the course of his argument the distinction which he had first laid down in his dissenting opinion in the Lynch case between the first and second parts of Article XVIII, section 3. His conclusion was that the power to prescribe regulations for nomination of candidates for municipal offices was one of the powers which came to the city of Cleveland (a charter city) through the first part of Article XVIII, section 3, so that the municipal regulation on this subject would not have to yield in case of conflict with the "general law." This argument was absolutely necessary to support the conclusion arrived at by the court, for there was a general law respecting the nomination of municipal officers which was in conflict with the charter of the city of Cleveland on the same subject. Therefore, in spite of what Judge Johnson said by way of dictum, in his opinion he must be regarded at least as committed to the view that there is a difference between the first and the second half of Article XVIII, section 3, respectively, in that the exercise of powers granted by the first half and made effectual by the adoption of the charter is not conditioned upon the conformity of the municipal legislation to the general laws of the state; whereas the power to adopt and enforce local police, etc., regulations, however made effectual, is so conditioned.

Judge Wilkin in the Fitzgerald case was with the "majority" and expressly gives allegiance at page 377 to the distinction drawn by Judge Wanamaker and above described. This is significant because it tends to explain Judge Wilkin's position in the Toledo case and to emphasize the view that what he said in that case cannot be regarded as directed to the latter part of Article XVIII, section 3.

Neither the syllabus in the Cleveland case nor the dissenting opinion of Donahue, J., bears in any way upon the issue now under consideration.

Carpenter vs. Cincinnati and Billings vs. Railway Company, 92 O. S., pp. 473 and 478, must next be considered. The first involved the right of a city, which had

not adopted a charter, to provide by ordinance of its council for extending a street railway along a street without the consent of the abutting property owners, such as was required by the general law. This legislation was of a kind with respect to which the power of the municipal council was actually limited and restricted by specific provision of the general laws, as Judge Wilkin seems to have imagined to have been the case generally, from what he says in the Toledo case. It is familiar law that power to grant franchises emanates from the state and is only delegated to municipal corporations as agents of the state. In a law dealing with the granting of a franchise (not a part of the municipal code as such) the municipal council was authorized to make the grant upon a condition. This law was held to be controlling and in a very short statement Judge Jones, who delivered the opinion of the court, points out that its operation is not affected by Article XVIII, section 3, unless a charter had been adopted. This case does not, in my opinion, hold anything which can be used to advantage in considering the present question, for the ordinance of the council of the city of Cincinnati there involved would have to be classified, for the purpose of Article XVIII, section 3, either as an attempted exercise of "powers of local self-government" or as a "local police * * * regulation." If the former, then State ex rel. vs. Lynch would seem to afford ground for holding that it could not lawfully be passed, because the city of Cincinnati did not possess "all powers of local self-government," but only such powers as had been granted by the general law. If the latter it would have to yield to the general law which was in existence, because it conflicted with it. Of course I have argued in this opinion that State ex rel. vs. Lynch did not on its face go so far as to establish the first of these propositions, but it must be conceded that the trend of thought running through the majority opinions in the subsequent cases is to this effect, whatever may be said of State vs. Lynch itself.

In Billings vs. Railway Company, supra, a result exactly to the contrary of that reached in the case just discussed, was arrived at in the case of a charter city. Judge Johnson, who wrote the opinion of the court, began with a review of State vs. Lynch, first quoting the first branch of the syllabus and then making this statement:

> "The judges who did not concur in the opinion of Shauck, J., who spoke for the court in that case, did not withhold their assent because they felt that the majority were going too far, but, as shown by the opinions they filed in the case, they thought that a majority did not go far enough, in that the judgment was that section 3 of Article XVIII was not self-executing and that the powers granted were not as extensive as those judges believed the section conferred."

Then taking up the meaning of the phrase "all powers of local self-government," he concludes that although previous to the adoption of the charter the power to grant franchises emanated from the state, such power was within the "powers of local self-government" appropriated by municipal corporations through the adoption of the charter. The ordinance was therefore upheld. Let me point out that this conclusion could not have been reached if the consent of council to the use of streets by electric railways had been regarded as a "police regulation," because there was in force a general law sustained in the Carpenter case with which the ordinance was inconsistent; so that, if the city of Cleveland had acquired the power to legislate on the subject of the use of the streets by public utilities, under the last part of Article XVIII, section 3, its legislation would necessarily yield to

the general law where inconsistent with the latter. That the local legislation was inconsistent with the general law is palpable; for the general law prohibits municipal councils from granting permission to use the streets for street railway purposes save upon the condition of securing the consent of the owners of abutting property, whereas the ordinance gave such permission without such consent.

I am forced to the conclusion, therefore, that Billings vs. Railway Company further emphasizes the distinction between the nature of the grant of "all powers of local self-government" and that of the grant of power to "adopt and enforce * * * such local police, sanitary and other similar regulations as are not in conflict with general laws." In following, and in a sense enlarging upon, State vs. Lynch, therefore, this case is not to be understood as an extension of the decision in that case beyond its natural scope. So far, then, we have it that none of the cases which have been examined do more than decide that a non-charter city does not acquire the right to exercise "all powers of local self-government" by virtue of Article XVIII, section 3, but that a charter must be adopted before any power can be exercised that is not granted by the "general laws" or "additional laws." But none of these cases touch upon the power of a non-charter city to adopt and enforce within its limits "such local police, sanitary and other similar regulations as are not in conflict with the general law."

This review of the cases prior to the case of Fremont vs. Keating is necessary because of the silence of that case with regard to such previous cases. Judge Donahue does not even cite these cases, much less does the decision in Fremont vs. Keating purport to overrule them. It is perfectly reconcilable with them if we accept the view that there are two distinct grants of power in Article XVIII, section 3, for in Fremont vs. Keating the city did not claim authority to pass an ordinance upon the subject of the speed of automobiles under the grant of power to exercise all powers of local self-government, but from the power to adopt and enforce within its limits local police, regulations not inconsistent with the general laws. The first branch of the syllabus says nothing whatever about local self-government, but does declare section 6307 to be in conflict with section 3, Article XVIII of the constitution, authorizing municipalities *"to adopt and enforce within their limits such local police, sanitary and other similar regulations as are not in conflict with general laws."* The case might have been decided upon the second and third ground stated in the syllabus, inasmuch as the defendant in error had been deprived of the right to a jury trial, but the history of these home rule cases shows that the judges participating in the decisions have been careful to express dissent from any proposition advanced in the syllabus, whether such proposition was necessary in their view to a decision of the case or not. Thus Johnson, J., in State ex rel. vs. Lynch, concurred in the judgment but did not concur in the second branch of the syllabus. Donahue, J., in the same case, concurred in the judgment but dissented from the reasons assigned in the syllabus and the majority opinion. All three judges who voted for affirmance in Fitzgerald vs. Cleveland saw fit to state their reasons in full. I find it impossible to believe that Fremont vs. Keating, which was concurred in by a unanimous vote, is not to be taken as authority as to what is laid down in the first branch of the syllabus, because I cannot believe that Judge Johnson, for example, who had taken occasion twice to repeat with approval the substance of the first paragraph of the syllabus in State ex rel. vs. Lynch, would have concurred generally in Fremont vs. Keating without intending thereby to express approval of the first branch of the syllabus. As we have seen, it is perfectly possible to reconcile the case of Fremont vs. Keat-

ing with the cases that went before it on grounds springing from the division of Article XVIII, section 3, into two parts. In fact, every judge, save Judge Shauck, who has had occasion to write an opinion in any way dealing with Article XVIII, section 3, has, at one time or another, expressed allegiance to the view that there are two separate grants of power in that section. Judge Wanamaker did so in expressions quoted from his concurring opinion in Fitzgerald vs. Cleveland, and has made the distinction more than once in clear and unambiguous language. Judge Johnson must necessarily have predicated his argument in Billings vs. Railway Company upon the same sort of distinction. Judge Donahue from the first has vigorously expressed the view that all of Article XVIII, section 3, is self-executing. We have, therefore, a pretty accurate line on the views of three of the seven judges who concurred in Fremont vs. Keating, and we find that none of them have ever expressed the view that Article XVIII, section 3, of the constitution is not self-executing and is not applicable to non-charter cities when it confers authority upon municipalities to adopt and enforce within their limits "such local police, sanitary and other similar regulations as are not in conflict with general laws" whatever may be its effect as conferring upon municipalities the right to exercise "all powers of local self-government." On the contrary I note that two of the judges who concurred in Fremont vs. Keating have always vigorously asserted that the whole section is self-executing and applies to non-charter cities.

In this way, then, I find it possible to account for the fact that Fremont vs. Keating lays down the proposition embodied in the first branch of the syllabus therein, without in any way referring to the previous cases. The distinction which, following the opinions of some of the judges in the previous cases, I have drawn, reconciles this part of the syllabus in the Fremont case with all of the cases that have gone before.

Now the Fremont case necessarily decides that all cities, non-charter as well as charter, may look to the last part of Article XVIII, section 3, for authority to pass local police regulations not in conflict with general law, because it says that an act of the General Assembly, which attempts in express words to deny such municipalities the right to exercise this power, is unconstitutional; *a fortiori,* the mere silence of the legislature, i. e., its failure to expressly confer by law power upon non-charter municipal corporations, to adopt particular police and similar regulations, could not have the effect of depriving such municipalities of such power.

The express holding to the effect that section 6307 is unconstitutional also disposes of the possibility of accounting for the result in the Fremont case by referring it to section 3632 G. C., which on its face contains ample power to pass the kind of ordinance involved in the case. The court does not mention this provision of the law, nor could it with propriety have done so in the face of section 6307 of the General Code if that section were constitutional. For although the legislature had left section 3632 unrepealed by express provision, it had by enacting section 6307 made so much of the former section as would otherwise authorize the regulation of the speed of motor vehicles inoperative so long as section 6307 might be in force. It is obvious, therefore, that the court could not have decided Fremont vs. Keating on the theory that section 3632 of the General Code conferred power to enact the ordinance in question, nor upon the broader ground that the "general laws" of the state conferred this power, because the net effect of the "general laws" was such as to deny the power. It is therefore impossible to reconcile the first branch of the syllabus in Fremont vs. Keating with any other view than that

all municipalities may look to the latter part of Article XVIII, section 3, for authority to adopt local police, sanitary and other similar regulations, regardless of what the "general law," which the legislature may attempt to adopt on such subject, may or may not provide.

There has been suggested to me the idea that the court may have intended to hold section 6307 unconstitutional because in terms it applies to all cities, as well to those which have adopted charters as those which have not; and because it cannot apply to charter cities it is therefore unconstitutional and does not restrain non-charter cities. If this point is well taken, it would follow, of course, that a non-charter municipality might look to section 3632 of the General Code for authority to pass ordinances like the one involved in Fremont vs. Keating, and that of the general character of those mentioned as examples in your letter. But the point is not in my judgment well taken. In all the home rule cases, beginning with State ex rel. vs. Lynch, and running through the rest of them, is found the statement that the general laws of the state are, by virtue of the schedule of the amendments of 1912, to remain in full force and effect except in so far as they may be inconsistent with the amendments. That is to say, any statute which cannot constitutionally apply to a charter city remains in full force and effect in its application to non-charter cities. This principle was acted upon in the two street railway company consent cases. Billings vs. Railway Co. holds the consent statutes "unconstitutional" as to their application to charter cities (see paragraph of opinion of Jones, J., in Carpenter vs. Cincinnati), whereas Carpenter vs. Cincinnati holds the statute constitutional and in full force and effect as to non-charter cities. It is therefore impossible to reconcile Fremont vs. Keating with the other cases on this ground, or to say that section 6307 of the General Code was held unconstitutional because of its interference with the rights of charter cities; certainly nothing in the opinion of Donahue, J., nor in the syllabus itself, justifies such a statement.

I must therefore conclude, on the authority of Fremont vs. Keating, that all cities in Ohio, charter cities as well as non-charter cities, now get their authority to adopt and enforce within their limits such local police, sanitary and other similar regulations as are not in conflict with the general laws, directly from the constitution. So that, the whole body of statutes on the subject of the police power of municipal corporations with regard to *local* regulations, at least, may be regarded as of little effect. I do not say that these statutes are of no effect, because they still operate as I have described their operation in dealing with subdivisions one and three of your first general question. That is to say, the question of conflict with the general law, which must always be raised under Article XVIII, section 3, is one that can be answered easily by ascertaining the legislative intent as to the exclusiveness of the regulations made by the general law as against those made under color of local authority. Where the legislature, then, has expressly authorized a particular kind of regulation to be made by a municipality, such action on its part is indicative of its intent that local regulations may supplement what it has done without being regarded as "in conflict" therewith.

In determining whether or not there is a conflict between a local ordinance and general law, it is always, of course, necessary to determine what the general law is, and if a part of that general law is a declaration to the effect that municipal ordinances may be passed on a subject, then we are unable to say that the adoption of the local ordinance in and of itself produces a conflict with the general law on the same subject.

But what I have said earlier in this opinion about the solution of the question,

as to the existence of a conflict between a general law and a municipal ordinance upon the same subject, cannot apply fully where the municipal ordinance embodies a local regulation, for I have heretofore intimated that the state of the law, prior to the adoption of Article XVIII of the Constitution, was in this respect substantially as follows: (1) If the state law expressly sanctions a thing which the municipal ordinance attempts to prohibit, or expressly prohibits a thing which the municipal ordinance attempts to sanction, there is a conflict; (2) If the state law embodies an intent, expressed or implied, that the state wide regulation which it promulgates shall be exclusive, i. e., shall be the only law upon the subject operating uniformly throughout the state, as well in municipalities as elsewhere, then *any* municipal regulation on the same subject is in conflict with this implication of the state law.

At first blush it might seem that these principles will apply as well to the solution of the question of conflict between a state law and a municipal regulation, where authority for the latter is claimed under favor of Article XVIII, section 3, as where authority for the latter is claimed under a statute of similarly general purport. But if the first branch of the syllabus in Fremont vs. Keating establishes anything at all, it proves the very contrary of the second proposition just mentioned, whether or not it impairs the full force of the first. For it will be remembered that in enacting the state automobile license law the legislature had seen fit to prescribe rates of speed which should be uniform for the operation of automobiles in all municipal corporations. The legislature intended that this uniformity should not be disturbed and was so solicitous to express that intent that it attempted to prohibit municipal councils from acting with respect to the regulation of rates of speed at all, providing bluntly that municipal councils should have no authority whatever in the premises. This provision, said the Supreme Court in Fremont vs. Keating, became unconstitutional when Article XVIII, section 3, was adopted and became effective. It necessarily follows, therefore, that the doctrine which I have quoted from Dillon on Municipal Corporations, and other authorities, no longer applies in Ohio, and that regulations which are "local" may be adopted by municipal corporations in this state under favor of Article XVIII, section 3, of the Constitution, though the general assembly may have covered the subject by general law, in which it expressed the intention that such general law shall be the only law on the subject, or stating it conversely, the general assembly no longer has power to pass an exclusive law which shall exclude the adoption of purely local regulations on the same subject.

As I have said, this seems to me to be the very point which was decided in Fremont vs. Keating, but with this point granted it seems to me also that there may be some question as to the power of the general assembly, under Article XVIII, section 3, of the Constitution, to sanction a course of conduct that may be the subject of proper local regulation, or to prohibit such course of conduct as against proper local regulation sanctioning it. Yet the constitution expressly sanctions the paramountcy of the general law, even as against regulations which are "local"; so that, upon full consideration, I am of the opinion that the first of the two propositions last above enumerated still holds good in Ohio.

The question as to what subjects of regulation may be local in character will no doubt prove to be a very troublesome one; but it is at least clear that where there is a question as to the local character of a given subject of regulation, i. e., as to the appropriateness of local regulations on that subject, the action of the state legislature, in authorizing particular regulations to be made by municipal corporations, may, as hereinbefore pointed out, remove all question. It is equally clear that if it appears beyond doubt that a particular subject is not local in character, no authority to regulate it can be claimed from Article XVIII, section 3, of the Constitution, and the statutes which I have mentioned in the earlier portions of

this opinion must be looked to as the sole source of the police power of the municipality in that field; and when they are so regarded, the principles developed hereinbefore in the opinion, will apply in their entirety.

These considerations bring us to the ultimate question as to what police regulations are "local." We have only dicta to guide us on this point, as far as Ohio is concerned. Without repeating any of these decisions, suffice it to say that the Supreme court now appears committed to the doctrine that the second part of Article XVIII, section 3, is distinguished from the first part in that the first deals with municipal affairs while the second deals with matters state-wide in their nature but local in their application. Therefore it is impossible to draw the line between those police regulations which are "local" and those which are not "local" in their nature by a test which will exclude from the grant of power in the constitution all subjects which are proper ones for the exercise of the police power of the state. That is to say, the police power which municipalities may exercise under Article XVIII, section 3, is itself the police power of the state, and the effect of the latter part of the section is to make a comprehensive grant of all the police power of the state to municipalities, to be exercised locally by way of "regulation." There is some intimation in some of the cases, notably Fitzgerald vs. Cleveland, supra, to the effect that something less than this is granted by the provision under consideration. This notion, however, was definitely rejected by the Supreme Court in Cleveland vs. Cleveland Telephone Co., 98 O. S., ——. In that case the court expressly holds in the syllabus (not yet reported) that a regulation of the rates of public utilities is such a local police regulation as may be adopted by a city, subject to the control of the general laws which in that instance gave an appeal to the Utilities Commission. It would be interesting to quote extensively from this opinion, but as it has not yet been published in final form, I do not feel at liberty to do so.

I may say that I have not referred to State ex rel. vs. French, 96 O. S., 172, a case decided before Fremont vs. Keating, and which, like some of the other cases referred to, repeats approval of the decision in State ex rel. vs. Lynch, because the question that arose in that case was, like that in Billings vs. Cleveland Railway Company, one relating to a charter city and involving the right to exercise all powers of local self-government rather than the power to adopt and enforce local police regulations.

I do not feel able to attempt the framing of a definition of the phrase "local police, sanitary and other similar regulations," which can be put forward with assurance, as legally accurate and practically workable. As at present advised, I believe that the word "local", as used in this context, implies the idea that the condition giving rise to the regulation must be one peculiar to thickly settled communities for which municipal organization would be appropriate. Fremont vs. Keating is authority on the point that the speed of vehicles on the public streets and highways is a matter of greater concern in thickly settled communities than it is in rural districts. In other words, the rapid driving of motor vehicles and the like in city streets presents a public menace of a different character from that which would be present by similar rapid driving on a country road. Therefore, under Article XVIII, section 3, a municipality, exercising the power to protect against such peculiar menaces as result from congested population, may act even in the teeth of the attempt by the legislature to preclude action for the sake of preserving the uniformity of regulation throughout the state.

Further than this I cannot go. I may say, however, that in my opinion the word "local" does not impart the idea that the regulation is operative within the municipal limits. Obviously this would be the case with all municipal regulations, nor, on the other hand, for the reason as stated, does the word imply a different

source of power than the police power of the state. Being neither of these, the idea embodied in the word must be, as I see it, that which takes its keynote from a public need which is peculiar to municipalities, as such, or as thickly settled districts.

Coming now to the specific kinds of ordinances mentioned in your request, which I understand are merely examples of possible ordinances, beg to advise as follows:

I do not believe that a non-charter governed city has power to pass an ordinance merely prescribing the punishment for violating the state law with respect to operating a motor vehicle without a license. Such an ordinance would not be a "local police regulation" because it would not be a regulation at all. For similar reasons it would not be a "regulation" within the meaning of section 3632 of the General Code.

Interpreting this part of your question in another way, it may be regarded as directed to the power of a municipality, not governed by a charter, to adopt an ordinance requiring the procuring of a municipal license as well as the state license, provided for in the state law, and to define and punish the offense of operating a motor vehicle on the streets of a city without a city license. Such an ordinance, if valid at all, would be limited to residents. Pegg vs. Columbus, 80 O. S., 367. Would such an ordinance conflict with the general law?

Frisbie vs. The City of Columbus, 8 O. S., 686, decides that such an ordinance did conflict with the automobile law of 1906, but the decision was predicated upon a section substantially like section 6307 of the General Code, expressly decided to be unconstitutional in Fremont vs. Keating by virtue of a constitutional provision adopted since Frisbie vs. Columbus was decided. Indeed, the section of the law of 1906 went further than section 6307 does in that it denied to municipal authorities the right to license motor vehicles, whereas section 6307 merely denies to them the right to regulate speed. The state motor vehicle license law is found in sections 6290 to 6310 inclusive of the General Code. Section 6294 G. C. requires every owner of a motor vehicle to be operated and driven upon the public highways of the state to file application for registration and pay a fee. Section 6298 requires the secretary of state, upon performance of these conditions, to assign a distinctive number to the motor vehicle and issue to the applicant a certificate of registration. Section 6299 requires the secretary of state to keep a list and index thereto, showing the registered automobiles. Sections 6301 and 6302 make similar provisions respecting manufacturers and dealers in motor vehicles, respectively. Section 6306 exempts foreign motor vehicles from the operation of the law, provided the foreign law has been complied with.

While I have omitted some of the sections, I do not find anywhere any section providing that registration by the state shall entitle the owner of the motor vehicle to operate it upon the roads and highways of the state without further license by local authorities. We see, then, that the act of 1908, as amended, contains no provision to this effect like that of 1906 on which the decision in Frisbie vs. State was based; and even if there were such a provision, Fremont vs. Keating goes so far as to say that it would be unconstitutional, if enacted. I cannot therefore escape the conclusion that not only under favor of Article XVIII, section 3, of the constitution, but also under favor of section 3632 of the General Code, which expressly says that municipalities "shall have power to license and regulate the use of the streets by persons who use vehicles * * * thereon; a non-charter governed city may, if it chooses, exact a local license from resident owners of automobiles or other vehicles and punish the offense of operating such vehicles in the city without such license, covering the fines recovered into the municipal treasury.

Section 12620 of the General Code, next referred to by you, is one of the penal sections of the automobile law. I may say that you do not inquire about speed regu-

lations, as such. I do not, therefore, specifically consider the provisions of section 12680 of the General Code in the light of the decision in Fremont vs. Keating, the facts in which did not call for any determination in this respect.

You next refer to section 12614-3 of the General Code, 107 O. L., 58. This section makes it the duty of every person operating a vehicle on wheels during the night season to have attached thereto a light or lights, the rays of which shall be visible at least two hundred feet from the front and two hundred feet from the rear and imposes a fine for its violation. Clearly a non-chartered city has the authority to make a similar regulation both under the constitution and under section 3632 of the General Code.

You next refer to section 12858, which in part provides:

> "Whoever * * * obstructs or abuses a sheriff or other officer in the execution of his office, shall be fined * * * or imprisoned * * *."

Here we have a different kind of question. Clearly a municipal ordinance defining and punishing the offense of resisting a police officer, or some other officer of the city, would not necessarily "conflict" with this provision if authority were specifically granted to the municipality to pass such an ordinance. However, no such authority has been granted. On the contrary, we have merely the general language of sections 3658 and 3664 of the General Code, construed in Wellsville vs. O'Connor, supra. The general grant of power to adopt and enforce local police regulations is of the same character. Such a regulation as is supposed would unquestionably be a police regulation, but on the question as to whether or not it would be local, so that the power to pass it could be found in Article XVIII, section 3, of the constitution, I am in doubt.

In order to support it, one would have to say that the offense of resisting an officer in a municipal corporation is one which is subversive of public interests peculiarly local; in other words, that there is something about resisting an officer in a municipality that presents public dangers which do not exist when like offenses are committed outside of municipalities. On the whole, I cannot go further than to say that the validity of such an ordinance would be extremely doubtful in the present state of the law in Ohio.

As to charter cities, it may be said in the first place that no general statement can be ventured respecting the exact extent of their powers. Section 7 of Article XVIII of the Constitution authorizes the adoption of a charter under which all powers of local self-government may be exercised. Though no decisions are available on the point, it seems clear enough that a city charter adopted under favor of this provision may be in the nature of an organic law for the corporation, though perhaps primarily its purpose is merely to construct a framework of the government and thus to create organs for the exercise of the municipal powers, without necessarily defining what these powers shall be in greater detail than they are defined by the constitution itself, viz., all powers of local self-government. However, as indicated, the practice is to claim by specific provision of the charter, in addition to such powers as may be specifically created by the charter itself, all powers that may be granted to municipalities by the constitution or laws of the state. Thus the charter of the city of Ashland contains a recital, set forth in section 1 thereof, of detailed powers and concludes with the statement that the "city shall have all powers that now or hereafter shall be granted to the municipalities by the constitution or laws of Ohio." The same provision is found in the charter of the city of Cleveland and in that of the city of Columbus, which does not enumerate powers at all. In fact the charter of this city attempts at least to make very clear the intention embodied in it by a section which states that the enumerations of par-

ticular powers by this charter shall not be held or deemed to be exclusive, but in addition to the powers enumerated herein, implied thereby or appropriate to the exercise thereof, the city shall have, and may exercise all other powers which, under the constitution and laws of Ohio, it would be competent for this charter specifically to enumerate.

Without going into detail, I may say I have examined all the city charters set forth in Volume 1 of the Supplement to Page and Adams General Code of Ohio, and find that all of them contain general clauses like those already noted, excepting possibly that of the city of Middletown, which does not clearly claim all the powers of municipal corporations which might be claimed under the constitution, but merely the benefit of all general laws of the state of Ohio, applicable to municipalities therein existing but "not in conflict with the provisions of this charter," and provides that:

> "The enumeration of particular powers by this charter shall not be held or deemed exclusive, but in addition to the powers enumerated herein, or implied thereby, appropriate to the exercise thereof, the city shall have and may exercise all other powers granted to municipal corporations, unless such grant of general powers by the State of Ohio is in conflict with the provisions hereof."

This last provision which attempts to set the authority of the charter above that of the "State of Ohio" might be deemed indicative of an interpretation to the effect that what is meant is the general laws passed by the legislature; for of course the charter could not control as against the constitution of the state.

This examination of the charter provisions now extant, so far as they are available, leads me to make the general statement—as a fact, of course, and not as a conclusion of law—that with respect to police regulations charter cities are in no different situation from non-charter cities; that is to say, all cities, both charter and non-charter, seem to have all the specific powers set forth in the general laws to legislate by way of police regulations. The non-charter cities have such powers because, obviously, the general laws apply directly to them; also the charter cities have such powers because their charters that have been adopted claim the benefit of such powers and, of course, the statutes thus appropriated by the charter cities are in terms broad enough to apply to such cities, unless the charters of such cities stand in the way. That is to say, a charter might conceivably do no more than create a framework of government, being entirely silent as to the powers of the municipality for which the framework was thus created, and it would be perfectly clear, I think, that the city would "secure immunity" from the general laws, to use a phrase that seems to have been used in State vs. Lynch, supra, only to the extent of making new provision for the framework of government and the general laws would still apply as to the powers of the municipality as a whole.

So far as the general powers which could be claimed by a charter city with respect to police legislation, by virtue of Article XVIII, section 3 of the Constitution, are concerned, we have seen that this grant of power is made to all municipalities regardless of whether or not charters have been adopted. As to limitation thereon, respecting the local nature of the regulations and their conflict with the general law, I can see no distinction between the principles that would apply to a charter city and those which would apply to a non-charter city.

Without prolonging the discussion, then, I express the conclusion that every statement which I have made respecting the powers of a non-charter city applies to every charter city whose charter is set forth in the supplement to Page and Adams General Code, and which accordingly I have had an opportunity to examine.

Only in the event that some municipal charter which I have not seen expressly restricts the municipality or its council, or legislative body, to the exercise of fewer powers by way of police legislation than those which it might claim under favor of the general laws or constitution, could it be said that the police powers of such city would be in any wise different from those of a non-charter city.

As to the powers of the so-called "model" charter municipalities, i. e., those which have by vote of their electors, adopted one of the additional laws referred to in Article XVIII, section 2 of the constitution, and found in 103 O. L., it may be said that "model" charters in no wise deal with the subject of the powers of municipalities, but only with the framework of government. However, Article 6, section 1, of that act, 103 O. L., 778, the same being a part of section 3515-1, provides that the powers conferred upon municipalities by the municipal code, so far as applicable, shall govern, unless otherwise provided by law. Such provision may be proposed by the legislative authority of any municipality, or by the electors of such municipality by petition * * *. Such provisions shall take effect and be in force when approved by the majority of the electors voting thereon.

So that it appears that it is competent for such "model charter" communities to alter the powers which they possess under the general law in this way. As I have intimated, in dealing with the charter cities, however, such alteration would have to be by way of restriction rather than by way of enlargement before any perceptible difference between the real powers of a model charter municipality and non-chartered municipalities would be created.

This last remark brings out a point common to charter municipalities and "model charter" municipalities which have altered the powers they have under the general law. Conceivably there may be in a charter or in the alterations made in its power by a model charter municipality a provision granting specific and detailed authority to deal with some subject matter that the General Code does not mention or govern by some such general language as a grant of power to provide for the public peace, health or safety. Such a provision would remove all question as to the power of the municipality to adopt such regualtions under favor of it. But it would amount to nothing as reflecting upon the question of conflict between the local regulation and the general law, for as we have seen, that question is always one of the legislative intent, i. e., the intent of a single legislative body—the general assembly of the state—and where that body has passed two laws, one directly regulating a specific subject and the other granting specific authority to municipalities to regulate that subject, it is very clear that it cannot be claimed that an exercise of municipal power in accordance with the grant of the general assembly can create a conflict with the general law, because the grant itself is a part of the general law. But where the specific authority to make police regulations of a certain character emanates, not from the general assembly but either from the constitution, Article XVIII, section 3, or from the charter, this reasoning cannot be indulged in, for the constitution itself provides that the action of the general assembly shall control in case of conflict, and nothing is clearer than that a locally adopted organic law, whether it be called a charter or alterations in the powers of a "model" charter community, cannot be a "general law."

Therefore it seems clear that the application of the principle set forth in the above quoted passage in Dillon on Municipal Corporations might produce a different result on the point of conflict as between the exercise of specific authority emanating from the general assembly of the state and the exercise of like specific authority emanating from locally adopted organic law.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1500.

STATE MEDICAL BOARD AUTHORIZED TO MAKE RULE TO ACCEPT EXAMINATION PAPERS SUBMITTED TO U. S. ARMY EXAMINERS IN LIEU OF EXAMINATION BY BOARD.

1. *The state medical board is authorized to receive applicants who are medical officers in the United States army, navy and marine hospital service and make a rule having their examination papers, with printed questions attached, submitted under seal to the examiners of the state examining board for inspection, and if questions and answers are found satisfactory to the examiners of the state medical board, certificates may be granted to such medical officers through such examination to practice medicine or surgery in Ohio.*

2. *The chapter of our General Code in which is contained the medical laws of this state does not apply to a commissioned medical officer of the United States army, navy, or marine hospital service in the discharge of his professional duties.*

COLUMBUS, OHIO, October 7, 1918.

The State Medical Board, H. M. Platter, Secretary, Columbus, Ohio.

GENTLEMEN:—You request my opinion as follows:

"I am directed by the State Medical Board to submit to you for an opinion an inquiry as follows received from W. C. Braisted, M. D., chairman of the National Board of Medical Examiners:

' * * * When a medical officer holding a certificate from the National Board makes application for licensure in Ohio, his examination papers, with printed questions attached, be submitted under seal to the examiners of the Ohio State Medical Board for inspection, and if satisfactory a further oral test be required as seems necessary. * * *'

The board desires to know whether such arrangement can be construed as in conformity with the provisions of sections 1273 and 1274, or 1282 of the General Code of Ohio."

Sections 1273, 1274 and 1282 G. C., referred to by you, read as follows:

Section 1273.—"The examinations of applicants for certificates to practice medicine or surgery shall be conducted under rules prescribed by the state medical board. Each applicant shall be examined in anatomy, physiology, pathology, chemistry, materia medica, and therapeutics, the principles and practice of medicine, diagnosis, surgery, obstetrics and such other subjects as the board requires. The applicant shall be examined in materia medica and therapeutics and principles and practice of medicine of the school of medicine in which he desires to practice, by the number of members of the board representing such school."

Section 1274.—"If the applicant passes such examination and has paid the fee required by law, the state medical board shall issue its certificate to that effect, signed by its president and secretary, and attested by its seal. Such certificate when deposited with the probate judge as required by law, shall be conclusive evidence that the person to whom it is issued is entitled to practice medicine or surgery in this state. An affirmative vote of not less than five members of the board is required for the issuance of a certificate."

Section 1262.—"The state medical board may dispense with the examination of a physician or surgeon, duly authorized to practice medicine or surgery in another state, a territory or the District of Columbia, who wishes to remove from such state, territory or district and reside and practice his profession in this state, upon his complying with the following conditions:

Such physician or surgeon shall make an application on a form prescribed by the board, pay a fee of fifty dollars and present a certificate or license issued by the medical board thereof; provided the laws of such state, territory or district require of physicians and surgeons practicing therein qualifications of a grade equal to those required of physicians and surgeons practicing in Ohio, and equal rights are accorded by such state, territory or district to physicians and surgeons of Ohio holding a certificate from the state medical board who desire to remove to, reside and practice their profession in such state, territory or district."

In order to understand fully section 1273 G. C., it is necessary to examine the language contained in certain other sections of the General Code, which language refers to the filing of applications by persons who desire to take examinations for certificates to practice medicine and surgery in the State of Ohio.

Section 1269 G. C. provides that:

"*Each person* who desires to practice medicine or surgery shall file with the secretary of the state medical board a *written application,* under oath, on a form prescribed by the board, and furnish satisfactory proof that he is more than twenty-one years of age and of good moral character."

While said section says "each person," it will be hereinafter noted that the provisions of this act, that is, the act of which section 1269 is a part, do not apply to all persons, that there are certain exceptions among whom are commissioned medical officers of the United States army, navy or marine hospital service when in the discharge of their professional duties, and what I shall say herein will apply to such commissioned persons only in so far as they are practicing their profession other than in an official way, or, in other words, this opinion will only refer to such military officers who desire to receive licenses and to practice medicine and surgery in Ohio other than as such officers.

After the written application referred to in section 1269 is filed, as is provided by said section, then the same is examined that the preliminary educational qualifications of the applicant may be determined. The following preliminary educational qualifications shall be sufficient to admit the applicant to an examination, viz: (1) a diploma from a reputable college granting the degree of A. B., B. S., or equivalent degree; (2) a diploma from a legally constituted normal school, high school or seminary, issued after four years of study; (3) a teacher's permanent or life certificate; (4) a student's certificate of examination for admission to the freshman class of a reputable literary or scientific college; (5) a certificate issued by the entrance examiner who is appointed by the board to conduct such examination, which certificate shows that the applicant has passed an examination in such branches as are required for graduation from a first class high school of this state.

If the entrance examiner finds that the applicant possesses the preliminary educational qualifications which bring such applicant within one of the above classes, then such entrance examiner shall issue to such applicant a certificate to that effect.

The applicant must produce such certificate and also a diploma from a legally

chartered medical institution in the United States in good standing, as defined by the board at the time the diploma was issued, and which institution subsequent to May 1, 1913, required for admission for the degree of M. D. to such institution a preliminary education equal to that required for graduation from a first grade high school in this state, or a diploma or license approved by the board which conferred the full right to practice all branches of medicine or surgery in a foreign country. After such applicant has such preliminary certificate and such diploma or license, then he must present same to the board, together with an affidavit that he is the person named therein and that he is the lawful possessor thereof, stating his age, residence, the college or colleges at which he obtained his medical education, the time spent in each, the time spent in the study of medicine and such other facts as the state medical board requires. If such applicant is engaged in the practice of medicine at the time such application is filed, he shall state the period during which and the place where he has been so engaged. It is next the duty of the state medical board to examine the credentials of such applicant and if it finds that they are proper, then the board shall admit such applicant "to an examination."

Such is the procedure which is necessary for each person to follow before he can take an examination, as is provided by section 1273, to which you refer. Just how the examinations shall be held by the board is not specifically pointed out in said section. The section simply provides that the examination shall be conducted under *rules prescribed by the board.* The applicant, however, must be examined in anatomy, physiology, pathology, chemistry, materia medica and therapeutics, the principles and practice of medicine, diagnosis, surgery, obstetrics and such other subjects as the board requires, provided, however, that the applicant shall be examined in materia medica and therapeutics and principles and practice of medicine of the school of medicine in which he desires to practice, by the number of members of the board representing such school. Just how much latitude is permitted to the board in the holding of such examinations is not determinable from the language of the various sections of the state medical laws, but it is plain that when they are given the right to make rules the legislative intent seems clear that they exercise whatever reasonable discretion is necessary in order to carry out the provisions of said section. The statutes formerly provided that the board should hold examinations in the cities of Cincinnati, Cleveland, Columbus and Toledo, but it did not say when such examinations should be held, and the board determined to hold an examination in Columbus rather than Cincinnati. Suit was brought in the case of State ex rel. vs. Medical Board, 12 O. C. C. (n. s.) 189, to compel the holding of such examination in Cincinnati, and the court held that while under such statute it is the duty of the board to hold examinations in such cities, yet inasmuch as the act is silent as to the time when such examination shall be held, and inasmuch as it is the duty of the board to determine the dates and places of examinations, a writ of mandamus will not be granted to compel the holding of such examination in the absence of a showing of an abuse of discretion on the part of the board with reference to the selection of times and places for the holding of such examinations. If, then, the discretion of the board could not be controlled unless that discretion was abused in the matter of the setting of the places and dates for the holding of examinations, I am of the opinion that the discretion of the board with reference to the manner of holding such examinations cannot be controlled unless that discretion is abused. That is to say, if your board determines, in the examining of those applicants for certificates to practice medicine or surgery in Ohio who are medical officers, that their examination papers, with printed questions attached, shall be submitted under seal to the examiners of the Ohio State Medical board for inspection, and if the examination papers so submitted cover the branches provided for under our laws, and if such applicant quali-

fies for such examination as is provided by our laws and as above set forth, and if such applicant passes such examination under the rules prescribed by the board, then I am of the opinion that such an examination is a valid examination as is referred to in section 1273 G. C.

Section 1274 merely provides that if the applicant passes such examination and has paid the fee required by law, the board shall issue its certificate to that effect, and that when such certificate is deposited with the probate judge as is required by law, it shall be conclusive evidence that the person to whom it is issued is entitled to practice medicine and surgery in this state. The provisions of the above section apply to every certificate issued by the board, whether by examination or by reciprocity, and no matter how the examination is held. If a certificate is granted following the examination, then the section applies to such certificate; therefore, if an examination is granted, as above indicated, and a certificate granted to the applicant, such certificate would be as valid as if the examination were given in any other manner.

You also refer to section 1282 G. C., above quoted. This is what is commonly called the reciprocity section of the medical law, that is, the State Medical board may dispense with an examination as far as a physician or surgeon is concerned who is duly authorized to practice medicine or surgery in another state, a territory or the District of Columbia, and which physician or surgeon wishes to move from such other state, territory or District of Columbia and reside in and practice his profession in this state, provided, however, that such physician or surgeon shall make application on a form prescribed by the board and shall pay a fee of $50.00 and shall present a certificate or license issued by the medical board of such other state, and provided further that the laws of such other state or territory, or the District of Columbia, require of physicians and surgeons who practice therein qualifications of a grade equal to those required of physicians and surgeons to practice in Ohio, and provided further that equal rights are accorded by said other state, territory or District of Columbia to physicians and surgeons of Ohio who hold a certificate from the State Medical board and who desire to remove to, reside and practice their professions in such other state, territory or district. This is merely a reciprocity provision with another state, a territory or the District of Columbia and was not made under our laws to include medical officers of the United States army, navy or marine hospital corps. So that, reciprocity certificates could not be issued to medical officers, as such, but, as noted above, the provisions of our medical laws do not apply to medical officers of the classes above named because section 1287 provides in part:

> "* * * This chapter shall not apply to a commissioned medical officer of the United States army, navy or marine hospital service in the discharge of his professional duties. * * *."

If, then, your inquiry refers only to the practice of such officers while they are performing service for the army, navy or marine service, you are advised that they are exempted from the provisions of the state medical laws, but if, on the other hand, such officers desire to receive certificates to practice medicine or surgery in Ohio outside of the United States service, then your board can make a proper rule by which a proper examination can be given as above indicated.

Answering your question specifically, then, I advise you that the State Medical board is authorized to make a rule that duly authorized applicants who are medical officers may have their examination papers, with printed questions attached, sub-

mitted under seal to the examiners of the Ohio State Medical board for inspection and, if satisfactory to the examiners of the State Medical board, certificates may be granted to such medical officers through such an examination.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1501.

APPROVAL OF BOND ISSUE OF THE CITY OF URBANA, OHIO.—$15,000.

COLUMBUS, OHIO, October 8, 1918.

The Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

In Re: Bonds of the city of Urbana, Ohio, in the sum of $15,000.00 for the purpose of purchasing equipment for the fire department of said city.

I have carefully examined the transcript of the proceedings of the city council and other officers of the city of Urbana, Ohio, relating to the above issue of bonds, and find the said proceedings to be in conformity to the provisions of the General Code of Ohio relating to bond issues of this kind.

I am therefore of the opinion that properly prepared bonds covering the above issue will, when the same are properly executed and delivered, constitute valid and binding obligations of the city of Urbana, Ohio, to be paid in accordance with the terms thereof.

No bond form of the bonds to be printed covering the above issue has been submitted to this department for approval, and I am therefore holding the transcript until such bond form is submitted and approved.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

1502.

ROADS AND HIGHWAYS—CONTRACT TO IMPROVE NOT RELEASED BECAUSE NO CERTIFICATE UNDER 5660 G. C. MADE UNTIL AFTER FINAL RESOLUTION ADOPTED, NOR BECAUSE OF FAILURE TO OBTAIN BRICK OWING TO GOVERNMENT EMBARGO, NOR BECAUSE OF DANGER IN PURSUING WORK.

Under the facts and circumstances of the cases, the reasons advanced by Stringer & Springer as grounds upon which they should be released from their contract, namely (1) *that the certificate of the county auditor to the effect that the money was in the treasury to take care of the obligation of the county was not made until after the final resolutions were adopted; and* (2) *that they were prevented from getting brick from a certain company owing to an embargo placed*

upon the shipment of brick by the federal government; and (3) *that an over-hanging bank along the route of said improvement made it dangerous for working upon the same, are not sufficient in law to warrant said contractors being released from the obligations of their contract.*

COLUMBUS, OHIO, October 8, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of September 26, 1918, which reads as follows:

> "For your information, I beg to quote the following from the Journal of the Highway Advisory board as of September 24th, 1918:
>
> *'Jefferson County*—I. C. H. No. 7, section "J"—Contractors request release from contract.'
>
> A statement was presented signed by Stringer & Springer, original contractors for the improvement of section "J", inter-county highway No. 7, Jefferson county, this statement requesting the cancellation of said contract by the highway department.
>
> The secretary was authorized to submit to Mr. McGhee a copy of the request of Stringer & Springer together with a copy of the entry on the Journal of the Advisory board as of September 24th, 1918, relative to this contract."

To your communication is attached a copy of a letter addressed to you by Chief Engineer Bruning; also one addressed to you by Stringer & Springer, contractors. These communications are too lengthy to quote in full, but the facts upon which you desire my opinion are briefly as follows:

Your department entered into a contract with Stringer & Springer for the improvement of section "J" of inter-county highway No. 7, Jefferson county, Ohio, and known as the Ohio river road. The date of the letting of this improvement was April 28, 1916; the contract was mailed to the contractors on June 7, 1916; the final resolution of the county commissioners in which they agreed to assume, in the first instance, a certain proportion of the cost and expense of the improvement of this road, was adopted on April 7, 1916; the certificate of the county auditor to the effect that the money was in the treasury of the county to take care of the county's share of the cost and expense of the improvement was dated May 16, 1916; the contractors entered upon the construction of this work on or about June 20, 1916, and completed about 90 per cent of the grading of the road in 1916.

From the communication I take it that but little work, if any, was done upon this work after the fall of 1916 by Stringer & Springer.

Under the provisions of section 1209 G. C. the state highway commissioner took over this contract and is completing the same under contract with Morgan Brothers. The contractors, Stringer & Springer, now request that they be released from the contract with the State of Ohio, through the state highway department. Their request for a release from the obligations under the contract is based upon three separate and distinct propositions as set out in their communication to the highway department. First, they claim that they should be released for the reason that the final resolutions of the county commissioners were entered into on April 7, 1916, while the certificate of the county auditor to the effect that the money necessary to take care of the county's share of the cost and expense of the improvement was not made until May 1, 1916; that this is not in conformity to the provisions of section 5660 G. C. and that therefore the final resolutions of the county commissioners are void and the contract of the state highway commissioner based upon said

final resolutions is also void, and therefore the contractors should be released from the obligations of the same.

Secondly, the contractors claim that they were not able to secure brick from the Mack Brick company of New Cumberland, West Virginia, with which they had contracted for the brick, and this for the reason that the federal government placed an embargo on the shipment of brick westward, so they were unable to get shipments.

Thirdly, the contractors suggest that there was an overhanging bank along a portion of this road which made work and travel along the road dangerous, and that the state highway commissioner did not take any steps to remove this bank until February, 1918.

I will note these different matters with a view to ascertain whether any of the claims made are of such a nature as that the contractors should be released from the obligations of their contract.

It occurs to me that the third matter submitted, that is, in reference to the over-hanging bank needs but little consideration. There is nothing to indicate that this condition made it at all impossible for the contractors to proceed with the improvement; in fact, they state that 90 per cent of the grading and much of the rolling had already been done in 1916. It is not likely that this over-hanging bank made it any more difficult or dangerous to lay the brick upon the road than to grade the same and roll it. Hence, I will pass this question by without further consideration.

The first matter suggested is entirely a legal one. I have already held in other opinions rendered to your department that the certificate of the county auditor to the effect that the money is in the treasury to take care of an obligation should be made prior to the time that the county commissioners make a final resolution or agreement to the effect that the county will assume a certain part of the cost and expense of an improvement. But this proposition must be taken in connection with the facts in reference to which the question is raised. In this case both the contractors and the state highway commissioner proceeded in accordance with the finding made by my predecessor, Hon. Edward C. Turner, to the effect that the final resolution upon which the contract was based was correct in form and legal in all respects.

Upon the final resolution adopted by the commissioners of Jefferson county, Ohio, we find the following conclusion made by my predecessor:

"DEPARTMENT OF THE ATTORNEY-GENERAL.

Pursuant to the requirements of section 1178 to 1231-4 inclusive of the General Code of Ohio, the foregoing agreement of the board of commissioners of Jefferson county, Ohio, is approved as to form and legality.

EDWARD C. TURNER,
Attorney-General of Ohio."

May 24, 1916.

Further, in Volume 1, page 918 of the Annual Reports of the Attorney-General for 1916, we find the opinion of my predecessor, Hon. Edward C. Turner, to the effect that this said final resolution was correct and that he had endorsed his approval thereon.

Inasmuch as the parties to this proceeding have gone forward on the theory that this final resolution was correct in form and legal, inasmuch as the Attorney-General, in accordance with the provisions of section 1218 G. C. had approved the same, I do not feel that I should overrule the opinion of my predecessor in reference to this final resolution.

It must be borne in mind that the contractors when dealing with public officials are held to have knowledge of all the acts of said public officials in reference to the contract which is made with said officials. Stringer & Springer in entering into the contract with the State of Ohio would be held to have knowledge of the acts of the county commissioners and of the county auditor as well as of the state highway commissioner and the Attorney-General of the state; and for this reason I do not feel that they should be allowed to complain of the fact at this late date that an error had been made in the proceedings, even though I should hold that such an error had been made.

I rendered an opinion to your department in which I held that contractors by the name of Rinehart Brothers should be released from their contract upon a condition of facts set out in the opinion. This opinion is found in Volume 1, page 658 of the Annual Reports of the Attorney-General for 1917. In the case of Rinehart Brothers, the certificate was not made until after the final resolutions were entered into, but there was much more in that case than in the one now before me. In that case Rinehart Brothers requested time after time that they might be permitted to go ahead with their work stating that they were ready and had been ready for a considerable length of time to proceed with the work, but they were prevented from doing so owing to the fact that there was no money in the treasury, and that the state highway commissioner was not able to deliver the contract to them. Owing to the equities in that case I held that Rinehart Brothers should be released.

But the case under consideration is entirely different; the contractors entered upon the performance of their work immediately; they received their pay as the work proceeded; there was no fault whatever upon the part of the county of Jefferson nor upon the part of the officials of the state. Further, it must be remembered, that in this case Stringer & Springer have forfeited their contract in not complying with the provisions of section 1209 G. C. and have no further rights in and to the same. The state highway commissioner has taken over the contract under the provisions of said section 1209 which makes it obligatory upon him to complete the same by force account, by contract or by any method which may seem to him to be for the best interest of the public, paying for the same out of the balance that may be due under the original contract, and if there be not sufficient to complete the same, then he must look to the bond for the difference between the total cost and expense of the improvement and the original contract price.

We can readily see from this that the state already has certain rights as against both the contractors and the surety on their bond. To be sure, if the contractors could be released from the obligations of their contract, the surety on the bond would also be released, to the detriment and loss of the State of Ohio.

Hence, inasmuch as my predecessor, Hon. E. C. Turner, passed favorably upon this particular final resolution, and both the state highway commissioner and the contractors acted in view of this finding, and inasmuch as the contractors have forfeited their rights under the contract, and the state highway commissioner has taken the same over and is completing the improvement under the provisions of section 1209 G. C. it is my opinion that you have no authority in law to declare the contract null and void as to the contractors, Stringer & Springer.

We now come to consider the second matter set up by the contractors, namely, that they were not able to get brick from the firm with which they had contracted for the brick, and this owing to the fact that the federal government had placed an embargo upon the shipping of brick westward during the season of 1917.

Insofar as the contract between the state highway commissioner and Stringer & Springer is concerned, there was no agreement whatever as to the place from which Stringer & Springer should secure the brick. Whether they secured the

brick from the particular firm mentioned, or whether they secured the brick from some other source, was not important to the state. The only condition required by the state was to the effect that the brick should come up to certain specifications set out in the contract. If Stringer & Springer were prevented from getting their brick from the particular firm with which they had contracted, they evidently could have gotten brick from other sources.

Further, this embargo that was placed upon the shipping of brick was not a lasting order. It was merely temporary. The law is well settled to the effect that the mere fact that a contractor is prevented for a time from getting the necessary material with which to carry out his contract because of a law or an order of the government, he is not therefore entitled to a release from the obligations of his contract.

I went into this matter pretty fully in an opinion rendered by me on August 10, 1918, to Hon. Benton G. Hay, prosecuting attorney, being opinion No. 1394. In this case the contractor was unable for the time to get tar products with which to place the top covering upon a highway which he was improving. In considering this I arrived at this conclusion:

> "There is one condition attached to the above principle which ought to be noted at this time, and that is, that a mere temporary disability to perform the obligations of the contract, due to the fact of some law, or due to the enforcement of a law already enacted, will not permit a party to a contract to refuse to perform his obligations."

Further along in the opinion I arrive at this conclusion:

> "In the first place, let me say it is my opinion that the contractor in your case could not demand as against the wishes of the county commissioners that he be released from the obligations which he has assumed, the order made by the federal government is from the very necessity of the case merely temporary in nature, and while the county commissioners could not compel the contractor to place upon the road a bituminous top dressing during the period of the war, yet after the war closes the county commissioners, if they so desire, undoubtedly could hold the contractor to the obligations entered into by him in his contract with the county."

Hence, in reference to the matter which I am now considering, let me suggest (1) that Stringer & Springer were not justified in simply relying upon the Mack Brick Company for the furnishing of the brick necessary for the construction of this highway. If they could not secure the brick from this firm, they should have secured the brick from some other source; and (2) even though they were prevented for the time in getting brick, due to the embargo placed upon the shipping of brick by the federal government, yet this embargo was merely temporary and not permanent, and hence would not be a sufficient ground upon which the contractors should be released from the obligations of their contract.

Hence, in view of all the above I advise you specifically that the reasons advanced by Stringer & Springer as a basis upon which they ought to be released from the obligations of their contract are not sufficient in law to warrant their release.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

1503.

APPROVAL OF BOND ISSUE OF HANCOCK COUNTY, OHIO.—$19,325.00.

COLUMBUS, OHIO, October 10, 1918.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In Re: Bonds of Hancock county, Ohio, in the sum of $19,325.00 in anticipation of the collection of taxes and assessments to pay the respective shares of Hancock county, of Liberty township and of the owners of benefited property assessed of the cost and expense of constructing the Ottawa-Findlay I. C. H. No. 223 road improvement located in said county and township.

I have carefully examined the corrected transcript of the proceedings of the board of county commissioners of Hancock county, Ohio, and of other officers relating to the above issue of bonds, and find the proceedings to be in conformity to the provisions of the General Code of Ohio relating to bond issues of this kind.

I am therefore of the opinion that properly prepared bonds covering said issue will, when the same are executed and delivered, constitute valid and binding obligations of Hancock county, Ohio, to be paid in accordance with the terms thereof.

Yours very truly,

JOSEPH MCGHEE,

Attorney-General.

1504.

APPROVAL OF ARTICLES OF INCORPORATION OF THE FIRST ROMAN CATHOLIC ST. ELIAS BENEVOLENT ASSOCIATION.

COLUMBUS, OHIO, October 11, 1918.

HON. WILLIAM D. FULTON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your favor under date of October 9, 1918, submitting for my approval the Articles of incorporation of The First Roman Catholic St. Elias Benevolent Association, together with check for $25.00 covering the filing fee of said articles.

I do not know anything in the statutory provisions relating to the incorporation of associations of this kind which require my official approval of these articles, but treating your submission of these articles as a request for my opinion with respect to the validity of the articles of incorporation, I beg to say that I find the same to be in all respects regular, save and except that conformable to the provisions of section 9427 General Code, as construed by this department from time to time, the word "stipulated" should be inserted in the purpose clause of the articles between the word "of" and the word "benefits."

I herewith return to you the said articles of incorporation for correction in the manner above indicated, together with the check for $25.00 before noted herein.

Yours very truly,

JOSEPH MCGHEE,

Attorney-General.

1505.

FORFEITED LANDS—REDEMPTION AND RIGHTS OF PARTIES.

A is the owner of property in fee simple which becomes delinquent for non-payment of taxes in 1897.

B buys the land at delinquent tax sale in 1898 *and pays the taxes for the year* 1899; *thereafter the property becomes delinquent again for taxes and is offered for sale and for want of bidders is forfeited to the state:*

HELD, *assuming that the state has not disposed of the property and that* B, *never received a tax deed.*

1. *A's right of possession has never been disturbed.*

2. *B's equity in the property is either extinguished or barred by lapse of time in* 1918.

3. *An outsider may acquire perfect title to the premises by procuring the owner to redeem them from forfeiture and taking a general warranty deed from the owner.*

COLUMBUS, OHIO, October 11, 1918.

HON. ADDISON P. MINSHALL, *Prosecuting Attorney, Chillicothe, Ohio.*

DEAR SIR:—By letter of September 16th, supplemented by your communication of October 4th, you have requested my opinion upon the following questions:

> "A is the owner of a piece of property in fee simple, the property is allowed to become delinquent by A, by reason of non-payment of taxes for the years of 1887 and 1888.
>
> The property is offered for sale by the county treasurer, under section 5711 G. C. and sold to B, a certificate is issued to B by the county auditor under section 5715 G. C. B pays the taxes for the year of 1899, and allows the land to become delinquent by reason of non-payment of taxes for the years of 1900 and 1901.
>
> Thereupon the land is again offered for sale by the treasurer at delinquent land sale in the year of 1902, not sold for want of bidders, and therefore forfeited to the state.
>
> How may A the original owner again come into possession of this land in the year of 1918?
>
> What equity if any has B in this property?
>
> C an outsider desires to purchase this property. What procedure must he take and what equity if any, or what settlement if any, must he make with A and B?"

As to your first question I may say that nothing in the statement of facts shows that A has ever lost possession of the land in question. Neither the sale thereof at delinquent tax sale nor the forfeiture thereof to the state would put him out of possession. The purchaser at the delinquent tax sale acquired no right of possession—indeed he never acquired perfect title at all,—merely a lien and an inchoate right to receive a deed, of which apparently he has never availed himself. If he (B) is in possession I am of the opinion that A can maintain ejectment against him; because as against the whole world excepting the state of Ohio A is the owner of the tract.

Thevenin vs. Lessee of Slocum, 16 Ohio, 519; State ex rel. vs. Godfrey, 62 O. S. 18.

Your statement of facts does not show that the land was ever sold at forfeited land sale. I assume therefore that the state has never disposed of it, so that no one claiming title from the state has dispossessed A. You do not say that the state has in any other manner dispossessed A.

In short, without further facts at least, I do not see that the first question submitted by the county auditor to you and by you to me exists at all.

By this purchase of the quantity of the land at delinquent tax sale B acquired the state's lien for the taxes which he paid and, as stated, an inchoate right to receive a deed at the end of two years (section 5719 G. C.). You do not state that B is asserting any right to receive a deed at this time. I am inclined to the opinion that B would have no right at this time to call for a deed. He has allowed the land to become again delinquent and it has been forfeited to the state. It now has, therefore, the status of "forfeited land" and is no longer "delinquent land." While I am unable to find any case directly in point, I repeat my opinion that B can not now call for a deed.

B's only other right was an interest in the land in the nature of a lien thereon representing the lien of the state for the taxes which he paid. If the delinquent tax sale was in all respects regular there would be some doubt as to whether or not this lien could be enforced otherwise than by calling for a deed under proper circumstances (See Cleveland Trust Co. vs. Brown, 17 C. C. n. s. 304). If B did have any right to enforce his lien in any of the usual ways such right, in my opinion, was of the same character as that given to a purchaser at an irregular tax sale by section 5724 of the General Code which created such lien, as follows:

> "Upon the sale of land or town lots for delinquent taxes, the lien which the state has thereon for taxes then due shall be transferred to the purchaser at such sale. If such sale should be invalid on account of irregularity in the proceedings of an officer, having a duty to perform in relation thereto, the purchaser at such sale shall be entitled to receive, from the owner of such land or lot, the amount of taxes, interest, and penalty legally due thereon at the time of sale, with interest thereon from the time of payment thereof, and the amount of taxes paid thereon by the purchaser subsequent to such sale. Such land or lot shall be bound for the payment thereof."

Under this section it is held that an action to enforce the lien expressly provided for in the latter part thereof is subject to the six year statute of limitations.

Wiltsie vs. McClymon, 11 C. C. n. s. 509; Wolcott vs. Holland, 5 C. C. n. s. 604.

This statute of limitations begins to run at the expiration of two years from the date of the sale. On the facts as the auditor states them, then, (though the dates seem to be in some confusion) B's right to enforce the lien of the state for the taxes which he paid, if such right ever existed, became barred in 1907.

I therefore arrive at the conclusion that B has lost all enforcible rights which he ever had under the tax sale to him.

C, the outsider, would in my opinion get a perfect title to the premises by dealing with A for A's legal title and redeeming the land from the forfeiture under section 5746 of the General Code, which provides as follows:

"If the former owner of a tract of land or town lot, which has been so forfeited, at any time before the state has disposed of such land or lot, shall pay into the treasury of the county in which such land or lot is situated, or into the state treasury, all the taxes and penalties due thereon at the time of such forfeiture, with the taxes and penalties which have since accrued thereon, as ascertained and certified by the auditor, the state shall relinquish to such former owner or owners, all claim to such land or lot. The county auditor shall then re-enter such land or lot on his tax-list, with the name of the proper owner."

I have previously assumed that the state has not disposed of the land, so that the right of redemption still exists in the original owner. A is the original owner because B never acquired any title to the land. A may then certainly redeem it. The right to redeem seems to be limited to the "former owner," which has been held to apply to his heirs.

Reynolds vs. Lieper's Heirs, 7 Ohio, (pt. 1) 17; Tullis vs. Pierano, 9 C. C. 647.

To avoid all question it might be best for the parties to deal with each other so that the redemption is made in the name of A. That is, A (with money furnished by C, of course,) can redeem from the forfeiture by paying all the unpaid taxes charged against the property with the penalties which have accrued, and then execute a general warranty deed to C. C will then have a good and perfect title because B's right to call for a deed and his right, if any, to enforce the lien which was transferred to him have both been extinguished, the one by the subsequent forfeiture of the land to the state, and the other possibly by the same event and certainly by the lapse of time.

Of course, all the statutes considered in this opinion have been repealed by an act passed in 1917. Such repeal, however, does not affect the rights that vested and became divested under the statutes as they were when the transactions inquired about occurred.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1506.

APPROVAL OF ABSTRACT OF TITLE TO LOTS NOS. 15 AND 67 OF WOOD BROWN PLACE SUBDIVISION, COLUMBUS, FRANKLIN COUNTY, OHIO.

COLUMBUS, OHIO, October 11, 1918.

HON. CARL E. STEEB, *Secretary, Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—I am in receipt of abstract of title covering the following lots of land located in the city of Columbus, county of Frankin and State of Ohio, and described as follows:

Being lots Nos. fifteen (15) and sixty-seven (67) of Wood Brown Place subdivision, as the same are numbered and delineated upon the recorded plat thereof, of record in plat book 5, page 196, recorder's office, Franklin county, Ohio.

I have examined said abstract and find no material defects in the chain of title to said premises as disclosed thereby.

Said abstract does not show any liens or encumbrances on said property, except the taxes for the year 1918, which are undetermined and unpaid.

I am therefore of the opinion that said abstract disclosed on October 3, 1918, a good title in John M. Hess, to the premises hereinbefore described.

I am returning herewith the abstract submitted by you.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1507.

APPROVAL OF ABSTRACT OF TITLE TO LOT NO. 69 OF WOOD BROWN PLACE SUBDIVISION, COLUMBUS, FRANKLIN COUNTY, OHIO.

COLUMBUS, OHIO, October 11, 1918.

HON. CARL E. STEEB, *Secretary, Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—I am in receipt of abstract of title covering the following lot of land located in the city of Columbus, county of Franklin and State of Ohio, and described as follows:

> Being lot No. sixty-nine (69) of Wood Brown Place subdivision, as the same is numbered and delineated upon the recorded plat thereof, of record in plat book 5, page 196, recorder's office, Franklin county, Ohio.

I have examined said abstract and find no material defects in the chain of title to said premises as disclosed thereby.

Said abstract does not show any liens or encumbrances on said property, except the taxes for the year 1918, which are undetermined and unpaid.

I am therefore of the opinion that said abstract disclosed on October 3, 1918, a good title in Hannah M. Kennedy, to the premises hereinbefore described.

I am returning herewith the abstract submitted by you.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1508.

APPROVAL OF ABSTRACT OF TITLE TO LOTS NOS. 70, 71, 72 AND 73 OF WOOD BROWN PLACE SUBDIVISION, COLUMBUS, FRANKLIN COUNTY, OHIO.

COLUMBUS, OHIO, October 11, 1918.

HON. CARL E. STEEB, *Secretary, Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—I am in receipt of abstract of title covering the following lots of land located in the city of Columbus, county of Franklin and State of Ohio, and described as follows:

Being lots Nos. seventy (70), seventy-one (71), seventy-two (72) and seventy-three (73) of Wood Brown Place subdivision, as the same are numbered and delineated upon the recorded plat thereof, of record in plat book 5, page 196, recorder's office, Franklin county, Ohio.

I have examined said abstract and find no material defects in the chain of title to said premises as disclosed thereby.

Said abstract does not show any liens or encumbrances on said property, except the taxes for the year 1918, which are undetermined and unpaid.

I am therefore of the opinion that said abstract disclosed on October 3, 1918, a good title in Mary E. Hess, to the premises hereinbefore described.

While I am passing favorably upon the title to the above named lots standing in the name of Mary E. Hess, as of date October 3, 1918, I desire to call attention particularly to one matter connected with the chain of title to lots Nos. 72 and 73. In so far as the records in the office of the recorder of Franklin county, Ohio, are concerned, said lots Nos. 72 and 73 stand in the name of Eliza J. Hess. John K. Kennedy makes affidavit which is made a part of the abstract and states that Eliza J. Hess made a last will and testament which was offered for probate on the day upon which the affidavit was made and that Mary E. Hess is her only daughter and only heir at law, and that all the estate, both real and personal, of Eliza J. Hess passes under her will to Mary E. Hess; that Eliza J. Hess had property at the time of her decease valued at over $100,000, and that her debts do not exceed $6,500.00.

Thus whether the will is probated or not, Mary E. Hess will come into the legal possession of lots Nos. 72 and 73. If the will is probated she would get them by devise. If it should not be probated, she will get title to said lots by descent. However, she takes said lots subject to the debts of the decedent, Eliza J. Hess.

Taking the sworn statement of John K. Kennedy at its full weight, which I do, I notice that there is an abundance of property to take care of the debts of Eliza J. Hess, without resorting to these two lots. However, this question might arise: Suppose Mary E. Hess should sell all the real estate before the debts of Eliza J. Hess are paid and there is not sufficient personal property to pay the debts, what would be the position of the state in reference to these two lots, inasmuch as it would be compelled to take them subject to the debts of Eliza J. Hess? I do not think the state would suffer in this respect, due to the principle laid down in Nellons et al. vs. Truax, et al., 6 O. S. 98, to the effect that in a case where several purchasers buy real estate encumbered by legacies, the property transferred is liable to the payment of the liens, upon it, because of the legacies, in the inverse order in which the purchasers acquired ownership. The syllabus in this case reads as follows:

"Where T. devised to his son all of his real estate, by his paying the valuation of two thousand dollars (after the decease of testator's wife), equally to his six children, the legacies thus created are a charge upon the land devised, which may be enforced against it in the hands of purchasers from the devisees, although they purchased without *actual* notice of the incumbrance, and for good considerations paid.

The several purchasers of such incumbered property are liable to the payment of the liens upon it, according to the inverse order of time in which they acquired ownership.

The rule of *pro rata* contribution does not apply, in this state, to vendees of incumbered lands, who became seized at different dates."

In the opinion on p. 104 the court say, in commenting upon another case therein cited, as follows:

> "This case was ably considered, and while it reaffirms former decisions of the court against the application of the *pro rata* principle of contribution to purchasers of incumbered real estate, also holds the doctrine that there is no distinction, in this particular, between mortgage, judgment, and testamentary liens; and that as between purchasers, they are all to have the same effect. It was a case of a charge upon real estate arising out of a will, and presented the question of the order of liability of several purchasers of the incumbered property acquiring their interest at different times. It was quite similar, in its main features, to the one now under consideration, and sustains fully the view we express."

Under the above principle I feel that the State of Ohio is perfectly safe and fully protected in the purchase of these two lots. The state being the first purchaser of any of the real estate, all other purchasers would take the real estate subject to the payment of the debts of the decedent in the inverse order of time in which said real estate is purchased and hence the state would be the last one to be called upon to answer for any of the debts of the decedent; and inasmuch as the property of the decedent is worth over $100,000.00, while the debts amount to only $6,500.00, the state is fully protected.

I am returning herewith the abstract submitted by you.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1509.

APPROVAL OF ABSTRACT OF TITLE TO LOTS NOS. 6 AND 14, HUNTINGTON TOWNSHIP, LORAIN COUNTY, OHIO.

COLUMBUS, OHIO, October 11, 1918.

Board of Agriculture of Ohio, Columbus, Ohio

GENTLEMEN:—I am in receipt of your letter of October 7, 1918, enclosing abstract of title covering the following described property, situated in the township of Huntington, county of Lorain and State of Ohio:

> Being all of lots Nos. six (6) and fourteen (14) in tract No. five (5) in the northwest quarter of said township, excepting therefrom ten (10) rods square on the southeast corner of lot No. six (6) conveyed to the board of education of Huntington township and three and ninety-three hundredths (3 93-100ths) acres of land across lot No. fourteen (14) from northeast to southwest, appropriated for railroad purposes by The Lorain, Ashland & Southern Railroad Company, and containing within said boundaries, ninety-nine and three-eighths (99⅜ths) acres of land in lot No. six (6) and one hundred and seven-hundredths (100 7-100ths) acres in lot No. fourteen (14), be the same more or less, but subject to all legal highways.

I have examined said abstract and find no material defects in the chain of title to said premises as disclosed thereby.

Said abstract does not show any liens or encumbrances on said property, except the taxes for the year 1918, which are undetermined and unpaid.

I am therefore of the opinion that said abstract disclosed on September 30, 1918, a good title in Samuel Denton Bradner, Mary Louisa Roice, Margaret Anna Holcomb and Orrie Emma Bradner, to the premises hereinbefore described.

While I am passing favorably upon the title to said property as shown by the abstract submitted to me, there are two matters to which I desire to call attention:

(1) There was no administration had upon the estate of George H. Bradner, who was the father of the persons who now have title to said property and from whom they secured the same by descent. There are two affidavits attached to the abstract, one of which was made by one of the heirs at law of Margaret Anna Holcomb, to the effect that George H. Bradner died on November 17, 1906, and that at the time of his death there were no outstanding debts against him excepting those of his last sickness and funeral expenses and that these were paid from his estate by J. T. Haskell as agent and attorney for the heirs at law of said George H. Bradner.

The other affidavit was made by J. T. Haskell, stating that he paid all the funeral expenses and debts arising during the last sickness of George H. Bradner; that said George H. Bradner died on November 17, 1906, intestate, and that to his knowledge, after investigation, there were no other outstanding debts of any kind against said estate.

Of course these two affidavits do not entirely eliminate the question of claims against the estate of George H. Bradner, for which claims the real estate in question would be liable; but inasmuch as twelve years have elapsed since the death of George H. Bradner, I feel justified in passing favorably upon the title to this property and not put the heirs to the trouble and expense of having the estate of their deceased father administered upon.

The two affidavits above mentioned state that George H. Bradner died on November 17, 1906, and I am taking this to be the fact, although in an affidavit made by Margarent Anna Holcomb under the statute, for the purpose of transferring the title to this property upon the records, from George H. Bradner to the heirs at law, a statement is made that he died on November 17, 1916. I am considering this to be a typographical error. If George H. Bradner actually died at such a later date, I would not pass favorably upon the title to this property.

(2) The second matter to which I will direct attention is that the affidavit made and filed in pursuance of statute, for the purpose of transferring, upon the records of Lorain county, the title of this property from George H. Bradner to said heirs at law, is signed by but one heir, namely, Margaret Anna Holcomb.

The statute (section 2768 G. C.) provides as follows:

> "Section 2768. * * * Before any real estate, the title to which shall have passed under the laws of descent shall be transferred, as above provided, from the name of the ancestor to the heir at law or next of kin of such ancestor, or to any grantee of such heir at law or next of kin; * * such heir at law or next of kin * * * shall present to such auditor the affidavit of *such heir or heirs at law* or next of kin, or of two persons resident of the State of Ohio, * * *",

setting out the fact of the death of the original owner, the date of his death, the heirs, their relationship to the deceased and the real estate of which the decedent died seized and the interest which each heir has in the property.

While to my knowledge the courts have never passed upon this section, it is my opinion that the affidavit should be signed by all the heirs at law or by two persons who are strangers to the estate; but this may be placing a technical construction upon the section, and inasmuch as the affidavit has already been filed with the recorder, I do not feel that I should require the heirs at law to prepare and file another affidavit, although I think this is the construction which should be placed upon the language of said statute.

I am returning herewith the abstract submitted by you.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1510.

MUNICIPAL COURT OF ALLIANCE—GOVERNOR FILLS VACANCY CAUSED BY RESIGNATION OF CLERK.

Under the act creating a municipal court for the city of Alliance and certain townships in the county of Stark (107 *O. L.* 660), *the governor of the state is authorized in law to fill a vacancy caused by the resignation of the clerk of said municipal court under the provisions of section* 38 *of the act.*

COLUMBUS, OHIO, October 11, 1918.

HON. MILTON C. MOORE, *Judge of the Municipal Court, Alliance, Ohio.*

DEAR SIR:—I have your communication of September 12, 1918, which reads as follows:

> "The Municipal Court of Alliance, Ohio, was created by special act of legislature and said act is found in the 107th volume of the Ohio Laws, page 660.
>
> Section 26 of said act provides that the clerk of said court shall be elected for a term of four years beginning January 1, 1918.
>
> B. was duly elected and qualified and has served as clerk of said court ever since January 1, 1918. He has now tendered his resignation as clerk as aforesaid, effective September 30 next.
>
> The question now arises as to who has the authority to appoint his successor. Sections 35 and 38 of said act are the only sections within the act bearing upon this proposition and it is difficult to determine the intention of the legislature upon this proposition.
>
> Will you kindly advise me who has the authority to fill this vacancy?"

The act which created the municipal court of Alliance is indefinite and uncertain, not only in reference to the particular matter about which you inquire, but in relation to others as well. You call attention to the provisions of sections 35 and 38 of the act, as pertaining to the question which you submit, but suggest that it is uncertain as to whether they apply.

Section 35 of the act reads in part as follows (section 1579-229, 107 O. L. 669):

> "Whenever the incumbent of any office created by this act, excepting the municipal judge shall be *temporarily absent or incapacitated from acting*, the judge shall appoint *a substitute* who shall have all the qualifications re-

quired of the incumbent of the office. Such appointee shall serve *until the return of the regular incumbent, or until his incapacity ceases.* * * *."

In my opinion it would be placing a violent construction upon this provision to hold that it applies to a case in which the incumbent of an office resigns the same.

We will now consider the provisions of section 38 of the act (section 1579-232 G. C., p. 670 of 107 O. L.), as to whether they could be made to apply to the resignation of the clerk of the municipal court. This section reads as follows:

"The judge of the municipal court shall be subject to the same disabilities and may be removed from office for the same causes as the judge of the court of common pleas. The vacancies arising from any cause except as herein provided shall be filled by appointment by the governor of the state."

The provisions of this section are very peculiar. The first paragraph of the section deals exclusively with the judge of the municipal court, but says nothing in reference to him in the way of filling a vacancy in the event his office becomes vacant. It merely puts him on the same plane, in reference to disabilities and removal from office, as is the judge of the court of common pleas. The latter part of the section relates to vacancies and reads as follows:

"The vacancies arising from any cause except as herein provided shall be filled by appointment by the governor of the state."

At first thought we might reach the conclusion that the vacancy suggested has to do with the office of the judge of the municipal court only and not with any other office; but we must remember that the first part of this section does not deal with vacancies. Hence it is my opinion that the latter part might cover vacancies in general occurring under the provisions of this act, and that whenever vacancies occur, no difference to what office they may apply, the governor of the state shall fill the vacancy, except where the act itself makes provision for the filling of the vacancy. The fact that the word "vacancies," instead of "vacancy" is used in the latter part of the section, strengthens me in my view. If the legislature had intended the latter part of the section to apply merely to the judge of the municipal court and to no other officer provided in the act, it is my opinion that the singular instead of the plural of the word would have been used.

Hence answering your question specifically, it is my view that it becomes the duty of the governor of the state to fill the vacancy caused by the resignation of the clerk of your municipal court.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1511.

ARTICLES OF INCORPORATION OF THE AMATEUR CLUB OF ROSSFORD—CORRECTIONS SUGGESTED.

COLUMBUS, OHIO, October 12, 1918.

HON. WILLIAM D. FULTON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—You have submitted for my opinion the question as to the legality of the purpose clause of the articles of incorporation of The Amateur Club of Rossford (Kolko Amatorskie Z Rossford).

The purpose clause of said articles reads as follows:

> "Said corporation is formed for the purpose of to play shows (theater), benefit for members, and spread patriotism for the Polish cause. The rehearsal and the private and public rendition of theatrical performances, the providing of other forms of public entertainment and amusement; the receipt from the performance to be used for the mutual protection and relief of the members of said organization, receiving and raising funds by donation and by assessment on its members; giving financial aid to its members when disabled by sickness or accident, and payment of benefits, on the death of members; of constructing, buying, leasing, owning, maintaining and selling such real estate, buildings and personal property as may be necessary or convenient to the carrying out of said purpose, and the doing of all things necessary or incident thereto."

The social features noted in the purpose clause above noted might well be covered by incorporation not for profit under the general incorporation laws of the state. Other provisions of the purpose clause, however, indicate a purpose on the part of the proposed association to conduct the business of insurance, and this purpose must be covered by incorporation under statutory provisions relating specifically to the incorporation of insurance organizations of this kind.

Authority to incorporate for insurance purposes set out in the purpose clause of these articles must be found, if at all, in the provisions of section 9427 General Code. The provisions of this section in its application to organizations of the kind here in question, have been discussed in opinions of this department from time to time, and it will serve no useful purpose for me to enter upon an extended discussion of the provisions of this section at this time.

It is sufficient to say that in my opinion the purpose clause of the articles of incorporation here submitted can be amended so as to substantially comply with the provisions of section 9427 General Code by making the following insertions:

(1) After the words "members of said organization" insert a semi-colon instead of the comma as now appears.

(2) Between the word "organization" and the word "receiving" and after the semi-colon to be inserted, insert the words "and for said purpose."

(3) Between the words "payment of" and the word "benefits" insert the words "stipulated amounts as."

The articles of incorporation submitted are herewith returned.

Yours very truly,

JOSEPH MCGHEE,

Attorney-General.

1512.

APPROVAL OF CONTRACT BETWEEN THE AMERICAN GREENHOUSE MFG. CO., OF PANA, ILL., AND THE BOARD OF CONTROL OF THE OHIO AGRICULTURAL EXPERIMENT STATION.

COLUMBUS, OHIO, October 14, 1918.

HON. W. H. KRAMER, *Bursar, Ohio Agricultural Experiment Station, Wooster, O.*

DEAR SIR:—You have submitted for my approval contract entered into on June 28, 1918, between The American Greenhouse Mfg. Co., of Pana, Ill., and the board

of control of the Ohio Agricultural Experiment Station, for the construction and completion of greenhouses for the sum of $8,500.00. With said contract you submitted a bond to secure said contract.

Having received from the auditor of state a certificate that there are funds available for the purpose not otherwise obligated, and finding the contract to be in compliance with law, I have this day approved the same and filed the same, together with the bond, in the office of the auditor of state.

I am herewith returning to you the balance of the papers submitted.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1513.

MUNICIPAL CORPORATION—MAY NOT CHARGE COST OF STREET FLUSHER AS PART OF COST OF CLEANING STREETS IN GIVEN YEAR NOR USE PROCEEDS OF STREET CLEANING ASSESSMENT BONDS THEREFOR.

A municipal corporation may not, under authority of section 3839 et seq. G. C., purchase a street flusher to be used in cleaning its streets through its officers and include the initial cost of the flusher as a part of the entire cost and expense connected with cleaning streets in any given year; nor may it purchase such a flusher out of the proceeds of bonds issued under section 3845 G. C. in anticipation of the collection of assessments for this purpose, such bonds being limited in amount to the assessments for a single year.

A municipal corporation is without power to issue bonds or borrow money for the purpose of buying a street flusher.

COLUMBUS, OHIO, October 14, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I am in receipt of a letter from the city solicitor of Washington C. H., Ohio, advising me that your bureau desires an answer to the following question which arises in that city:

> "Under authority of sections 3839 et seq. of the General Code, can a municipal corporation, through its officers, purchase a street flusher for cleaning its streets, and include the initial cost of flusher as part of the entire cost and expense connected with cleaning streets, the entire cost to be assessed against properties abutting on streets so cleaned?"

As I interpret this inquiry in the light of a conversation with the city solicitor the point in which all concerned are primarily interested is the question as to the manner in which a municipality may secure the funds with which to purchase apparatus of this character; for if the first cost of the flusher can be included in the assessment about which inquiry is made, then it may be purchased from the proceeds of the bonds issued in anticipation of the levy or collection of such assessment under authority of section 3845 of the General Code, which will be hereinafter referred to; whereas if this is not the case it would appear that there is no way to borrow money for this purpose, as section 3839 G. C., commonly known as the

Longworth act, does not authorize bonds to be issued for the purchase of machinery or equipment to be used in sprinkling or sweeping the streets, and I know of no statutory or other authority in a municipality to borrow money for the purpose indicated, unless the expenditure involved may be regarded as a part of the cost of sweeping or cleaning the streets for which assessments or special taxes may be levied. It would follow, therefore, that if a negative answer be given to the question as submitted by the city solicitor we would be driven to the conclusion that apparatus of this kind could only be acquired for a village by the expenditure of the proceeds of general tax levies for the service fund.

The question as to the inclusion of the purchase price of a street flusher in the total cost of an assessment for cleaning streets, etc. invokes consideration of the following sections of the General Code:

Section 3839:—"Municipal corporations may sprinkle with water, sweep, and clean any streets or alleys, or parts thereof. All such work may be done by contract or by and through the officers of the corporation. *Before such work shall be done by or through such officers, the council thereof shall pass an ordinance authorizing the officer or officers having the care of streets and alleys to purchase or rent the necessary tools, machinery and appliances, to employ the necessary labor, and to do such work.*"

Section 3841:—"* * * From the statements so filed (by a board of commissioners whom the director of public service is authorized but not required to appoint for the purpose of determining the necessity of sprinkling or cleaning a given street) and from such other information as may come to his knowledge, or upon failure of the commissioners to file such statement, the director of public service may determine and recommend to the council, as provided in the next section, what work is necessary to be done, upon such streets or alleys, or parts thereof, within any such period." (one year or part thereof).

Section 3842:—"The council of a city upon the recommendation of the director of public service, or the council of a village, may provide by ordinance for sprinkling with water, sweeping, or cleaning of such streets or alleys, or parts thereof. For the purpose of carrying out the provisions of this section and of the next three preceding sections, one ordinance may be made to include one or more streets or alleys, or parts thereof, and one or more of the powers granted by such sections."

Section 3844:—"*The entire cost and expense connected with any such work in any year*, except as herein provided, whether done by contract, or by and through the officers of the corporation, may, by ordinance, be assessed upon the abutting or other specially benefited property, and by any one of the methods mentioned in the first section of this chapter. The assessments so levied may be collected in one installment in the manner provided in the case of assessments for street improvements, but if it deems expedient the council may levy and collect such assessments, at any time, before or after the completion of the work. Such assessing ordinance may be made to include the property abutting upon any one or more streets or alleys, or parts thereof, and one or more of the powers granted in the preceding five sections."

Section 3845:—"Bonds, notes or certificates of indebtedness may be issued and sold before or after doing such work in anticipation of the levy or collection of such assessments, and may be authorized and provided for in the assessing ordinance, or in a separate ordinance, but no publication

of such assessing ordinance or of the ordinance authorizing and providing for such notes, bonds and certificates of indebtedness shall in any case be required."

Section 3846:—"No part of the cost and expense connected with such work shall be paid by the municipal corporation, except when the whole or any portion of a street or alley upon which work shall be done passes by or through a public wharf, market space, park, cemetery, structure for the fire department, waterworks, school building, infirmary, market building, workhouse, hospital, house of refuge, gas works, public prison, or any other public structure or public grounds within and belonging to the corporation, and, subject to the limitation hereinbefore imposed in this chapter, the council may authorize the proper proportion of the estimated cost and expense of such work to be certified by the clerk of the corporation to the county auditor and entered upon the tax list of all taxable real and personal property in the corporation, and they shall be collected as, and in addition to, all other taxes. The right of the corporation to levy such assessments shall not be affected by the tax valuation of the property to be assessed or by the amount of assessments theretofore levied upon such property."

The group of statutes from which quotation is made embodies a method of assessment entirely distinct from that embodied in sections 3812 et seq. of the General Code. It is true that in section 3812 G. C. it is provided that the council of any municipal corporation may assess upon specially benefited lots or lands

"any part of the entire cost of an expense connected with the improvement of any street * * * by grading, draining, curbing, etc., * * * and any part of the cost of lighting, sprinkling, sweeping, cleaning, or planting shade trees thereupon."

This declaration in section 3812 may, in my opinion, however, be taken as declaratory of all purposes for which the municipality may levy and collect special assessments for the improvement of a street, and the sections immediately following and providing the machinery for making an ordinary street improvement to be paid for by special assessment cannot have complete application to sweeping, cleaning and sprinkling streets for the following reasons:

(1) No resolution of necessity is required. Merely the passage of an ordinance and service of notice thereof (sections 3842 and 3843 G. C.) is sufficient to initiate the machinery of sweeping streets. Moreover it would be ridiculous to hold that section 3815 G. C., which requires the establishment of a grade and the approval of plans, specifications and profiles for the proposed improvement, is applicable to cleaning and sweeping streets.

(2) The provision that the corporation shall pay part of the cost and expense of the improvement, not less than one-fiftieth and the cost of intersection, cannot apply, because of the explicit provisions of sections 3844 and 3846 G. C. to the effect that the entire cost and expense of the improvement shall be assessed upon the property owners unless the street to be cleaned or swept passes by public grounds, in which event the municipality is in effect to be assessed therefor. In fact the very inclusion of section 3846 G. C., above quoted, in the statutory scheme for the sweeping and cleaning of streets rather conclusively shows the separation of the two methods of procedure; for if the group of statutes immediately following section 3812 G. C. apply in their entirety, section 3846 G. C. would not have been necessary, section 3837 G. C. containing a complete provision practically identical with section 3846 on this point.

(3) The machinery of filing claims for damages, etc., which is a part of the general sections, could have no application to cleaning and sweeping streets. This is another reason for dispensing with the resolution of necessity as a part of the procedure for sweeping streets.

(4) An ordinary street improvement must be done by contract, (section 3833 G. C.) whereas it is expressly provided in section 3839, supra, that the work of cleaning and sweeping streets may be "by and through the officers of the corporation" as well as by contract.

(5) The requirement that no public improvement a part of the cost of which is to be specially assessed shall be made without the concurrence of three-fourths of council, except upon petition (section 3835); and the further provision to the effect that when a petition subscribed by three-fourths of the interested owners of abutting property is filed the entire cost may be assessed, cannot have any application to sweeping and cleaning streets.

Many of these features of the applicable statutes were dealt with in an opinion of recent date to your bureau relating to the power of municipal corporations to assess the cost of lighting streets upon the property abutting thereon. It is, perhaps, too much to say, as I have indicated, that the machinery for sweeping and cleaning streets on the assessment plan is entirely distinct from that for making street improvements by assessments generally. It is sufficient to observe that the latter is, in a large part at least, a separate and distinct procedure. Moreover I am of the opinion that in spite of what is said in section 3812 above referred to, the sweeping and cleaning of streets can only be done on the assessment plan by complying with the group of sections which I have quoted; so that the general features of the street improvement statutes cannot be used in sweeping and cleaning streets.

These observations clear the way for a careful examination of the statutes which I have quoted, and in particular for the consideration of the meaning of the declaration of section 3844 G. C. to the effect that "the entire cost and expense connected with any such work *in any year* * * * may be assessed upon the abutting or other specially benefited property" and that in section 3846 to the effect that "no part of the cost and expense connected with such work shall be paid by the municipal corporation" except when the public is the owner of abutting property. Do these provisions imply that a municipality may incur no expense in connection with the sweeping and cleaning of streets, which shall be a charge on the general duplicate, unless the street upon which the work shall be done passes by public ground? If this be the meaning of these provisions then it might be argued that the purchase of a street flusher, being an expense attributable to cleaning streets, could not be made as a charge on the general funds of the corporation, and if this should be true, we would have to inquire whether or not the initial cost of such equipment could be practicably and legally assessed upon the owners of abutting property when the equipment after its purchase would belong to the municipality.

Considerable difficulty is involved in the ultimate questions which have been suggested, for it is clear from the statutes which I have quoted that streets are to be swept and cleaned as separate thoroughfares, or at least that council is not obliged to pass a single ordinance providing for the sweeping and cleaning of streets which are to be swept and cleaned in a single legislative act. Moreover the council has power under section 3629 G. C. to provide for sweeping and cleaning streets by general taxation instead of on the assessment plan, and it has been held that the two plans may be combined.

Hunter vs. Austin, 9 C. C. 583.

Hence it would be very difficult to apportion the first cost of a street flusher

among the various streets that are to be cleaned, or between the streets that are to be cleaned by assessment and those that are to be cleaned by general taxation.

Moreover, the validity of levying special assessments for the purpose of sweeping and cleaning streets may be called seriously into question. See Dillon on Municipal Corporations, Volume 4, page 2583, where it is pointed out that in many states:

> "The power to impose a special assessment for that purpose (sprinkling streets) is denied on the ground that the effects are not substantial or permanent and are too intangible to be designated as an improvement which will confer a special and peculiar benefit on the property" (citing cases from New York, Illinois, Michigan, Missouri, Montana, Utah and Kentucky).

So that it would seem that if the statute should be interpreted as requiring the inclusion in the total cost of the sweeping and cleaning for which assessments may be levied of the initial cost of a street flusher which is to become the property of the corporation, and may be used on any of its streets, the validity of the statutes themselves would be called into question.

The general statutes providing what may be included in the total cost and improvement for which assessments may be levied do not afford much help because of the extreme generality of their terms and because of the doubt which exists about their application to sweeping and cleaning streets. Thus section 3896, which possibly applies, after enumerating various items of cost which are to be included in the cost of the improvement, concludes with the vague and unsatisfactory phrase "and any other necessary expenditure."

Under this section it has been held in Ohio that the cost of surveying and engineering which is done by the salaried officers of a municipal corporation and was paid for out of the general fund cannot be included in the assessment.

> Longworth vs. Cincinnati, 34 O. S. 101.

The reason assigned, however, is that Municipal Code is to be so interpreted as to make such salaries a charge on the general duplicate.

Cases in several states are not all in accord with Longworth vs. Cincinnati on this point.

> *See*: In re Fifth Ave. Sewer, 4 Brew. (Pa.) 364, accord; People ex rel. vs. Kingston, 56 N. Y. Supp. 606; Gibson vs. Chicago, 22 Ill. 556; contra.

In our case, however, the operation of the principle relied upon in Longworth vs. Cincinnati is not clear because we must first decide whether it is the clear intent of all the statutes now in force that any expense incurred for the purpose of cleaning and sweeping streets shall be paid out of the general fund, and to do this we must interpret the language of sections 3844 and 3846 G. C. last above quoted.

Of course it is clear that the council might provide for sweeping and cleaning streets on the contract plan instead of through the officers of the municipality. If this plan should be chosen the contractor would undoubtedly include in the price for which he would do the work some part of the cost of equipment belonging to him which he would use on the work, and no question could be raised as to the validity of including the entire contract price in the cost of the improvement; and if the municipality should own a street flusher and then decide to let the work by con-

tract, the contractor to use the city's street flusher and to pay or allow the city something in the nature of rent for its use, the total contract price could be assessed without making any deduction for the rent paid to the city for the use of its equipment.

McGlynn vs. Toledo, 22 C. C. 34.

So that it might be argued that if the city chose to do the work itself it could at least include as part of the total cost to be assessed a reasonable rental for the use of the equipment belonging to the city on the particular street which was being cleaned on the assessment plan.

It seems to me that the answer to the principal questions above suggested is furnished by consideration of the clause "in any year" as found in the context quoted from section 3844 G. C. in connection with what appears to be the controlling idea of the whole group of statutes under examination, which is that the thing to be assessed is the annual cost of a continuous service. As pointed out in the other opinion, to which reference has been made, the primary difference between the machinery for assessing the cost of sprinkling streets and that for assessing the cost of making a specific improvement in a street is just this: the latter is a method of apportioning a part or all of the cost of doing a single thing; the former is a method of apportioning all the cost of furnishing a continuous or intermittent service. Naturally the cost to be apportioned in the one case is certain and fixed once and for all when the specific thing to be done is accomplished; naturally also the cost to be apportioned in the case of the former must be ascertained from time to time by marking off a period of service, such as a year or a number of years.

In the case of the statutes under consideration the thing to be assessed is the annual cost. From this it follows rather clearly, it seems to me, that only such items as are referable to a given year are to be assessed.

This statement really furnishes a complete answer to the question submitted by the solicitor. For it is clear that the initial cost of a street flusher is not an expenditure referable to a single year because the probable life of the apparatus undoubtedly exceeds a single year, whatever may be said of the possibility of apportioning such an expenditure among the various streets.

It would, therefore, in my judgment be illegal to include the entire initial cost of a street flusher in the assessments for cleaning and sweeping streets for a single year.

It still might be argued that although the entire cost might not be assessed in a single year, it might be spread over a number of years which the council might estimate to be the probable life of the apparatus and the assessments for such subsequent years might be anticipated by the issue of bonds under section 3845 G. C. Such an argument would present an interesting question arising by analogy from the decision in McGlynn vs. Toledo, supra, on the theory that the municipality might, as it were, rent its own equipment to different streets and include a reasonable rental cost in the cost of sweeping for a given year, and thus ultimately reimburse itself for the initial expenditure of the assessments; but this argument would lead to no definite conclusion in connection with the question submitted, unless it could be determined that under section 3845 G. C. bonds, notes, certificates of indebtedness, etc., may be issued and sold in anticipation of the levying or collection of assessments for more than one year. I do not believe that this can be done. It is true, perhaps, that under section 3842 G. C. council may pass an ordinance providing for the sweeping and cleaning of a large number of streets or alleys on the assessment plan, and that this ordinance will stand until it is repealed, and afford the basis of making annual assessments thereafter. Nevertheless, each assessment

is for the cost and expense of sweeping or cleaning a particular street for a single year, and section 3844 G. C. specifically provides that such assessments are to be collected in one installment. There is nothing to prevent council from repealing such an ordinance at any time after it has been passed except as to proceedings already initiated and deciding to sweep and clean all streets by general taxation, or to eliminate some streets from those to be swept and cleaned on the assessment plan and adding others.

This being the case I do not believe that section 3845 can be so interpreted as to authorize the borrowing of money in anticipation of more than one assessment.

I, therefore, arrive at the conclusion that whatever may be the power of a municipality to include in the assessment for sweeping or cleaning a particular street for a particular year, a reasonable sum by way of compensation for the use of a street flusher owned by the municipality in such work for such period of time—a question which I do not decide—the entire initial cost thereof may not be included in a single annual assessment upon all the streets swept and cleaned for that year, nor can funds for the purchase of such a flusher be acquired by the issuance of bonds under section 3845 G. C. in anticipation of the collection of assessments for sweeping and cleaning during future years sufficient in number to cover the probable life of the apparatus.

Finally it is my opinion that the only way in which a municipal corporation can acquire the necessary non-expendable machinery and appliances for doing the work of sweeping and cleaning, through its own officers, is by expending the proceeds of tax levies accumulated in the proper subdivision of the service fund for this purpose.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1514.

APPROVAL OF BOND ISSUE OF CITY OF EAST CLEVELAND, OHIO. $17,500.00.

COLUMBUS, OHIO, October 14, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In Re: Bonds of the city of East Cleveland, Ohio, in the sum of $17,500.00, to pay the city's portion of the cost and expense of certain designated street improvements in said city.

I have carefully examined the transcript of the proceedings of the city council and other officers of the city of East Cleveland, Ohio, relating to the above issue of bonds, and find the said proceedings to be in conformity to the provisions of the General Code of Ohio relative to bond issues of this kind.

I am therefore of the opinion that properly prepared bonds covering the above issue will, when the same are properly executed and delivered, constitute valid and binding obligations of said city, to be paid in accordance with the terms thereof.

No bond form of the bonds to be printed covering the above issue has been submitted to this department for approval, and I am therefore holding the transcript until such bond form is submitted and approved.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1515.

BOARD OF EDUCATION—TUITION OF PUPIL WHO HAS COMPLETED COURSE PRESCRIBED, EVEN THOUGH DIPLOMA WITHHELD, MUST BE PAID AT HIGH SCHOOL.

A pupil who completes the course of study prescribed by a board of education is considered a graduate even though his diploma has been withheld from him and the board of education of such pupil's residence must pay his tuition at a high school the same as though he had received said diploma.

A diploma must be granted to any one who completes the curriculum in any high school.

The statute which required a pupil to deliver an oration or declamation, or read an essay at a commencement exercise before such pupil was entitled to a certificate of graduation, has been repealed.

If the board of education has included in its course of study the writing of a thesis and a pupil refuses to write such thesis, the said pupil is not a graduate of such school and is not entitled to his diploma.

COLUMBUS, OHIO, October 15, 1918.

HON. WAYNE STILLWELL, *Prosecuting Attorney, Millersburg, Ohio.*

DEAR SIR:—Your request for my opinion reads:

"During the school year of 1914-15 the Killbuck Village School district maintained a second grade high school, under section 7748 G. C. One G. O. was, with several other pupils, attending the said Killbuck high school and doing the senior, or third year, work; that said G. O. did the work as stated and shown on the enclosed certificate, which gave him credit for twelve high school units, fully completed, and that several years prior to the year 1914 the board of education of Killbuck Village School district adopted the course of study as shown by the certificate hereto attached, and that the said G. O. had completed in a satisfactory manner said adopted course of study in all of its branches at the time that the commencement was held at the close of the school year of 1915; that the record of the school board does not show that graduates from the Killbuck high school were required to write an oration to the approval of the superintendent of the Killbuck school in addition to the adopted course of study above referred to. The facts concerning said oration are as follows:

The board of education placed the management and conduct of the commencement in the hands of their high school principal and superintendent, but the records of the school board do not disclose this fact, it being only a custom. The said superintendent required each member of the graduating class to deliver an oration, or write a satisfactory theme. The theme was written by G. O., but was not acceptable to the superintendent and G. O. refused to rewrite or compose another theme, and as a result of that action he was not permitted to take part in the commencement exercises, nor was he granted a diploma from the high school showing that he had completed the course required by the school board.

In the year 1915-16 the said G. O. attended the Millersburg school, a high school of the first grade, and the tuition for such attendance has not been paid. Who, under these facts and circumstances, is liable for the payment of the tuition, the Killbuck village board of education, or the parents of G. O?"

Section 7748 G. C. provides in part:

> "A board of education * * * providing a second grade high school as defined by law, *shall pay the tuition of graduates* residing in the district at any first grade high school for one year * * *."

The first question to be determined is, what is a graduate and was G. O. a graduate from said school at the end of the school year of 1914-15. You say in your statement of facts that he had completed the course of study in all of its branches, as said course had been adopted by the board of education and that it was completed in a satisfactory manner by said student, but that his high school diploma was refused him because he failed to re-write a theme as requested by the superintendent of schools, who had charge of the commencement exercises.

Boards of education are required to prescribe a course of study for all schools under their control and such courses of study are approved by the superintendent of public instruction. The said superintendent of public instruction, upon the course of study and the work performed in such school, issues to such board of education a certificate designating whether a school is a first, second or third grade high school. The writing of the theme in this case was not a part of the course of study prescribed by the board of education of such school and the question is, was said pupil a graduate, having completed the course of study but not having received his diploma.

To graduate is defined by Webster as "To pass to, or to receive a degree," and Patterson, J., delivering the opinion of the court in People ex rel. Johnson vs. Eichelroth, 2 L. R. A., 770, (Calif.) where a statute containing the word "graduate" was being construed, said:

> "But I do not think it necessary to give the word, as used in this statute, a strict and technical definition. In the construction of a statute the intention of the legislature is to be ascertained, not so much from the phraseology in which the intent has been expressed, as from the general tenor and scope of the legislation on the subject. * * * It cannot be said that the meaning of the word is clear; and in such case the statute should be given such construction as will not deprive the person in its construction of a substantial right."

What was the intention of the legislature, when it enacted General Code section 7748? Manifestly to secure to all pupils, who had finished a certain lower course of study, the advantages of a higher school education. The pupil in this case had finished all that was required of him by the board of education when it adopted the course of study and there was no provision of statute which required him to take part in the commencement exercises as requested by the superintendent. True, the board of education had a right to make all rules governing itself, its employes and pupils, but there is nothing in the statement of facts submitted by you which indicates that any rule of the board had been violated by the pupil when he refused to re-write his theme.

Section 7656 G. C. provides that:

> "A diploma *must* be granted by the board of education to any one completing the curriculum in any high school, which diploma shall state the grade of the high school issuing it as certified by the superintendent of public instruction, be signed by the president and clerk of the board of edu-

cation, the superintendent and the principal of the high school, if such there be, and shall bear the date of its issue."

It seems to me, from the language contained in the above quoted section, that when said pupil completed the course of study of curriculum in said high school there was nothing for the board of education to do but to grant him said diploma, and the fact that they refused to do so would make him no less a graduate than if said diploma had been delivered to him after he had completed said school course. If the statute is to be given that construction as will not deprive the person interested in its construction of a substantial right, then this statute must be given that construction which, after a person has completed a course of study, will entitle such person to be considered a graduate and be entitled to high school tuition, even though a diploma is refused such pupil because he does not re-write a theme to make it satisfactory to the superintendent. The superintendent was following the statute as it existed prior to 1914, or under what was commonly known as the Boxwell-Patterson law. Said statute provided that each successful applicant for a Boxwell-Patterson certificate, which was a certificate entitling pupils to admission to high schools, should be required to deliver an oration or declamation or read an essay, and after the pupil had thus performed, then the board of education should issue such pupils a certificate, stating that the applicant took part in such commencement. But, that law was repealed in 1914 and no similar provision was enacted in its place. So that, I can come to but one conclusion and that is, considering the laws as they existed at the end of the school year in 1915, when a pupil finished the course of study provided by the board of education in said high school, he was entitled to his diploma and must be considered a graduate, and the board of education of the district where he resides must pay the tuition for such pupil at the first grade high school in Millersburg. If, however, the board of education had included in its course of study the writing of a thesis and the pupil would refuse to write same and thereby fail to complete the course so prescribed, then and in that event it would be unnecessary for me to conclude that the board of education of the district of such pupil's residence would not have to pay said tuition.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1516.

TEACHER—ATTENDING INSTITUTE DURING VACATION ENTITLED TO INSTITUTE FEES, THOUGH ONLY TEACHES TWO WEEKS, IF CALLED TO ARMY SERVICE.

Where a teacher attends the institute during the vacation period, or when the schools are not in session, and receives a certificate of attendance from the county superintendent for not more than five days of actual attendance, and begins to teach within three months after the institute, but teaches for only two weeks and then joins the United States army, the institute fees are payable as an addition to that part of the first month's salary received by such teacher.

COLUMBUS, OHIO, October 15, 1918.

HON. EUGENE WRIGHT, *Prosecuting Attorney, Logan, Ohio.*

DEAR SIR:—Your request for my opinion reads:

"In Hocking county a teacher was employed to teach the Union Furnace

school and he, being within the draft age, between 18 and 45, after teaching two weeks resigned his school to enter the Ohio University under the proposition from the government to furnish free tuition, board and clothing to registrants eighteen years of age, in colleges.

This young man has only taught two weeks and is making claim for institute money, he having attended the Hocking County Institute within three months prior to his employment.

It is my opinion that he is not entitled to his institute money for the reason that he did not teach a full month * * *. I am asking an opinion from your department on this question."

The statute which refers to institute fees for teachers is section 7870 G. C., and provides in part:

"* * * The board of education of all school districts shall pay the teachers and superintendents of their respective districts their regular salary for the week they attend the institute upon the teachers or superintendents presenting certificates of full regular daily attendance, signed by the county superintendent. *If the institute is held when the public schools are not in session, such teachers or superintendents shall be paid two dollars a day for actual daily attendance as certified by the county superintendent, for not more than five days of actual attendance, to be paid as an addition to the first month's salary after the institute,* by the board of education by which such teacher or superintendent is then employed. In case he or she is unemployed at the time of the institute, such salary shall be paid by the board next employing such teacher or superintendent, if the term of employment begins within three months after the institute closes."

In your case the teacher attended the institute as required by the statute and, I am taking it, received his certificate of attendance from the county superintendent. The institute was held during vacation time or at the time when the schools were not in session. He began teaching within the time required by statute, but failed to teach the full first month because he was permitted to attend the training school for persons within the draft age, he being within that age. He only taught two weeks, or one-half of the time mentioned in the statute, and the question now is, can he receive such institute fees as an addition to his first pay, the same being less than one month's salary?

The objects of the institute fees are, as noted by the circuit court in Board of Education vs. Burton, 11 O. C. C. (n. s.) 103-105:

"To encourage teachers to avail themselves of the opportunities afforded by the institutes and to better fit themselves to instruct the youths committed to their charge. This is a policy commendable in itself and likely to be a public benefit, and any act or agreement in contravention of it should receive little favor at the hands of courts."

But it is urged that the teacher did not teach the full month and did not earn the entire month's salary and therefore could not receive the month's pay. While the above is true, yet he did receive salary, whether rightfully or wrongfully I shall not decide here, and he received the same for the teaching he performed during the first month after the institute, and, as far as the teacher was concerned, he performed every act on his part necessary to the receiving of the institute fees, ex-

cept, as above noted, possibly the act of teaching the remaining two weeks of the first month.

As noted in Beverstock vs. Board of Education, 75 O. S., 144, 152:

> "When he so becomes employed, his rate of compensation is fixed, and on presentation of the proper certificate, showing that he had attended the preceding institute for a week, his compensation for that week is ascertainable *and his right to receive it complete.*"

You call my attention in your communication, and in that part which I have not quoted above, to an opinion of the Attorney-General rendered in 1913 and found in Volume 2 of the Attorney-General's Reports for that year, at page 1082. The case under consideration there was different from your case, as will be noted by the facts therein contained. In that case the teacher performed one full month's service and received his institute fees and the question was whether or not the substitute teacher, who had also attended the institute and who finished he term of the first teacher, and who began teaching within three months after attending the institute, should receive his institute fees after the institute fees had been paid to the first teacher. The opinion held, and we think rightfully too, that both teachers were entitled to the institute fees.

From a consideration of all the above, I can come to but one conclusion and that is that when the board of education paid the teacher in your case the salary he earned during the first month, he was also entitled to his institute fees, in addition thereto.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1517.

APPROVAL OF BOND ISSUE OF HARRISON TOWNSHIP RURAL SCHOOL DISTRICT.—$25,000.00.

COLUMBUS, OHIO, October 15, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

> In Re: Bonds of Harrison Township Rural School district, in the amount of $25,000.00, for the purpose of enlarging, repairing and furnishing school houses in certain subdistricts of said school district.

GENTLEMEN:—I have examined the transcript of the proceedings of the board of education of Harrison Township Rural School district in the issuance of the above described bonds and find that said proceedings are in all respects regular and that the bonds when issued will constitute valid, legal and binding obligations of said district, payable as therein provided.

No form of bond has been furnished.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1518.

STATE—AUTHORITY TO PURCHASE MILITARY PROPERTY AND TITLE THERETO—OHIO NATIONAL GUARD—DISPOSITION OF MONEYS AND PROPERTY OF LOCAL ORGANIZATIONS.

1. *The state has authority to purchase military property for the national guard, but the officials of the national guard have no authority in law to use said property so purchased, to replace military property of the United States which has been lost or destroyed.*

2. *The property purchased by the various local organizations and paid for from their treasuries becomes the property of the State of Ohio, and, in case the local organizations are mustered into federal service, passes under the jurisdiction and authority of the adjutant general, as set out in section* 817 *of Article* LXXVII *of the "Regulations of the Ohio National Guard."*

3. *Until the adjutant general acts under the provisions of said section* 817 *of Article* LXXVII, *the state is under obligation to store the property of the local organizations and pay rent for said storage.*

4. *When military property purchased by the state and paid for out of state funds is condemned and sold, the proceeds of said sale must be placed in the state treasury, under section* 5282 *G. C.*

COLUMBUS, OHIO, October 16, 1918.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of May 28, 1918, which reads as follows:

"In making an inventory of the property of the various units of the Ohio National Guard, left in their armories or placed in storage when the troops were federalized, numerous questions have arisen about which I wish your written opinion, as follows:

From the organization of the Guard in this state up to December 13, 1916, it was the custom to charge the Governor with all military equipment and stores furnished by the Federal government, and to credit said account with property which was sold, transferred or condemned, but it appears that no inventory was ever taken of such property to determine if it was intact, until the War department appointed a receiving and disbursing officer on said December 13, 1916, to take charge of said property, when it was found to be many thousands of dollars short of what the book accounts showed should be on hand. Numerous vouchers aggregating thousands of dollars were subsequently paid by the state to replace some of said shortages, but it was not known by me at the time of payment that they were intended for such purposes.

QUERY (1) Was this a proper use of state funds, and if not, who is liable?

The commanders of the various military units were paid regularly the amounts indicated in section 5287 G. C. They were also paid yearly the amount of six hundred ($600.00) dollars for armory rent, even when they occupied state-built armories. These amounts, together with rents accruing under the provisions of section 4262 G. C., were paid into the organization treasuries and disbursed therefrom for current expenses and for equipping the quarters with furniture, pictures, musical instruments, etc. It also developed that friends of the organizations had donated desks, tables and other furniture, and in one instance an automobile.

QUERY (2) Has the state any right or title to said property which was left behind when the Guard was called into the Federal service and to the balances in the organization treasuries as shown by the last report of the various treasuries?

The state is caring for this property through caretakers of state-owned armories, and by paying storage for many of the others—in one case as much as $5,000.00 a year.

QUERY (3) What proceedings should be had to dispose of the property and get rid of the rent? If we have a National Guard at this time, what is its status?

Prior to the provisions of section 196-12 G. C. going into effect, if state-owned military property was condemned and sold or the ordinary furnishings purchased by the state for state-owned armory were sold, could the money thus derived be legally placed in a junk fund, under the control of the Adjutant General, and promiscuously expended by him, or should it have been paid into the state treasury?"

In considering your first query, it will be necessary for us to note the provisions of a number of sections of the Revised Statutes of the United States. In an act passed by Congress on June 22, 1906, U. S. Stats. at Large, Volume 34, Part I, Ch. 3515, page 449, provision was made as follows:

"Chap. 3515. * * *.

Section 1. That the sum of two million dollars is hereby annually appropriated, to be paid out of any money in the treasury not otherwise appropriated, for the purpose of providing arms, ordnance stores, quartermaster stores, and camp equipage for issue to the militia, such appropriation to remain available until expended. * * *."

Section 2 of said act provides that the money appropriated by Congress—

" * * * shall be apportioned among the several States and Territories, under the direction of the Secretary of War, according to the number of senators and representatives to which each state respectively is entitled in the Congress of the United States, * * *."

Section 3 of said act provides that the military property furnished the different states under and by virtue of said provisions—

" * * * shall be receipted for and shall remain the property of the United States, and be annually accounted for by the governors of the States and Territories * * * for which purpose the Secretary of War shall prescribe and supply the necessary blanks and make such regulations as he may deem necessary to protect the interests of the United States."

Section 4 of said act provides that in case said property so furnished by the Federal government to a state shall be lost or destroyed through—

" * * * carelessness or neglect or that its loss could have been avoided by the exercise of reasonable care, the money value thereof shall be charged against the allotment to the States under section sixteen hundred and sixty-one of the Revised Statutes as amended. * * *."

This section also provides for an examination by a disinterested surveying officer of the organized militia, to be appointed by the governor of the state or territory, as to the condition of the said property of the Federal government.

From these provisions it is readily seen how the property comes into the possession of the National Guard and how the Federal government is kept in touch with the same and what the results are if any of this property, so turned over to the National Guard of the state, shall be lost or destroyed, due to carelessness or neglect.

The provisions of this act were somewhat modified by the provisions of the national defense act which was passed by Congress on June 3, 1916, and it will be well for us to note a few provisions of this latter act.

Section 3064a of the Revised Statutes of the United States, which was section 67 of the national defense act, makes provision for the appointment of a property and disbursing officer for the United States, to be appointed by the governor of the state with the approval of the Secretary of War. This property and disbursing officer receipts and accounts for all funds and property coming into his possession.

Provision is also made in this act, in section 3057 R. S., which was section 87 of the act, as follows:

> " * * * If it shall appear that the loss, damage or destruction of property was due to carelessness or neglect, or that its loss, damage or destruction could have been avoided by the exercise of reasonable care the money value of such property shall be charged to the accountable state, * * *, to be paid from state, territory, or district funds, or any funds other than Federal. * * *."

Provision is also made in this section that if any state refuses to make payment for the value of the property so lost or destroyed, it shall be debarred from further participation in any and all appropriations for the national guard, until such payment shall have been made.

From this section it is seen that the state becomes absolutely liable to the Federal government for the value of all Federal military property lost or destroyed through carelessness or neglect while in the possession of the National Guard.

Under the provisions of this act a receiving and disbursing officer was appointed by the governor of the state on December 13, 1916. Up until that time it seems that there was no inventory taken by the state authorities of the property of the federal government in the hands of the National Guard of the state, but an inventory of said property is now being taken and, according to your communication, it is found that it is short many thousands of dollars, when compared with the reports that have been made from time to time by the proper officials of the National Guard.

It might be well for us to consider here that the state also has the authority to purchase military property for the National Guard of the state. For instance, section 5280 G. C. as it stood prior to the enactment of the law as found in 107 O. L., read as follows:

> "The adjutant-general, after the appropriations are made for that purpose, may purchase and keep ready for use, or issue to the National Guard, as the best interests of the service require, such amount and kind of camp and garrison equipage as are necessary. * * *."

The proper officials of the state have purchased many thousands of dollars' worth of military property, which was paid for by the state and for which you

issued your warrants in favor of the proper parties. This property so purchased by the state was used to replace property of the Federal government which had been lost or destroyed. The question now arises as to whether this was a proper use of state funds. I think it was. The state has full authority in law to purchase military property for the National Guard of the state, but there was no authority in any one to use this property so purchased to replace property of the Federal government that was lost or destroyed. This property so purchased remains the property of the state and does not and can not become the property of the Federal government.

The rights of the Federal government against the state, in reference to property lost or destroyed by the National Guard, are fully set out and protected in the provisions of the sections hereinbefore quoted. If the Federal government, upon making an investigation through the proper officials, finds that this property was lost or destroyed through the carelessness and negligence of persons having charge of the same, then said government will have a claim, under the provisions above quoted, against the State of Ohio, for the value of the property so destroyed or lost. This I think answers your first question.

In your second question you ask whether the state has any right or title to property which some of the organizations of the National Guard left when they were mustered into the service of the Federal government, and to the money in the treasuries of the said organizations.

We will first observe how this fund of the local organizations is created. It comes from a number of sources. For example, section 5210 G. C. as it formerly stood provided for contributing members to the National Guard, who should pay dues of not less than five dollars each per annum. This money went into the treasury of the local organization.

Section 5252 G. C. provided for the assessing of certain fines against members of the organization and the recovery of the same. These fines also went into the treasury for the use of the organization.

Section 5264 G. C. provided that the local organization might rent the armory used by them, for temporary purposes, the money derived from such rental to be paid into the treasury of the organization so renting the armory.

Section 5287 G. C. provides for the payment of certain sums of money by the state to the National Guard, with the approval of the adjutant general, in return for the care of the state property and to be used by it for other incidental expenses. All of this money so accumulated by the different local organizations became the property of the organization, and in no sense that of the state.

There was one other source of income, which you suggest in your communication, and it was provided for in section 5261 of the old law. Said section read as follows:

> "Section 5261.— * * * In no city or village shall more than one building be erected or purchased until provisions have been made for all organizations therein, nor shall a building be leased or rented for the use of a company or single organization in excess of six hundred dollars per year for each organization provided for."

Under this section there was turned over to each local organization the lump sum of six hundred dollars each year. This was done whether or not the local organization used a state armory and whether it paid six hundred dollars, or a lesser sum, for rental. It is clear from a reading of the provisions of the law as it formerly stood that this was not in harmony with either the letter or the spirit

of said law. Section 5254 G. C. provided for a state armory board consisting of four officers of the Ohio National Guard. Section 5255 G. C. provided that:

> "Section 5255.—The board shall provide armories for the purpose of drill and for the safe keeping of arms, clothing, equipments, and other military property issued to the several organizations of organized militia, and may purchase or build suitable buildings for armory purposes when, in its judgment, it is for the best interests of the state so to do. * * *."

Section 5268 G. C. read:

> "From the 'state armory fund,' the board shall provide armories by leasing, purchasing or constructing as provided in this chapter."

From all these provisions it is clear that it was the duty of the state armory board to make provision for suitable rooms for the National Guard, either by leasing, purchasing or erecting the same. To be sure, if the state built an armory, there would be no need of leasing one, and the local organization that used an armory owned by the state would not have been entitled under the law to the six hundred dollars; neither was it contemplated that in all instances the sum of six hundred dollars should be paid, even in the case of leased armories. Six hundred dollars was the maximum amount that could be paid for leased premises. If such premises could be secured for a lesser sum, it was the duty of the board to do this.

In this connection it might be well to note the provisions of section 5242 G. C. (107 O. L. 395), which provides in part as follows:

> "Section 5242.—* * * A sum of not to exceed six hundred dollars shall be allowed each organization to cover armory rent, heat, light, water and janitor service."

From this provision it is apparent that the officials of the state have authority to turn over to each organization a lump sum of not to exceed six hundred dollars, but such was not the law until this particular act was passed by the general assembly.

The question now arises as to what becomes of the money that remains in the treasury of any of these local organizations after the members thereof have been inducted into the United States army. The statutes are not clear on this matter but it is my opinion that the money would not become the property of the State of Ohio and that the state has no right, title or interest in and to the same.

It might be well for us to note the rules and regulations of the National Guard in reference to this matter, adopted under authority of sections 5240 and 5242 G. C. On page 208 of the "Regulations of the Ohio National Guard" we find the following provisions set forth in Article LXIX, sections 745, 746 and 747 thereof:

> "745.—All moneys, from whatever source derived, pertaining to or supplied for the use of any organization in the National Guard, are, as regards responsibility and accountability, public funds."
>
> "746.—The regimental treasurer is the custodian of the public money in the regimental fund; this fund includes all money pertaining to regimental headquarters and band; and donations, contributions and collections from any source."
>
> "747.—The company treasurer is the custodian of the public money in the company fund; this fund accrues from amounts transferred by com-

manding officers for care of State property and as balances from armory funds; from subscriptions of contributing members; from fines and dues of active members and from donations, contributions and collections from any source."

It will be noted that section 745 provides that this money is to be considered as public funds, in so far as responsibility and accountability is concerned. However, I do not feel that this departmental construction is sufficient to make the funds in the treasuries of these various local organizations state funds.

In your second question you also ask what right the state has to property of the local organizations of the National Guard, which was left behind when they were mustered into the Federal service. In this connection we are not considering what is technically known as military property, but simply property of various kinds which the local organizations purchased and paid for from money which from time to time came into their treasuries and also property which was donated to the organizations by individuals. The statutes are not clear as to this question and we will therefore consider the rules and regulations for the National Guard.

Section 844 of Article LXXIX, page 226 of the Regulations above referred to reads as follows:

"844.—All property of whatever description purchased out of any public funds by authority of any council of administration, or by any other officer or officers, and all property commonly known as 'company property' or 'regimental property,' is property of the State of Ohio and will be carried on the proper property returns of the officer in whose care or custody the property may be, except such property as is expendable in ordinary service or business of the organization. Whenever necessary to transfer this property in the case of retirement, resignation, relief from command or any other reason, this property will be transferred in the manner prescribed for all public property. Should any council of administration at any time order the sale of any such property, the money derived from the sale thereof will be covered back into the incidental fund controlled by such council of administration. A certified copy of the deposit slip from the bank where such fund is deposited, attached to a list of the articles sold and the amounts received therefor, will be a voucher to and authority for dropping from the accountable officer's next returns of property."

This section makes it clear that said department has always considered this property to be the property of the State of Ohio. This construction is further borne out by section 817 of Article LXXVII (p. 222) which reads as follows:

"817.—When a company is ordered disbanded and is finally mustered out of the service, the officer accountable for all the property will transfer the same to the Governor of Ohio. All property in use by the organization, including all property not theretofore carried on property returns of the organization, will be regarded as property of the state, unless it can be proven to the satisfaction of the Adjutant General of Ohio that it is the private property of individuals. All property of disbanded organizations, after proper transfer to the Governor of Ohio, will be shipped to the state arsenal, stored or sold, as the Adjutant General may direct, and in no case will be disposed of except by his order."

Hence from all the above I feel that inasmuch as the statutes themselves are uncertain with reference to this question, I should follow the said rules and regulations, and hold that this property under consideration is the property of the State of Ohio.

The second part of your third question relates to the rent that the state is paying for the storage of property belonging to the local organizations of the National Guard. The matter arises as to what should be done with this property, left behind by the various local organizations. This matter is also provided for under the rules and regulations for the National Guard.

Under section 817, Article LXXVII, p. 222, above quoted, it becomes the particular duty of the adjutant general to look after such property as that inquired about by you. In other words, it becomes his duty to have the same shipped to the state arsenal and there stored or sold, as the adjutant general may direct, and in no case to be disposed of except by his order. Under this ruling it is my opinion this property should not be considered such property as comes under the authority and control of the state purchasing agent, but is under the authority and control of the adjutant general.

You further suggest that I set forth the status of the National Guard at this time. I will call your attention to an opinion I rendered on August 17, 1917 to Hon. George H. Wood, Adjutant General of Ohio, found in Volume II, Opinions of the Attorney-General for 1917, p. 1564. In this opinion I set forth my views as to the present status of the National Guard, which I think will fully answer the question you have in mind and I therefore refer you to said opinion.

In considering your question as to what should be done with the moneys realized from the condemnation and sale of military property and ordinary furnishings purchased by the state, I will note not only the condemnation and sale, but also the purchase and care of the property, especially with a view to ascertaining what might be included within the term "military property." I have already covered the property which is purchased by the local organizations and paid for out of their treasuries.

Section 5255 G. C. provides that the board shall provide armories for the purpose of drill and for the safekeeping of arms, clothing, equipments and other military property issued to the several organizations of organized militia.

Section 5256 G. C. provides that the board may receive donations of property for the purpose of furnishing an armory building. In the matter of the care of same, section 5279 G. C. provides that the adjutant general shall have charge of all the military stores received from the United States government *or purchased by the state.*

Section 5280 G. C. provides that the adjutant general shall see that all military stores, both the property of the state and of the United States, are properly cared for and kept in good order, ready for use.

From all the above, it is my opinion that any property that would be purchased by the state from state funds and issued to the various local organizations, would be issued to them in a sense as military property and for their use as military organizations of the state.

Section 5281 G. C. provided that when military stores become unserviceable, the adjutant general may convene a board of officers of the National Guard and if the board finds the military property unserviceable, it may condemn it.

Section 5282 G. C. provided that the adjutant general may then sell the condemned military stores and further provided:

> "The sums realized from the sales thereof, to be turned into the state treasury, to be credited to any fund appropriated for the use of the National

Guard, as determined at the time by the governor, adjutant general and auditor of state."

Said section also provided that the adjutant general might exchange such condemned stores for such other military stores as the interests of the service might require.

From the two sections last above referred to, it is evident that the money realized from the sale of property purchased by the state and paid for from state funds and issued to the local organizations of the National Guard, must be turned into the state treasury, to the credit of the National Guard, and can not legally be used for any other purpose. The intention of the legislature evidently was that inasmuch as the state in the first place furnished the money for the purchase of the military stores, the state should have the benefit of any proceeds realized from the sale thereof.

Inasmuch as the matters about which you inquire took place prior to the enactment of the law of 1917, the quotations herein made are taken from the statutes as they then existed.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

1519.

APPROVAL OF BOND ISSUE OF GUERNSEY COUNTY, OHIO.—$10,000.00.

COLUMBUS, OHIO, October 16, 1918.

The Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

In Re: Bonds of Guernsey county, Ohio, in the sum of $10,000 for the construction of certain improvements in the infirmary building of said county.

I have carefully examined the corrected transcript of the proceedings of the Board of County Commissioners of Guernsey county, Ohio, relating to the above issue of bonds and find said proceedings to be in conformity to the constitution and laws of Ohio relating to bond issues of this kind.

I am therefore of the opinion that properly prepared bonds covering the above issue will, when the same are properly executed and delivered, constitute valid and binding obligations of said county to be paid in accordance with the terms thereof.

No bond form of the bonds to be printed covering said issue was submitted with and as a part of said transcript, and I am therefore holding the same until proper bond form is submitted and approved.

Yours very truly,
JOSEPH McGHEE,
Attorney-General.

1520.

FEES AND EXPENSES—NO PROVISION FOR, WHEN PERSON CONVEYS CHILD UNDER FIFTEEN TO INSTITUTION FOR FEEBLE-MINDED.

There is no provision in law for the payment of expenses of a person other than the sheriff when such person conveys a child under fifteen years of age to the feeble-minded institution.

COLUMBUS, OHIO, October 17, 1918.

HON. ERNEST THOMPSON, *Probate Judge, Bellefontaine, Ohio.*

DEAR SIR:—I have your letter as follows:

> "Some weeks ago I committed a girl nine years of age to the Institution for Feeble-Minded Youth, at Columbus, Ohio, directing my warrant to convey to a relative of the child. This relative has now handed me a bill for $10.00 to cover her expense. I should like to pay this bill if I could do so legally. Would you please give me your opinion as to whether I can lawfully pay the bill?"

Section 1891 G. C. reads:

> "The trustees of the Institution for Feeble-Minded Youth, may admit thereto all youth of this class not over fifteen years of age who have been residents of the state for one year, and are not capable of receiving instruction in the common schools."

On December 5, 1917, this department rendered an opinion in which it was held:

> "Where a child not over fifteen years of age, or a person over fifteen years of age and a public charge, is admitted to the Institution for the Feeble-Minded, no commitment by the probate court is necessary and no fees to physicians for mental examination can be allowed."

This opinion is found in Opinions of the Attorney-General, Volume 3, 1917, page 2236.

This opinion followed the views of Hon. Timothy S. Hogan and Hon. Edward C. Turner, my predecessors, as expressed in the opinion therein quoted.

Children under fifteen years of age are not committed to the feeble-minded institution by the probate court as are adults and the various provisions of law relative to the commitment to insane hospitals are without application to the commitment of children under fifteen years to the feeble-minded institution. The statutes, therefore, which authorize the probate judge to appoint some one other than the sheriff to convey the insane person to the hospital and the statute allowing such person compensation, are without application in the case you submit and I do not know of any statute which will permit the payment of the bill for $10.00, submitted by the person referred to in your communication.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1521.

APPROVAL—LEASE FROM SUPERINTENDENT OF PUBLIC WORKS TO UNION GAS AND ELECTRIC CO.

COLUMBUS, OHIO, October 17, 1918.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of October 7, 1918, in which you enclose, for my approval, a contract (in triplicate) entered into by and between the Superintendent of Public Works and the Union Gas and Electric Company, for the lease of certain water to said company, to be taken from the Miami and Erie canal.

Under the circumstances I am returning this lease to you with my approval endorsed thereon, but I desire to call your attention to matters connected therewith which are not strictly in conformity to law.

(1) The party of the second part is a corporation and there is no authority given to the president of said company to sign contracts in general or this contract in particular. Inasmuch as this lease is signed by the president and attested to by the secretary and the seal of said company is thereto attached, I am inclined to overlook this technical irregularity in the contract lease.

(2) Section 14011 G. C. (107 O. L. 419) provides as follows:

> "Section 14011.—All sales, leases or conveyances of any water or right to use the same or of any hydraulic power, made by the superintendent of public works shall be subject to the rights of the state for purposes of navigation, and for the maintenance of the state reservoirs as public parks and pleasure resorts, and no water shall be used or taken by the lessee or vendee under such sale, lease or conveyance if the same is necessary for the purpose of navigation."

There is no provision in the contract reserving the right of the state in and to the water leased for the purpose of navigation, nor for maintaining state reservoirs, but inasmuch as this canal has already been leased to the city of Cincinnati for a consideration, and thus the rights of the state in and to said water to a certain extent having passed to the city of Cincinnati, I am inclined also to overlook this irregularity.

I am therefore returning said lease to you with my approval endorsed thereon.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1522.

STATE DENTAL BOARD—DUTY OF SECRETARY TO FURNISH TRANSCRIPT UNDER SECTION 1318 G. C.

It is the duty of the secretary of the State Dental Board to furnish a transcript of the entries of the record of licensees, properly certified to, to soldiers who desire said certificate, that the same may be used for filing purposes with the war department when asking admittance to the dental corps.

COLUMBUS, OHIO, October 17, 1918.

DR. HOLSTON BARTILSON, *Secretary Ohio State Dental Board, Columbus, Ohio.*

DEAR SIR:—You refer a letter to me and request my opinion as to whether or not you are required to give the certificate requested in said letter. The letter reads:

"I have a chance to apply for a commission in the Dental Corps but need a certified statement that I have passed the Ohio board. Can you send me a certified copy of my license or the equivalent in the near future?

Thanking you in advance, I beg to remain,

Sincerely yours,

(Signed) O. O. Leininger.
Post Dental Dept.
Fort Benjamin Harrison, Ind."

Replying to your request permit me to call your attention to several sections of the General Code affecting the duties of the secretary of the State Dental board.

Section 1314 G. C. provides for the appointment of the members of the State Dental board. Section 1315 provides that the board shall organize by the election from its members of a president and secretary. Section 1316 provides that the secretary, before entering upon the discharge of the duties of his office, shall give a bond to the state in the sum of $2,000, conditioned for the faithful discharge of the duties of his office. Section 1317 provides that the salary of the secretary shall be fixed by the board and that he shall receive his necessary expenses incurred in the discharge of his official duties. Section 1318 reads:

> *"The State Dental board* shall have an official seal and *shall keep a record of its proceedings, a register of persons licensed as dentists and a register of licenses by it revoked.* At reasonable times, its records shall be open to public inspection, and it shall keep on file all examination papers for a period of ninety days after each examination. *A transcript of an entry in such records, certified by the secretary under the seal of the board, shall be evidence of the facts therein stated."*

The language of the last above quoted section is too clear to need any interpretation. It provides that the State Dental board shall keep a record of its proceedings and a register of the persons who are licensed as dentists and a register of licenses which have been revoked by the board. While the law does not provide in so many words, yet by necessary implication it follows, that the secretary is the person who shall keep such record and registers. The letter which you refer to me asks you to furnish a certified copy of a license, or the equivalent. The equivalent, of course, will be a transcript of the entry of the licensee on your records, and the statute provides that such transcript, when certified to by the secretary, under the seal of the board, shall be evidence of the facts therein stated.

The certificate asked for is, I am advised, required by the war department, before an applicant can be admitted to the dental corps. This being true, it is not only your right, but your duty to furnish the same by making a transcript of the entry upon your records and certifying to the same as secretary of the board, and affixing the seal of the board. When the same is thus made, it is evidence of what the facts in relation to said certificate are.

Answering your question, then, I advise you that it is your duty to furnish the soldier a certified transcript of the entries upon your records in relation to the license granted to him.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1523.

APPROVAL OF BOND ISSUE OF SENECA COUNTY, OHIO.—$25,700.00.

COLUMBUS, OHIO, October 18, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In Re: Bonds of Seneca county, Ohio, in the sum of $25,700.00, in anticipation of the collection of taxes and assessments to pay the respective shares of said county, of Jackson township and of the owners of benefited property assessed of the cost and expense of the construction of Lima-Sandusky I. C. H. No. 22, section "F", road improvement located in said county and township.

I have carefully examined the corrected transcript of the proceedings of the board of county commissioners of Seneca county, Ohio, relating to the above issue of bonds and find said proceedings to be in conformity to the provisions of the General Code of Ohio relative to bond issues of this kind.

I am therefore of the opinion that bonds properly prepared according to bond form submitted will, when the same are properly executed and delivered, constitute valid and binding obligations of said county, to be paid in accordance with the terms thereof.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1524.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN CLARK COUNTY.

COLUMBUS, OHIO, October 18, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of October 17, 1918, in which you enclose, for my approval, final resolutions for the following named improvements:

Clark county—I. C. H. No. 1, section F. Clark county—I. C. H. No. 1, section (g) & H.

I have carefully examined said resolutions, find them correct in form and legal and am therefore returning the same to you, with my approval endorsed thereon in accordance with the provisions of section 1218 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1525.

APPROVAL—ABSTRACT OF TITLE TO 205.30 ACRES IN VIRGINIA MILITARY DISTRICT, UNION TOWNSHIP, MADISON COUNTY, O.

COLUMBUS, OHIO, October 19, 1918.

The Ohio Penitentiary Commission, Columbus, Ohio.

GENTLEMEN:—Two abstracts have been submitted to me for examination, covering the 205.30 acres of land to be purchased by your commission from John Ellsworth, being located in the Virginia Military district, Union township, Madison county, Ohio, and bounded and described as follows:

First Tract:—Beginning at a stone in the north line of lands of James Kilgore (now John Ellsworth) S. E. corner to Thomas Meehan (now Charles and Martin Meehan) then with the east line of Thomas Meehan N. 14° W. 21.73 chains (chain 4 poles) to a stone N. E. corner to said Meehan's land; thence with said Meehan's N. line N. 85° 25′ W. 58.32 poles to a stone in Orcutt's road; thence N. 19° 13′ W. with said road to the center of the Columbus, Springfield and Cincinnati railroad 50 feet; thence with the center of said railroad S. 85° 39′ E. 135 poles and 13 feet to a stone in the center of said railroad N. W. corner to John Thompson, (now John Ellsworth) thence with the W. line of said Thompson S. 1° W. 73 poles and 12½ feet to a stake N. E. corner to said Kilgore; thence with the N. line of said Kilgore S. 82° 30′ W. 13.53 chains to the beginning, containing 33 acres more or less, being part of survey No. 6247.

Second Tract:—Beginning at an iron post in the east line of a 49.84 acre tract of land now owned by John Ellsworth and being northwesterly corner to 160.75 acres of land now owned by Robert Cooke; thence with the easterly line of said Ellsworth N. 4° E. 1822 to a stone in the center of the C. C. C. & St. L. railroad (formerly the Columbus, Springfield and Cincinnati railroad); thence with the center of said railroad S. 82° 45′ E. 5041 feet to a stone corner to lands now owned by Alice K. Downing; thence with two lines of said Downing S. 5° 15′ W. 464 feet to a corner post in the line between Military survey No. 4513 and Military survey No. 5429 and 8744; thence with said survey line S. 87° 30′ W. 1127½ feet to a corner post in the east line of a tract of land now owned by Ivy Armstrong and corner to said Downing; thence with three lines of said Armstrong N. 2° 45′ E. 214 feet to a post; thence S. 86° 30′ W. 1471 feet to a post; thence S. 5° 10′ W. 630½ feet to a post corner to said Armstrong; thence with another line of said Armstrong and of said Cooke (passing their corner) S. 86° W. 2450½ feet to the beginning, containing 122.40 acres of land, of which 37 acres are in Military survey No. 8743, 34 acres are in Military survey No. 4513, 8.40 acres are in Military survey No. 6247 and 43 acres are in Military survey No. 5429 and 8744.

Third Tract:—Beginning at a stone in the center of the Roberts Mill road corner to George Hunter and Evaline Armstrong, thence with Evaline Armstrong's north line S. 84° 45′ E. 9.82 chains (chain 4 poles) to a stone corner to said Armstrong; thence with her west line N. 3° 15′ E. 30.10 chains to a stone in John Thompson's west line and corner to Joseph Suver; thence with the south line of said Suver and Thomas Meehan S. 84° 10′ W. 25.17 chains to a stone in center of Roberts Mill road corner to Thomas

Meehan and J. M. Porter; thence with the center of said road S. 26° 55' E. 29.92 chains to the beginning containing 49.84 acres more or less, part of survey No. 4513.

The abstract to the premises containing 49.84 acres of land situated in survey No. 4513, shows a good merchantable title in John Ellsworth.

The abstract covering the remaining property embraces two tracts, one of 33 acres located in survey No. 6247, and another tract containing 122.40 acres of land of which 37 acres are in Military survey No. 8743; 34 acres in Military survey No. 4513; 8.40 acres in Military survey No. 6247, and 43 acres are in Military surveys No. 5429 and 8744, and will be considered as to each tract separately.

The abstract shows a good and merchantable title in John Ellsworth to the 43 acres located in Military surveys No. 5429 and 8744.

There is a break in the title covering the 34 acres located in survey No. 4513. On page 72 of the abstract is shown a warranty deed from Peter Helphenstine to John Timmons, but there is no conveyance from John Timmons or his heirs to any of the succeeding owners of said premises. An agreement between a part of the heirs of John Timmons is shown at pages 74, 75 and 76. This agreement was entered into during the lifetime of said John Timmons and there is nothing to show that this agreement was ever executed or that it was ratified by his other heirs who did not join in the agreement.

On page 77 is shown a deed from Lewis Timmons to David Groves for an undivided seventh part of a 100 acre tract of land being a part of survey No. 4515. There is no conveyance from David Groves or from John Timmons or his wife, covering the premises under consideration.

On page 79 is shown a deed from David Dunkin and wife to John Thompson, covering the 34 acres in survey No. 4513, now under consideration. This deed is dated April 6th, 1847. This property was devised to John Ellsworth by said John Thompson, which will was probated in Madison county, Ohio, on February 8th, 1909.

The above constitutes a cloud upon the title, but as continuous possession and chain of title is shown from 1847 to the present time, this would constitute a good merchantable title by prescription.

The abstract shows a good merchantable title in John Ellsworth for the 37 acres located in Military survey No. 8743.

The abstract also shows a good merchantable title in John Ellsworth for the 8.40 acres located in survey No. 6247.

The abstract to the 33 acres located in survey No. 6247 and known as the first tract in the abstract, shows the following situation as to title thereto:

This 33 acre tract constitutes a part of a 60 acre tract which was conveyed by Daniel Orcutt and wife to William Watson and James Watson, under date of December 28th, 1863, as shown at page 30 of the abstract. This 60 acre tract constitutes the western part of a tract of land described in the abstract and containing 109½ acres of land. On page 41 of the abstract James Watson and wife conveyed to William Watson a ten acre tract off of the east end of said 109½ acre tract; also the 109½ acres excepting therefrom the 10 acre tract above mentioned and also excepting the 60 acre tract above in question and he then conveyed the undivided one-half of said 60 acre tract to William Watson in the same deed. As William Watson was already the owner of the undivided one-half of said 60 acre tract, this gave him title to the entire 109½ acres.

On page 43 of the abstract is shown a deed from William Watson and wife to James Q. Minshall. The description in this deed conveys by metes and bounds, first, the 10 acre tract off the east end of said 109½ acres, second, the 109½ acres, excepting therefrom the 10 acre tract and also the 60 acre tract, and he then conveys,

thirdly, the undivided one-half of said 60 acre tract. This leaves an undivided one-half of the 60 acre tract not conveyed by William Watson. The abstractor certified that there is no further conveyance of said 60 acre tract or the undivided one-half thereof by William Watson. This conveyance was executed November 19, 1868.

The tax duplicate of Madison county for the year 1869 shows a transfer of the whole of said 60 acres from William and James Watson to James Q. Minshall. James Q. Minshall conveyed a part of said 60 acres to Thomas Meehan under date of March 9, 1871, as shown at page 44a of the abstract as containing 25.09 acres. In 1875 he conveyed the 33 acres. These two tracts cover the 60 acres in question.

The question arises as to whether or not the above facts are sufficient to create a title by prescription as against the undivided one-half interest which William Watson failed to convey to James Q. Minshall, and which has not since been conveyed. There is a continuous chain of title from James Q. Minshall to John Ellsworth, the present owner.

The general rule as to adverse possession as against the co-tenant is stated in Youngs vs. Heffner, 36 O. S., 232, where the first branch of the syllabus reads:

> "The statute of limitations does not run in favor of a tenant in common in the occupancy of the premises, against his co-tenant, until some overt act of an unequivocal character, clearly indicating an assertion of ownership of the entire premises, to the exclusion of the right of the co-tenant."

The question then arises as to whether the execution of the deed by a tenant in common for the entire premises, and the placing of said deed upon record, constitutes an overt act within the above case.

The general rule is stated at page 34, Volume 38 of Cyc. as follows:

> "An unauthorized or unratified sale or conveyance of the whole property or any specific part thereof by metes and bounds by one tenant in common, followed by entry by the grantee thereunder and his exclusive possession thereof, under adverse claim of the title to the whole or some specific part by metes and bounds, amounts to an ouster of the other co-tenants; and such a conveyance of the entire estate coupled with possession by the grantee and notice to the other co-tenants, actual or presumed, or open, hostile, exclusive, and notorious acts of ownership, constitutes adverse possession which may ripen into a valid title by prescription."

In support of this contention two Ohio cases are cited. The first is that of Payne vs. Cooksey, 7 O. N. P. page 90, wherein the syllabus reads:

> "Where a grantee enters under a deed describing his estate as a tenancy in common, with others, his possession will be presumed to be not adverse to the co-tenants until by unmistakable acts of which the co-tenants have or ought to have taken notice, re claims the entire ownership.
>
> P., being the owner of a part interest in land, sold the whole estate by warranty deed in 1864 to B., giving B. a mortgage on other land as a guaranty that he would procure the title of his co-tenant. B. sold to third parties who had no notice of any claim of others to an interest in the land. P. had failed to acquire the title of his co-tenant to his interest in the land, and such interest was conveyed in 1864 to Payne, who waited until 1896 before he brought suit to recover his interest in the land. Held, the statute of limitations applies against his claim, and he can not recover."

The second case is that of Ward vs. Ward, 11 C. C. n. s., 396, wherein the syllabus reads:

> "Where a tenant in common releases for a valuable consideration to a co-tenant by quit-claim deed all his right, title and interest in certain land therein described, expressly including the interest inherited by him from a brother, then believed to be dead; and where also the grantee goes into actual possession of the land upon which he and his heirs make valuable improvements and continue in peaceable possession thereof for more than twenty-one years, such grantee and his heirs acquire a good title to such interest as against the grantor and his heirs although the brother was not dead at the time of the execution of the deed of release."

On page 400 the conclusion of the court is stated as follows:

> "Again, is not the bar of the statute of limitations conclusive? The claim of defendants is that as these parties are all tenants in common the statute of limitations has no effect. This claim is not well founded in this case. If Seth were living he would have a right to rely on the bar of the statute, and his children have the same right. The deed was made in 1862 and Seth went into possession under the deed and made valuable improvements and paid taxes on the entire interest. This was an assertion of an independent absolute title under the deed as against all the heirs of the grandfather, as he obtained like deeds from all of them. These deeds were placed upon record. It was a direct assertion of entire title and a public proclamation to all persons that he was such owner. He took the property under color of title at least; he went into possession under such title, and he and his heirs continued in such possession openly and adversely as against these claimed tenants in common for more than forty years. Taken altogether 'it was an overt act of an unequivocal character clearly indicating an assertion of ownership of the entire premises to the exclusion of the right of the co-tenant.'"

From the above authorities it is clear that the circumstances in the present case as shown by the records of Madison county, and the affidavit of J. A. Porter, as to the possession of said premises, show an adverse possession as against William Watson for a period in excess of forty years, and that this possession constitutes an overt act within the case of Youngs vs. Heffner, supra.

Therefore a good merchantable title by prescription is shown to exist in John Ellsworth as to the 33 acres in question.

I find no other objections to said abstract.

The deed hereto attached, when signed by John Ellsworth and his wife, and duly acknowledged and witnessed, will convey a good title to said premises. Said deed should have attached the sum of $41.00 in stamps, covering the payment of revenue tax.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1526.

DISAPPROVAL—ARTICLES OF INCORPORATION OF THE LUMBERMENS' MUTUAL INSURANCE COMPANY.

INSURANCE COMPANY—IF IT AVAILS ITSELF OF POWERS GRANTED IN SUB-SECTION 1 OF SECTION 9607-2 G. C., CANNOT EXERCISE OTHER POWERS IN SAID SECTION.

A fire insurance company availing itself of the powers granted by sub-section 1 of section 9607-2 General Code by amendment to its articles of incorporation or otherwise, is limited to powers conferred by said sub-section, and cannot exercise the powers granted by section 9607-2 to corporations incorporated for any or all of the other purposes mentioned in said section of the General Code, nor of powers now or hereafter granted to other corporations other than life insurance companies.

Proposed amendment to the articles of incorporation of the Lumbermens' Mutual Insurance Company considered and disapproved.

COLUMBUS, OHIO, October 19, 1918.

HON. WILLIAM D. FULTON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—You have submitted for my opinion a question with respect to the legality of a proposed amendment to the purpose clause of the articles of incorporation of The Lumbermens' Mutual Insurance company of Mansfield, Ohio.

The purpose clause of the articles of incorporation of this company as it now reads is as follows:

> "To carry on and conduct the business of insuring property against loss or damage by fire, and on the plan of mutual fire insurance, under and in pursuance of the provisions of the laws of Ohio, and specifically in pursuance of section 3634 of the Revised Statutes of the State of Ohio, and the provisions of all the laws of Ohio, providing for the incorporation of companies, and for conducting and carrying on the business of insurance, other than life insurance."

The proposed amendment reads:

> "And to carry on and conduct a general insurance business by transacting all the kinds of insurance as is permitted under section 9607-2, subsection 1, of the General Code of Ohio, or that may hereafter be permitted under the provisions of all the laws of Ohio, providing for the incorporation of companies, and, for conducting, and carrying on the business of insurance, other than life insurance."

Though the provisions of the general incorporation laws of this state do not apply in any general way to insurance companies, as to which special provision is made by statute (38 O. S. 347), I am of the opinion that an insurance company of this kind may amend its articles under and subject to the provisions of section 8719 General Code. This much was held by my predecessor, Hon. T. S. Hogan, in an opinion to the then secretary of state, under date of April 10, 1911, (A. G. R. 1911, p. 98), and I have no reason to doubt the correctness of the conclusion reached by Mr. Hogan with respect to this question.

Though not as specific to that end as might be desired, the proposed amendment would probably be effective to confer upon this company the "fire insurance"

powers granted by sub-section 1 of section 9607-2 General Code as enacted in the act of March 21, 1917 (107 O. L. 647). This proposed amendment, however, goes far beyond the powers granted by sub-section 1 of section 9607-2 General Code, and seeks to permit the company to avail itself of powers that may hereafter be granted to all companies incorporated for the purpose of carrying on the business of insurance other than life insurance.

Under its present charter this company is limited by the provisions of section 9511 General Code to the one particular purpose under section 9510 General Code, for which it is incorporated, and to the powers legally incident to said purpose, and if this company avails itself of the powers granted in sub-section 1 of section 9607-2 General Code, it will by the express provision of said section be limited to the fire insurance powers granted by said sub-section.

These considerations are sufficient to show that the proposed amendment as submitted is illegal, and should not be accepted by you.

A number of other questions have suggested themselves to my mind in the consideration of the question submitted by you, but inasmuch as their determination is not necessary with respect to the determination of the question submitted, the same are not here noted or discussed, and for the reasons above noted, the proposed amendment to the articles of incorporation of this company is disapproved.

Yours very truly,

JOSEPH MCGHEE,

Attorney-General.

1527.

CORRUPT PRACTICES ACT—CANDIDATES FOR WHOM FIXED MAXIMUM SUM NAMED IN SECTION 5175-29, CANNOT EXPEND IN EXCESS THEREOF.

The provision of section 5175-29 *G. C. which permits an expenditure of five dollars for each one hundred votes cast in excess of five thousand at the last preceding state election is not supplementary to the fixed maximum sums named earlier in the act as the amounts which may be expended by candidates for the several offices designated, and the expenditure by a candidate, for any of the offices named therein, of a sum in excess of the amount designated for the particular office, is in violation of the corrupt practices act.*

COLUMBUS, OHIO, October 21, 1918.

HON. JARED P. HUXLEY, *Prosecuting Attorney, Youngstown, Ohio.*

DEAR SIR:—I am in receipt of your communication in which you state:

> "As there is some misunderstanding among the candidates for office in this county as to the interpretation of section 5175-29 of the Corrupt Practices act, we have been asked by the Mahoning County Board of Elections to secure your opinion as to the construction of this act on the following point:
>
> The section sets forth the amount each candidate is allowed to spend, and then says:
>
> 'If the total number of votes cast therein at such last preceding election be in excess of five thousand, the sum of five dollars for each one hundred in excess of such number may be added to the amount above specified.'

Does this added amount apply to each of the offices enumerated in the previous part of the section, or does it apply only to those offices covered under the part of the section that reads:

'by a candidate for any other public office to be voted for by the qualified electors of the county, city, town or village, or any part thereof, if the total number of votes cast therein for all candidates for the office of Governor at the last preceding state election shall be five thousand or less, the sum of three hundred dollars.' "

Section 5175-29 G. C. reads as follows:

"The total amount expended by a candidate for a public office, voted for at an election, by the qualified electors of the state, or any political subdivision thereof, for any of the purposes specified in section 26 of this act, for contributions to political committees, as that term is defined in section 1 of this act, or for any purpose tending in any way, directly or indirectly, to promote or aid in securing his nomination and election, shall not exceed the amount specified herein; by a candidate for governor, the sum of five thousand dollars; by a candidate for other state elective office the sum of two thousand five hundred dollars; by a candidate for the office of representative in congress or presidential elector, judge of the court of appeals, the sum of two thousand dollars; by a candidate for the office of state senator, the sum of three hundred dollars in each county of his district; by a candidate for judge of common pleas, probate or insolvency court, the sum of five hundred dollars; by a candidate for the office of state representative the sum of three hundred and fifty dollars; by a candidate for any other public office to be voted for by the qualified electors of a county, city, town or village, or any part thereof, if the total number of votes cast therein for all candidates for the office of governor at the last preceding state election, shall be five thousand or less, the sum of three hundred dollars. If the total number of votes cast therein at such last preceding state election be in excess of five thousand, the sum of five dollars for each one hundred in excess of such number may be added to the amounts above specified. Any candidate for a public office who shall expend for the purpose above mentioned an amount in excess of the amounts herein specified shall be guilty of a corrupt practice."

My predecessor, Hon. Edward C. Turner, was called upon to construe this section, as evidenced by an opinion to Hon. E. D. Fritch, judge of the common pleas court, Akron, Ohio, found in Volume II, Opinions of the Attorney-General for 1916, p. 1517. As stated by Mr. Turner in said opinion, while the second sentence of the section is not entirely free from ambiguity, when it is taken in connection with the latter part of the sentence that precedes it the meaning of the second sentence is rendered reasonably clear. In concluding his opinion Mr. Turner held as follows (p. 1518):

" * * * the additional $5.00 for each one hundred in excess of five thousand votes cast therein provided in the second sentence of section 5175-29 G. C., supra, has reference only to candidates for any other public office than those specifically enumerated in the earlier portions of said section. I am strengthened somewhat in this conclusion by reason of the necessary result of the application of a different construction. For instance, it will be noted that it is provided that a candidate for any other

state elective office than that of governor may not expend in excess of twenty-five hundred dollars in the first instance. If the provision for an additional amount of five dollars for each one hundred in excess of five thousand total votes in the state may be applicable to such other state officer, it would result that such increase in the amounts authorized to be expended would be many times the initial amount so authorized. That is to say, a candidate for any state office, other than that of governor, would be thereby authorized to expend in excess of the twenty-five hundred dollars, specifically provided in the earlier part of said section, under the provision of the second sentence thereof, as based upon the total vote for governor in the state at the last preceding state election, an amount equal to many times the initial amount of twenty-five hundred dollars.

It is hardly believed that it was the legislative intent that by reason of the application of the provision for the expenditure of five dollars for each one hundred votes cast in excess of five thousand, in addition to the original amount provided for candidates for state offices, they should be authorized thereby to expend an amount equal to many times the original amount of twenty-five hundred dollars."

In Baker vs. Slusser, 19 O. N. P. (N. S.) 523, McClure, J., of the common pleas court of Summit county, took a different view and held, as shown by the first paragraph of the syllabus, as follows:

"Under the section of the corrupt practices act which limits the amount which may be expended by candidates at an approaching election, the office of probate judge falls within the provision which fixes such expenditure at a sum not exceeding $500 with $5 additional for each one hundred votes in excess of 5,000 cast at the last preceding state election."

Despite the fact that the judge of the probate court was specifically enumerated in the list of candidates that were permitted under the section to expend the amount named, the court was of the opinion that the legislature was dealing with the office in the relation it sustained to the electorate which was, of course, confined to the county unit and that the provisions by which it was designated to afford additional amounts of expenditures to other county and municipal officers applied as well to the office of probate judge.

This decision was reversed by the court of appeals, as found in 27 O. C. A. (N. S.) 197. The first paragraph of the syllabus in that case reads: Baker vs. Slusser)

"The provision of the corrupt practices act, which permits an expenditure of five dollars for each one hundred votes cast in excess of five thousand at the last preceding state election, is not supplementary to the fixed maximum sums named earlier in the act as the amounts which may be expended by candidates for the several offices designated, and the expenditure by a candidate for probate judge of a sum in excess of five hundred dollars is in violation of that act."

Commenting on the claim that the intention of the legislature was to permit the additional sum of $5.00 per hundred to be expended for election purposes, over and above the sum specifically named, Leighley, J., says: (p. 200)

"That method of calculating would permit a candidate for governor to expend about $37,000; a candidate for this court over $10,000; a candidate

for secretary of state, a two-year term, about $35,000, which is several times his salary for the term; a candidate for common pleas judge in Cuyahoga county over $6,000. Can it be possible that the legislature intended to put such sinews of war in the hands of a non-partisan judiciary for the purposes of political strife which would necessarily attend the expenditure thereof by the various candidates for judge? We think that this construction is in conflict with the apparent intention of the legislature in enacting the corrupt practice act, viewed with reference to the trend of public sentiment of late years which eventuated in the enactment of the non-partisan judiciary laws.

We think the sentence of section 29 last above referred to qualifies only the language after the last semi-coloon and only those offices and the amounts that may be expended by candidates for those offices which have not been specifically mentioned and opposite which no specific amount has been fixed by the legislature in the act. In short, we think that by law the contestee was obliged to confine his expenditures at or below the sum of $500."

This case was taken to the supreme court and was decided there on July 3, 1917, as shown in 96 O. S. 606. While the supreme court reversed the court of appeals, the *per curiam* opinion or entry shows that the reversal was—

"for the reason that it appears from the record that the contestor was not entitled to judgment against the contestee in this proceeding. Even if it be proven that there was a violation of the section of the statute under which this proceeding was brought, it would not constitute a ground for removal * * *."

It is evident that the supreme court did not pass upon the question decided by the court of appeals, in the first paragraph of the syllabus, above quoted.

I am inclined to agree with the opinion of my predecessor, Mr. Turner, and with the view expressed by the court of appeals on the reasoning therein set forth.

It is therefore my opinion that the provision of the second sentence of section 5175-29 G. C., permitting the expenditure of an additional sum of $5.00 for each hundred votes in excess of five thousand cast for governor at the last preceding state election, by candidates for office, is applicable only to candidates for other public offices than those specifically enumerated in the earlier part of said section.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1528.

MUNICIPAL CORPORATION—COUNCIL OF VILLAGE MAY FIX COMPENSATION OF POLICE JUSTICE.

The council of a village has authority to fix by ordinance the compensation of the police justice appointed by council under the provisions of section 4544 G. C.

COLUMBUS, OHIO, October 21, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I have received the following inquiry from Hon Britton S. Johnson, solicitor of the village of Kent, O.:

"Has the council of a village the authority to fix and designate the salary and compensation of a police justice appointed under section 4544 of the General Code of Ohio?"

I am addressing this opinion to your bureau and will forward copy thereof to Mr. Johnson.

Section 4544 G. C. reads:

"Upon the recommendation of the mayor, the council may, by an affirmative vote of two-thirds of all the members elected, appoint a justice of the peace, resident of the corporation, or if there is no such justice of the peace, another suitable person resident of the corporation or a justice of the peace for the township in which such corporation is situated, police justice, who shall, during the term of office of such mayor, unless removed on suggestion of such mayor by a two-thirds vote of all the members of the council, have concurrent jurisdiction of all prosecutions for violations of ordinances of the corporation with full power to hear and determine them, and shall have the same powers, perform the same duties, and be subject to the same responsibilities in all such cases as are prescribed by law, to be performed by and are conferred upon the mayors of such corporations. Any person so appointed police justice, other than a justice of the peace, shall take an oath of office and give bond in such sum for the faithful performance of his duties as the council may require."

It is evident that the justice of the peace, or the suitable person where there is no justice of the peace, becomes an officer of a municipality, with the powers, duties and jurisdictions set forth in the section. No provision is made in the section for any compensation or salary to the police justice so provided for.

Section 4219 G. C. provides:

"Council shall fix the compensation and bonds of all officers, clerks and employes in the village government, except as otherwise provided by law. All bonds shall be made with sureties subject to the approval of the mayor. The compensation so fixed shall not be increased or diminished during the term for which any officer, clerk or employe may have been elected or appointed. Members of council may receive as compensation the sum of two dollars for each meeting, not to exceed twenty-four meetings in any one year."

Inasmuch as it is my opinion that the police justice provided for in section 4544 G. C. is an officer of the municipality, it is my view that council should fix his compensation.

One of my predecessors, Hon. Timothy S. Hogan, in an opinion found in Volume I of the Annual Report of the Attorney-General for 1913, p. 257, was called upon to construe section 4549, which is somewhat similar to section 4544, inasmuch as it provides that a justice of the peace may be appointed in cities having no police judge to act during the absence or disability of the mayor, and held among other things that under section 4214 G. C., which is the general section authorizing council to fix the compensation of officers of the city government and is similar to section 4219 G. C., giving like authority to council of villages, the

council was authorized to fix the compensation of the justice of the peace designated under section 4549, for services performed by him in ordinance cases.

Answering the question specifically, then, it is my opinion that the council of a village has authority to fix by ordinance the compensation of the police justice appointed by council under the provisions of section 4544 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1529.

BOARD OF EDUCATION—CANNOT LEASE SCHOOL GROUNDS FOR OIL PURPOSES.

A board of education of a rural school district has no power to lease school grounds for oil or gas purposes.

COLUMBUS, OHIO, October 21, 1918.

HON. FRANK B. PEARSON, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—A communication comes to me from the president of a board of education and it seems to me that the question therein is of such general public interest that my answer thereto should be directed to you. The communication reads in part:

> "They have secured a *very good* gas well one-quarter mile from I---- school and the company is anxious to lease our school grounds. They offer to put a well in immediately or to pay $200.00 per year as rental and to furnish free gas for the use of the school until such well is drilled. While there is no law about the board leasing school grounds, could it be implied where the board bought the ground as in this case."

The question involves a consideration of those sections of the General Code which refer to the securing and the use of school property. Section 4749 G. C. provides that:

> "The board of education of each school district * * * shall be a body politic and corporate, and, as such, capable of suing and being sued, *contracting and being contracted with, acquiring, holding, possessing and disposing of real and personal property* * * * and of exercising such other powers and privileges as are conferred by this title and the laws relating to the public schools of this state."

Under the above section a board of education may acquire, hold and dispose of real and personal property, and section 7620 provides that:

> "The boards of education of a district may build, enlarge, repair and furnish the necessary school houses, purchase or lease sites therefor, or rights of way thereto, *or purchase or lease real estate to be used as playgrounds for children,* or rent suitable schoolrooms, provide the necessary apparatus and make all other necessary provisions for the schools under its control. It also shall provide fuel for schools, build and keep in good

repair fences inclosing such school houses * * * and make all other provisions necessary for the convenience and prosperity of the schools within the subdistricts."

Under the provisions of this section power is granted to boards of education to provide school houses, rights of way thereto and play grounds for the children, and to make all necessary provisions for the schools under the control of such boards. Nowhere in the statute is there any authority granted to boards of education to grant leases of school lands or school property. In this the powers granted to boards of education are more limited than are the powers which are granted to county commissioners, for section 2486 provides that when in their opinion the county would be benefited thereby, the commissioners may make, execute and deliver contracts or leases to mine iron ore, stone, coal, petroleum, salt and other minerals, upon lands owned by such county, thus giving to boards of county commissioners full and complete authority to lease county property for oil or gas purposes.

It has been held by our courts numerous times that boards of education, being corporate bodies, hold the school property in trust for the uses and purposes to which it is designed by law and for no other purposes, and that a corporation can exercise only such powers as are expressly conferred upon it and are incidental to the powers expressly conferred.

8 Ohio, 257; 5 O. S., 59; 12 O. S., 601.

That is to say, a board of education which is authorized to purchase real estate would, by inference, be authorized to accept deeds to such real estate. But a lease of real estate for a purpose other than that granted by statute could not be held to be a power necessarily inferred from the power to purchase for school purposes. I know of no case in Ohio directly covering this matter, but in Weir vs. Day, 35 Ohio St., 143, the board of education attempted to lease a public school house to persons who desired to run a private school. In the syllabus of said case the court say:

1. "Boards of education are invested with the title to the property of their respective districts in trust for the use of public schools, and the appropriation of such property to any other use is unauthorized.

2. A lease of a public school house for the purpose of having a private or select school taught therein for a term of weeks, is in violation of the trust; and such use of the school house may be restrained at the suit of a resident taxpayer of the district."

If the building could not be used for private school purposes, naturally it would follow that it could not be used for purposes other than the conduct of a school or other commercial purposes.

I do find a case, however, bearing directly upon your question, viz., Herald et al. vs. Board of Education, 65 S. E., 102, (W. Va.), the syllabus of which reads:

"Residents and taxpayers in a school district, being patrons of a free school therein, suing for themselves and all others similarly circumstanced, may sustain a chancery suit to annul a lease of a school lot for oil and gas, as unauthorized and void, made by a board of education, and enjoin the use of the lot for such purpose.

A board of education is a quasi public corporation, existing only under statute, having only the powers given by statute, and such implied powers

as are absolutely necessary to execute such express powers. It cannot engage in business or make contracts outside its functions touching education. It cannot lease a school house lot for production of oil and gas."

In that case the board of education had leased a school house lot for oil and gas purposes. Suit was brought by Herald, et al., to annul the lease. The plaintiffs prevailed, the syllabus above quoted stating the full conclusion of the court.

My predecessor, Hon. Timothy S. Hogan, rendered an opinion in 1913, found in the Annual Reports of the Attorney-General for that year, Volume 2, page 1508, on the question as to whether or not boards of education had the right to lease part of the real estate which was not used for school purposes. The syllabus of said opinion reads:

"Section 4749, General Code, which enumerates the power of the board of education with reference to acquiring, holding, possessing and disposing of real and personal property, *does not include any provision for the leasing of such property by the board,* and as the statutes nowhere prescribe the manner of executing such a lease, the board cannot be held to possess such power."

It seems to be the universal rule followed by courts in Ohio that school property cannot be used for other than strictly school purposes unless otherwise authorized by statute. To this end the legislature made provision in sections 7622-1 et seq. that school houses might be used as recreation centers and for civic, social and grange meeting places. Without such statutory authority the school property could not be used for such purposes.

Provision is also made for the leasing of school and ministerial lands, that is, state, school and ministerial lands, but that authority does not cover the property which is held by local boards of education. I can come to but one conclusion, therefore, and that is that a board of education is not authorized, by our school laws, to lease the school property under its control for oil and gas purposes.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1530.

MUNICIPAL CORPORATION—COLUMBUS—UNDER CHARTER ENLISTMENT OF CITY AUDITOR DOES NOT CREATE VACANCY IN OFFICE.

Under the charter of the city of Columbus, the enlistment of the city auditor in the United States army would not affect the tenure of his office and council would have no authority to appoint a successor until he should die, formally resign or be removed by a legally constituted tribunal.

COLUMBUS, OHIO, October 21, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I am in receipt of communication from the solicitor of the city of Columbus, in which he requests my opinion as follows:

"Mr. W. M. G., city auditor of Columbus, has asked me for an early reply to the following question:

'If I should enlist in the National army for the duration of the war, what effect would this have on my tenure in office which expires January 1, 1922?'

I do not like to burden you with this request for an opinion, but, inasmuch as the provisions of the charter in relation to the office of city attorney are identical with those relating to the office of city auditor, it seems to me more appropriate that you pass upon this question."

I consider this matter of such state-wide importance that I am addressing my opinion thereon to you and will forward copy of same to the city solicitor.

The provisions of the charter of the city of Columbus which bear upon the question submitted are sections 79, 86, 87 and 232, which read as follows:

"Section 79.—The auditor shall be an elector of the city and be elected for a term of four years, excepting that at the first election under this charter he shall be elected for a term of two years."

"Section 86.—The auditor may appoint a deputy and such other assistants and clerks in his department as council may authorize. Said deputy shall have power to perform all the duties of the auditor."

"Section 87.—If the auditor die, resign, *or remove from the city* during the term of his office, his successor in office shall be appointed by council to serve until the first day of January following the next regular municipal election. If such election be the time for the regular election of the auditor, an auditor shall then be elected to serve for a term of four years; otherwise, for the unexpired term."

"Section 232.—All general laws of the state applicable to municipal corporations, now or hereafter enacted, and which are not in conflict with the provisions of this charter, or with ordinances or resolutions hereafter enacted by the city council shall be applicable to this city; provided, however, that nothing contained in this charter shall be considered as limiting the power of the city council to enact any ordinance or resolution not in conflict with the constitution of the state or with the express provisions of this charter."

The important provisions of these sections, as they pertain to the question under consideration, are:

(1) The only qualification of the city auditor is that he must be an elector of the city.

(2) The city auditor may appoint a deputy and other assistants and clerks, as council may authorize, and the deputy has power to perform all the duties of the auditor.

(3) If the auditor die, resign or remove from the city during the term of his office, the council of the city shall fill the vacancy under the conditions set out in section 87 of the charter.

There is no question but that the city auditor has the qualifications provided for by the charter and that there are in his office a deputy and assistants who are authorized in law to perform the duties of the office during his absence.

The city solicitor's communication also sets out the following:

"The council has fixed the salaries of the deputy city auditor and the assistants, and such deputy and assistants have been appointed and are now serving."

This leaves for consideration the provision of section 87 of the charter which provides that if the auditor shall resign or remove from the city during the term of his office, the council shall appoint his successor in office; that is, fill the vacancy. The question to be determined is: If the present city auditor enlists in the United States army for the period of the war, can he be said to have removed from the city? I think not. He would still have his domicile and legal residence in the city of Columbus. His voting residence would still remain in Columbus, at the place he lived at the time he enlisted in the army. He would merely be temporarily absent from his legal residence or domicile. By enlisting in the army and taking up his duties incident thereto, he would not remove from the city of Columbus any more than he would if temporarily absent from the state for some other reason.

The next question to be decided is whether he might be considered to have resigned his office by virtue of the fact that he in a sense abandoned it for the time of his enlistment in the army. I do not think an enlistment in the army and the taking up of the duties incident thereto can be considered an abandonment of the office and a resignation of the same.

I went into this matter at considerable length in an opinion (number 1349) which I rendered to your bureau on July 13, 1918, wherein I arrived at the conclusion above indicated. I distinctly held in that opinion that an appointing authority has no power in itself to declare a vacancy to exist; that is, it does not have judicial powers; and until a vacancy exists, either through death, resignation by the official or a removal by the proper judicial body, the appointing authority has no power vested in him to fill a vacancy.

Hence, answering the question specifically, it is my opinion that the enlistment of the auditor of the city of Columbus in the United States army, for the duration of the war, would have no effect upon his tenure of office, but that he would continue to hold the same until his death, resignation or removal by some legal tribunal which has authority conferred upon it by law or charter to remove him.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1531.

COUNTY AUDITOR—ANNUAL REPORT MAY BE PUBLISHED IN NEWSPAPER PRINTED ANYWHERE IN COUNTY.

The county auditor's annual report, the publication of which is governed by section 2508 of the General Code, may be published in newspapers printed anywhere in the county and circulating generally in the county; such publication is not required to be made in a newspaper printed or published at the county seat.

COLUMBUS, OHIO, October 21, 1918.

HON. HARRY S. CORE, *Prosecuting Attorney, Ottawa, Ohio.*

DEAR SIR:—I have your letter of October 8th requesting my opinion upon the question as to whether or not the commissioners' report, the publication whereof

is provided for by section 2508 of the General Code, is required to be published in a newspaper published at the county seat.

Section 3508 of the General Code provides for the publication of what was formerly the commissioner's report but what may now be called with perhaps more accuracy the "auditor's report." Among its provisions are the following:

> "Said auditor shall cause an exact copy of said report to be immediately published one time in one newspaper of the political party casting the largest vote in the state at the last general election, and in one newspaper of the political party casting the second largest vote in the state at the last general election, published in the county and of general circulation in said county."

If this statute governs the case alone it furnishes a complete answer to your question; for it does not require that the papers in which publication be made shall be printed or published at the county seat.

There is a general section which gives preference to newspapers printed at the county seat. I refer to section 6252 General Code, which provides as follows:

> "A proclamation for an election, an order fixing the times of holding court, notice of the rates of taxation, bridge and pike notices, notice to contractors and such other advertisements of general interest to the taxpayers as the auditor, treasurer, probate judge or commissioners may deem proper, shall be published in two newspapers of opposite politics at the county seat, if there be such newspapers published thereat. In counties having cities of eight thousand inhabitants or more, not the county seat of such counties, additional publication of such notices shall be made in two newspapers of opposite politics in such city. This chapter shall not apply to the publication of notices of delinquent tax and forfeited land sales."

In my opinion, section 6252 does not apply to the report of the auditor. It is not one of the "other advertisements of general interest to the taxpayers as the auditor, treasurer, probate judge or commissioners may deem proper" to be published within the meaning of section 6252, for the reason that this provision of the section obviously refers only to advertisements the publication of which is discretionary with one of the officials named; whereas the publication referred to in section 2508 is mandatory.

Inasmuch as section 6252 of the General Code does not apply to the publication in question, it follows that section 2508 is the only provision of law in any way relating thereto, there being no other statute which has application. As section 2508 does not require that the papers in which publication be made shall be printed or published at the county seat, it follows that the auditor's report may lawfully be published in a newspaper of general circulation in the county and published in the county, whether at the county seat or not.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1532.

TREASURER OF STATE—TRUST COMPANIES—IF TWO TRUST COMPANIES, EACH QUALIFIED IN OHIO, MERGE, TREASURER OF STATE SHOULD NOT PERMIT WITHDRAWAL OF DEPOSITS WITHOUT ORDER OF COURT.

Two trust companies, each of them organized under the laws of New York, have qualified for the acceptance of trusts in the state of Ohio by depositing with the treasurer of state securities in the amount of one hundred thousand dollars for each company; one of these companies has since been merged into the other of them: HELD,

The treasurer of state should not permit the merging company to take down the deposit originally made by the merged company without an order of court.

COLUMBUS, OHIO, October 21, 1918.

HON. CHESTER E. BRYAN, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—On September 18, 1918, you requested my opinion upon a question which may be phrased as follows:

> "Two trust companies, each of them organized under the laws of New York, have qualified for the acceptance of trusts in the state of Ohio by depositing with the treasurer of state securities in the amount of $100,000.00 for each company. One of these companies has since been merged into the other of them. The merging company desires to take down the deposit originally made by the merged company. May this be done and, if so, what is the procedure therefor?"

Since receiving your letter I have been in correspondence with counsel for the merging company with respect to the effect of a merger under the laws of New York. Before considering that question in this opinion, however, the meaning of the Ohio statute involved must be determined. This statute is found in sections 9778 and 9779 of the General Code, which provide as follows:

> "Section 9778. No such corporation either foreign or domestic shall accept trusts which may be vested in, transferred or committeed to it by an individual, or court, until its paid in capital is at least one hundred thousand dollars, and until such corporation has deposited with the treasurer of state in cash fifty thousand dollars if its capital is two hundred thousand dollars or less, and one hundred thousand dollars if its capital is more than two hundred thousand dollars, except that, the full amount of such deposit by such corporation may be in bonds of the United States, or of this state, or any municipality or county therein, or in any other state, or in the first mortgage bonds of any railroad corporation that for five years last past paid dividends of at least three per cent on its common stock."

> "Section 9779. The treasurer of state shall hold such fund or securities deposited with him as security for the faithful performance of the trusts assumed by such corporation, but so long as it continues solvent he shall permit it to collect the interest on its securities so deposited. From time to time said treasurer shall permit withdrawals of such securities or cash, or part thereof, on the deposit with him of cash, or other securities of the kind heretofore named, so as to maintain the value of such deposit as herein provided."

One striking feature of these sections is apparent upon first reading, viz.: they contain no provision whatsoever for taking down a deposit nor for permitting the withdrawal of cash or securities save when other cash or securities are deposited in place of that or those withdrawn so that the value of the deposit is maintained. In one sense, therefore, the entire question which is submitted may be answered by the statement that there is no procedure for the withdrawal of a deposit, as such.

However, it is impossible to suppose that the legislature intended that deposits made under these sections could never be withdrawn. In the absence of any express provision on the subject, then, a statement of the rules which must govern the withdrawal of deposits can be formulated only by having regard to the purpose for which the deposits are required to be made. This purpose is plainly stated in section 9779: the deposits constitute "security for the faithful performance of the trusts assumed by such corporation." This phrase, however, contains terms which perhaps require still further definition. What trusts are those secured by the deposit and when are they to be assumed; again, what corporation is contemplated by the statute?

Some light upon the questions thus suggested is afforded by section 9778 which prohibits the acceptance of any trusts in Ohio until the deposit therein required has been made and by section 9780, which has not been quoted, which makes null and void any trust deed or mortgage given or taken without complying with the provisions of sections 9778 and 9779. It is apparent to me, therefore, that the trusts for the faithful performance of which a deposit is intended to be security are those accepted after the making of the deposit.

This proposition is of some service in the solution of the question presented by your inquiry. Suppose in the case before us that the merging company had never entered Ohio and complied with section 9778; would it be required to comply with that section by reason of its merger of the merged company? I think not; for the Ohio law does not contemplate the making of a deposit to secure the performance of trusts already accepted; and unless the merger itself because of its effect be regarded as the acceptance of the trusts originally reposed in the merged company the statute could have no application; and if the merger itself be regarded as an acceptance of trusts we would have the anomalous proposition that the merger could not be effected, conformably to the laws of Ohio, in such a case, without making a deposit; whereas such assumption would be a necessary legal incident to the merger under the laws of New York. In other words, by the merger the merging company would be assuming the trusts originally reposed in the merged company as a legal consequence of compliance with the statutes of New York; but the statutes of Ohio, if applicable to such action, would make the merger itself, insofar as Ohio trusts are concerned, ineffective—"null and void"—unless an additional step not required by the laws of New York be taken, viz.: the prior deposit of securities in Ohio by the merging company before the completion of the merger.

Rather, I think that in a case such as that which I have imagined the securities deposited in Ohio by the merged company would remain on deposit to secure the performance of the trusts accepted by the merged company. In such event if the merging company thereafter should desire to accept other trusts in Ohio it would be necessary for it to make an independent deposit in Ohio, for the reason that the deposit already made by the merged company would be security for the performance of the trusts accepted by that company and that only.

In the foregoing statement I have suggested the opposite view which might be taken of the application of the Ohio statute to a case such as that which I have supposed. That view is that the merger of two foreign trust companies under the laws of a state permitting such merger would, if the laws of that state gave it such effect, itself constitute an assumption of trusts, viz.: the trusts originally assumed by the merged company and as a result thereof the problem might be worked out by requir-

ing the merging company prior to the merger to make the deposit mentioned in section 9778 of the General Code.

What is perhaps a technical difficulty is encountered here, however, in that section 9778 applies only to foreign corporations which desire to accept trusts which may be "vested in, transferred or committed to it by an individual, or court." This language may not be broad enough to include the transfer or commission to a trust company of trusts by action of another corporation. If not, then it could not be said that the merger of two foreign trust companies resulting in the assumption by the merging company of the trusts originally reposed in the merged company could be regarded as such a vesting, transferring or committal of such trusts in or to the merging company as would require compliance with section 9778. Then, if the effect of the merger be to release the securities under such circumstances the result would be that the Ohio trusts would still subsist and be vested in a foreign corporation, but without any security of the kind contemplated by sections 9778 and 9779 G. C.

Of course, I have been speaking of a case in which the merged company alone had previously made a deposit in Ohio; but I can not see that the fact, present in the case now under consideration, that the merging company had also qualified in Ohio makes any difference. True, by its deposit it had qualified to accept trusts regarding Ohio property which might be reposed in it without limit as to amount involved; but if it should be held that its assumption through merger of the trusts originally reposed in the merged company did not constitute such acceptance of trusts as is contemplated by the Ohio statutes, that deposit so made by it prior to the merger would not be security for the trusts so assumed, but only for the trusts assumed by it alone prior to the merger.

The question which I have been discussing is enshrouded in considerable doubt. Another question which is doubtful is the exact effect of a merger under the laws of New York. This question will hereinafter be discussed. The point which I think is clear under the Ohio statute is that the deposit required to be made thereby cannot be withdrawn as a whole until the obligations the performance of which it was intended to secure have been discharged.

When I say this I mean that the relation of trustee and *cestui que* trust between the beneficiaries and the trust company must come to an end and the trustee be discharged therefrom. The giving of additional security for the performance of the trust or the creation of a sub-trust by the trustee, with or without the consent of the *cestui que* trust, would not amount to a discharge of the trustee. The trust must either be performed as an obligation or there must be such an effective substitution of another trustee by order of the court or by operation of law as to release the original trustee from all obligations connected therewith. When these things occur I would be of the opinion that the deposit might lawfully be withdrawn without at this time expressing any view as to the procedure to be pursued in such case.

Thus, I do not believe that the dissolution of a foreign trust company, without the performance of the trust or the release by the *cestui que* trust or by the court of the trustee from the performance thereof, would justify the withdrawal of the deposit. So long as the obligation—which is a better term to use than the word "liability"—exists the deposit must remain.

With this expression of doubt as to whether or not the Ohio statutes contemplate the making of the deposit by the merging company, as such, on account of the result of the merger with respect to its relation to the trusts originally assumed by the merged company, and this conclusion as to the circumstances under which a deposit may be withdrawn, I come now to the consideration of the effect of a merger under the laws of New York.

The present statute of New York on this subject is that found in Birdseye, Cumming & Gilbert's Consolidated Laws of New York, 1914 supplement, pages 306 et

seq., being sections 487 et seq. of the Revised Banking Laws of the State of New York (Laws of 1914, Chap. 369). I quote the following from this statute:

"Section 487. Any two or more corporations, other than savings banks, organized under any one article of this chapter or under the laws of this state for the purposes or any of them mentioned in any one article of this chapter, are hereby authorized to merge one or more of such corporations into another of them as prescribed in succeeding sections of this article. * * *."

"Section 488. The respective boards of directors of such corporations may, by a vote of a majority, and the respective boards of trustees of savings banks by a vote of two-thirds, of all the members of each board, make or authorize to be made between such corporations a written agreement in duplicate under their respective corporate seals, for the merger of such corporations. * * *."

"Such agreement shall specify each corporation to be merged and the corporation which is to receive into itself the merging corporation or corporations, and it shall prescribe the terms and conditions of the merger and the mode of carrying it into effect. Such agreement may provide the name to be borne by the receiving corporation and such name may be the name of any corporation which is a party to such agreement. * * *."

"Section 489. Such merger agreement and sworn copies of the proceedings of the meetings of the respective boards of directors or trustees at which the making of such agreement was authorized, shall be submitted in duplicate to the superintendent of banks for his approval."

"Section 490. Except in the case of savings banks, the merger agreement shall, within sixty days after due notice to such corporations of its approval by the superintendent, be submitted to the stockholders or shareholders of each of such corporations * * *; and if such agreement as approved by the superintendent of banks, shall be approved at each of such meetings by the vote or ballot of the stockholders or shareholders owning at least two-thirds in amount of the stock or shares of their respective corporations, it shall thereupon become binding upon such corporations. * * *."

"Section 493. Upon filing the duplicates of such merger agreement, together with copies of its approval by the superintendent as prescribed in the last preceding section, the merger agreement shall take effect according to its terms and the merger shall thereupon take place as provided in the agreement."

"Section 494.. Upon the merger of any corporation into another as provided in this article:

1. Its corporate existence shall be merged into that of such other corporation; and all and singular its rights, privileges and franchises, and its right, title and interest in and to all property of whatsoever kind, whether real, personal or mixed, and things in action, and every right, privilege, interest or asset of conceivable value or benefit then existing which would inure to it under an unmerged existence, shall be deemed fully and finally, and without any right of reversion, transferred to and vested in the corporation into which it shall have been merged, without further act or deed, and such last-mentioned corporation shall have and hold the same in its own right as fully as the same was possessed and held by the merged corporation from which it was, by operation of the provisions of this article, transferred.

2. Its rights, obligations and relations to any person, creditor, de-

positor, trustee or beneficiary of any trust, shall remain unimpaired, and the corporation into which it shall have been merged shall by such merger succeed to all such relations, obligations, trusts and liabilities, and shall execute and perform all such trusts, in the same manner as though it had itself assumed the relation or trust, or incurred the obligation or liability; and its liabilities and obligations to creditors existing for any cause whatsoever shall not be impaired by such merger; nor shall any obligation or liability of any stockholder or shareholder in any corporation which is a party to such merger be affected by any such merger, but such obligations and liabilities shall continue as fully and to the same extent as existed before such merger.

3. A pending action or other judicial proceeding to which any corporation that shall be so merged is a party, shall not be deemed to have abated or to have discontinued by reason of the merger, but may be prosecuted to final judgment, order or decree in the same manner as if the merger had not been made; or the corporation into which such other corporation shall have been merged may be substituted as a party to such action or proceeding, and any judgment, order or decree may be rendered for or against it that might have been rendered for or against such other corporation if the merger had not occurred."

The procedure outlined in these sections has been in the case before us fully complied with.

Looking now to section 494 above quoted, which defines the effect of the merger, it will be observed that the first effect thereof in the case at hand was to vest in the merging company all right, title and interest in and to the securities in your hands. However, these securities are pledged for a specific purpose, and this transfer of property rights to the merging corporation is palpably subject to your right, if any, to hold the securities for the purpose for which they were deposited. This would be true if it were not expressly so provided in the New York statute, but that section confers upon the merging company the property right of the merged company "as fully as the same was possessed and held by the merged corporation from which it was * * * transferred."

The second thing which is to be observed with respect to section 494 is that the obligations and relations of the merged company to its beneficiaries are to remain unimpaired. I interpret this clause to mean that such obligations are in nowise discharged. The second paragraph of the section goes on to say that the merging company shall "succeed to all such relations, obligations, trusts and liabilities, and shall execute and perform all such trusts, in the same manner as though it had itself assumed the relation or trust or incurred the obligation or liability." That is to say, the merging corporation does assume as a legal consequence of the merger all the trusts reposed in the merged company. But this is done without discharging the merged company. The legislature of the state of New York might perhaps have provided that the effect of the merger should be to discharge the merged company and that the assumption of obligations on the part of the merging company should have this effect; but it has not done so. And in view of the doubt which I feel as to the application of the Ohio statutes, and especially as to the applicability of a deposit previously made by the merging company to existing trust obligations thus assumed by it, and affecting Ohio property, I am unable to say that such assumption of trusts should have the effect of releasing the deposit originally made by the merged company.

In short, unless the effect of merger under the New York law is to discharge the merged company from the obligations of its trusts, as well as to impose them upon the merging company in what may be a secondary capacity, I can not say that any deposit which such merging company might have made under the laws of Ohio would secure the performance of the trusts so assumed by it on the one hand, nor can I say on

the other hand that the purpose for which the deposit was made by the merged company has been achieved so that the security should be released.

Such expressions of opinion as to the effect of merger as have emanated from the court of appeals of New York serve rather to accentuate the doubts which I feel in the premises. I refer to the cases of *In re Bergdorf*, 206 N. Y. 309, and *Irvine* v. *New York Edison Co.*, 207 N. Y. 425. In the first of these cases the court, construing a previous statute, the substantial effect of which I am unable to distinguish from that now in force, used the following language:

> "The former company became (with the nominal exception hereinafter stated) rightless, propertyless and powerless; and the latter company was enlarged by absorption of all that the former surrendered. The former disburdened itself of each and every obligation, undertaking and relation, and the Guaranty Company absorbed and assumed them all. The Guaranty Company was authorized to issue new shares of stock in favor of the stockholders of the Morton Company in lieu of the shares of the latter surrendered and cancelled. *But the* Morton Trust Company did not surrender its corporate existence. It was not dissolved. It remained a corporation, but for the single purpose and with the sole power of being sued or proceeded against upon and defending against causes of action alleged to exist against it at the time of the merger. All the other powers bestowed upon it and which were evidenced by its certificate of incorporation and the statute law relating to it were by the merger transferred to the Guaranty Company. A corporation may exist though it possesses no property, A corporation may have a partial as well as a total extinction, and a legislature may enact that the merged corporation shall be extinguished by the merger, except insofar as the legislature may keep it nominally alive for a specified purpose. Our conclusion is that the Morton Trust Company does not exist within or as a part of the Guaranty Company and the two are not identical. As a legal being, a corporate entity, it retained the one activity and power and otherwise is non-existent."

This language was quoted with approval in *Irvine* v. *New York Edison Co.*, supra, in which the distinction between merger and consolidation under the general statutes of New York was pointed out.

The language which I have quoted leaves considerable doubt in my mind as to the question which I have raised. On the one hand the court says that the merged company by reason of the merger "disburdened itself of each and every obligation, undertaking and relation, and the Guaranty Company (the merging company) absorbed and assumed them all." If the first part of this sentence be taken literally it would amount to an adjudication to the effect that the result of a merger is to discharge the merged company. The court goes on to say, however, that the merged company does not surrender its corporate existence, but remains a corporation "for the single purpose and with the sole power of being sued or proceeded against upon and defending against causes of action alleged to exist against it at the time of the merger."

It seems obvious to me that if the merged company can be proceeded against as a defendant upon obligations matured against it at the time of the merger, it is not discharged therefrom in the eyes of the law. Moreover, as the court points out in *Irvine* v. *New York Edison Co.*, a statutory provision to the effect that the rights, obligations and relations of the merged company to any person, etc., shall remain unimpaired must be broad enough to "include the right to sue the debtor corporation and to take the property which was of the debtor corporation by execution issued upon a judgment obtained against such debtor." (207 N. Y. 430.) It is true that

this sentence was used in describing the effect of the general merger statutes of New York, which the court sharply distinguished from the statutes relating to the merger of banks. However, I can not see how one can say that the rights of creditors and beneficiaries of the merged company could remain "unimpaired" if a deposit such as that required by the laws of Ohio, made for the purpose of securing those rights as affecting Ohio property and citizens, could as a result of the merger be withdrawn, even though some other deposit which might secure the same rights be substituted therefor.

In short, I am in grave doubt as to whether or not by the New York statute itself it was intended that any vested rights of creditors and beneficiaries of a merged company should be disturbed by the merger. I would regard a deposit made to secure the performance of Ohio trusts as giving rise to such vested rights.

For all the foregoing reasons I arrive, not at a state of certainty in my own mind, but at a conclusion which is characterized by considerable doubt. In view of my doubt and of the total absence of any statutory procedure for the withdrawing of such deposit, my advice to you is that you decline to return the deposit save upon the order of a court of competent jurisdiction. Very truly yours,

JOSEPH MCGHEE,
Attorney-General.

1533.

APPROVAL—LEASES OF CANAL LANDS TO ANNA SCHROEDER, CHARLES HENRY, H. E. AND G. S. LUCAS, JOHN R. ALLEN, CHARLES E. JOHNSON, MRS. ANNIE KREIG, MIDDLETOWN BOARD OF PUBLIC PARKS, S. L. AND SADIE PRICE.

COLUMBUS, OHIO, October 22, 1918.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of October 19, 1918, to which you attach the following leases (in triplicate) of canal lands, for my approval:

	Valuation
To Anna Schroeder, land at St. Marys, Ohio	$1,000 00
To Chas. Henry, island for cottage site at Buckeye Lake	1,666 66
To H. E. and G. S. Lucas, canal land at Massillon	1,066 66
To John R. Allen, Bradford, Ohio, lease reservoir land Lake St. Marys for agricultural purposes	250 00
To Chas. E. Johnson, Columbus, Ohio, cottage site at Buckeye Lake (half lot)	200 00
To Mrs. Annie Kreig, Hocking Canal land for agricultural purposes	200 00
To Middletown Board of Public Parks, berme bank M. & E. canal, park purposes	200 00
To S. L. and Sadie Price, Logan, Ohio, abandoned Hocking canal land for agricultural purposes	100 00

I have carefully examined these leases, find them correct in form and legal and am therefore returning the same to you with my approval endorsed thereon.

While I have approved the leases, there are two irregularities to which I will direct your attention.

(1) In the lease to Charles E. Johnson the appraised value of the land is fixed at $200.00 and the rental value thereof at $24.00, the rental value thus being 12% of

the appraised value. While the law provides that canal lands must be leased upon a basis such as to provide for an income to the state of at least 6% of the appraised value, yet if the state can realize 12% on the appraised value, of course there is nothing in this contrary to law. I refer to this matter, thinking there may be a mistake either in the appraised value of the property or in the rental value as set forth in the lease.

(2) In the lease made to the Middletown Board of Public Parks, the signature of the Middletown Board of Public Parks, by Douglas Robbins, president of said board, is witnessed by but one party, viz., "John E. Fay, secretary park board."

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1534.

BOARD OF EDUCATION—SCHOOL—PARENTS TEMPORARILY RESIDING IN DISTRICT FOR SOLE PURPOSE OF SCHOOLING, WHEN MUST PAY TUITION.

Parents who move into a school district to reside temporarily in order that they may have the advantages of the schools therein for their children and intend to move back to the former residence, which is their permanent residence, at the end of the school term, cannot escape the payment of tuition for their children.

COLUMBUS, OHIO, October 25, 1918.

HON. A. C. MCDOUGAL, *Prosecuting Attorney, Woodsfield, Ohio.*

DEAR SIR:—You request my opinion as follows:

> "A number of parents are moving into the Woodsfield Village school district in order that they may have the advantage of the Woodsfield schools for their children. They have no property listed in the Woodsfield village school district and intend to move back to their former residence, which is their permanent residence, at the close of the school term.
>
> "Under this state of facts do they gain residence for school purposes so that the Woodsfield village school district is compelled to educate them free of charge?"

Section 7681 G. C., as amended in 107 O. L. 62, provides in part:

> "The schools of each district shall be free to all youths between six and twenty-one years of age who are children, wards or apprentices of *actual* residents of the district. * * *."

"Residence" may be defined to be the place where one's home is and, as used in law, the word denotes the fact that a person dwells in a given place. "Residence" is distinguished from domicile in that "domicile" always denotes permanency of habitation, while residence, if actual, may be of a temporary nature, but not necessarily so.

In State ex rel. v. Kuhn, 8 O. N. P. 197, the question of residence for school purposes was under consideration. Certain persons were living in the district of Cincinnati and the question was whether or not certain school privileges should be extended to them without charge. On page 199 the court says:

"Referring to the standard laid down by the terms of the gift by Mr. McMicken, the law, and the rules and regulations of the University for free tuition, we find it is confined to *bona fide residents of Cincinnati.* * * * 'Residence' is the favorite term employed by the American legislator to express the connection between person and place, its exact signification being left to construction to be determined from the context and the apparent object to be attained by the enactment. 'Residence' when used in statutes is generally construed to mean 'domicile.' * * *

In general, the term 'residence' implies the place of domicile, the place where a person has his home, and where he has gained a residence. Horton v. Horner, per Birchard, C. J., 16 O., 148.

The word 'residence' as used in the constitution has substantially the meaning of 'habitation,' 'domicile' or place of abode. Sturgeon v. Korte, Boynon, J., 34 O. S. 534.

What constitutes a person a resident of Ohio, for the purpose of voting, *or admission to the public schools* or benevolent institutions of the state, for the administration of estates, and in other cases, has been a frequent matter for consideration. There is no substantial difference between the words residence and domicile in regard to these matters, though they are not always synonyms. * * *.

Domicile is said to have its nearest equivalent in untechnical or colloquial language in the word 'home.' * * * 'Domicile' expresses the legal relation existing between a person and the place where he has, in contemplation of every law, his permanent home. * * * Every person must have a domicile somewhere. No person can at the same time have more than one domicile. * * * .The abandonment or change of domicile is a proceeding of a very serious nature, and an intention to make such a change requires to be proved by very satisfactory evidence. Jacobs on Domicile, section 124. * * *

One who goes to a place for the sole purpose of attending a school or university, intending to remain for a limited time, does not thereby gain a domicile. His stay is only temporary, and is to be treated like any other temporary residence. It sometimes happens, however, that when study is one of the purposes, or even the main purpose of residence in a place, there exists the ulterior intention of remaining there permanently after the period of study is at an end. In such case there can be no doubt that domicile is acquired. Up to this point the case of a student differs in nothing from that of any other person. He does not gain a domicile by intention to reside temporarily, and he does gain a domicile by intention to reside permanently; and where his intention clearly appears, the fact of his studentship is of no significance whatever. But when we come to consider residence as a proof of *animus manendi,* we are met by the fact that the residence of a student is usually temporary; and as hence results the presumption that the residence of the particular student is also temporary, it is necessary, in order to show the acquisition of domicile in the particular case, to overcome this presumption by suitable evidence. This is the ratio of all the cases in which the question of the domicile of students has been considered. * * *

I am therefore of the opinion that under Charles McMicken's will, the statute R. S. 4100, and the rules and regulations of the university of Cincinnati, Jacob H. Kapplan is entitled to free truition."

It will be noted that while the court in the above case started out to distinguish "residence" and "domicile," but concludes that a domicile has been acquired by the student, he bases his conclusion upon the fact of the student's intention. It is plain

in our case that the parents of the children who desire to attend the Woodsfield village school do not intend to change their domicile. They are mere temporary residents at Woodsfield so that their children may live with them while attending school, and in that the case is different from the Cincinnati case above cited. In the Cincinnati case the court found not only the residence but the domicile of the student to be in Cincinnati, but in our case the domicile is conceded to be outside of Woodsfield and with only a temporary school residence within. It is also true that the section of the statute under consideration here is different from the section of the statute under consideration in the Cincinnati case, in that in our statute the words used are "actual residence," while the statute in the Cincinnati case read "citizens." A person may actually be a resident of a particular place and yet not be a citizen of that place.

In Hart v. Lindsey, 17 N. H. 235, it is held:

> "When a person has a fixed abode where he dwells with his family, there can be no doubt as to the place where he resides. The place of his personal and legal residence are the same. So, when a person has no permanent habitation or family, but dwells in different places as he happens to find employment, there can be no doubt as to the place where he resides. He must be considered as residing where he *actually* or personally resides. But some individuals have permanent habitations where their families constantly dwell, yet pass a great portion of their time in other places. Such persons have a legal residence with their families, and a *personal* residence in other places; and the word 'reside' may, with respect to them, be used to denote either their personal or their legal residence."

If, following the above, we were to determine the actual residence of the person, it will be noted that the court uses the same synonymously with "personally;" that is to say, the person actually resides at places other than the permanent habitation of his family, and while it will be admitted the permanent habitation of the school children and their parents is not in Woodsfield, but in the school district in which the permanent home is located, yet they do personally reside, for the time being at least, in Woodsfield, which, under the above reasoning, would be their actual place of residence.

It is held, however, in State v. Selleck, 76 Nebr. 750, that:

> "The exact meaning of the word residence often depends upon the connection in which it is used."

So that, while a person might have a residence for a particular purpose at one place, yet for some other purpose his residence would be at another. It is the actual residence of the debtor and not his domicile which determines the status of parties in attachment proceedings (3 O. C. n. s. 51); and the residence of one who is serving a sentence of imprisonment is for the purpose of the service of summons in the county where the prison is located and service upon him in a suit brought in that county renders service valid upon co-defendants in the county where they reside. (2 O. N P. n. s. 368). On the other hand, an elector's residence is where his habitation is fixed and to which, when absent, he intends to return. (51 Bull. 30.)

In considering the question of residence for school purposes, this department held in opinion No. 1140, rendered under date of April 13, 1918, that any child who lives in a district temporarily, or simply to establish a school residence, or who resides in the district only during the time school is in session, does not establish a residence for school purposes in such district.

The above view is also taken by the author in Jacobs on Domicile, section 325.

While it is the object of our laws that every child should have a free education in the state of Ohio, yet it cannot be said that it is the policy of the law to permit parents to pay taxes in one school district and whose children are enumerated therein for school purposes, and whose actual place of residence is there located, to move into another school district during the school year simply to escape the payment of tuition therein. Such parents cannot be said to be actual residents of such school district.

Answering your question specifically, then, I advise you that where parents move into a school district in order that they may have the advantages of the schools therein for their children, and intend to move back to the former residence, which is their permanent residence, at the end of the school term, they cannot be said to have gained an actual residence in the school district to which they move solely for school purposes.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1535.

APPROVAL—LEASE TO H. S. WILLARD, WELLSTON, OHIO, OF CERTAIN COAL LANDS IN MEIGS COUNTY, OHIO.

COLUMBUS, OHIO, October 26, 1918.

HON. JAMES M. COX, *Governor of Ohio, Columbus, Ohio.*

DEAR SIR:—Hon. A. V. Donahey, auditor of state, has submitted for the approval of the governor and attorney-general a lease in triplicate to H. S. Willard, of Wellston, Ohio, covering 300.25 acres of coal lands, situate in section 16, township 2, range 12, Meigs county, Civil township of Sutton, and more particularly described as original surveyed lots numbers two (2), five (5) and six (6).

I have approved said lease as to form and legality and herewith submit the same to you for examination and approval as to advisability and consideration. Should you approve the same, will you not kindly endorse your approval thereon and send the said lease to Mr. Donahey, auditor of state? Very truly yours,

JOSEPH MCGHEE,
Attorney-General.

1536.

APPROVAL—LEASE TO W. V. FERGUSON OF CERTAIN CANAL LANDS IN PIKE COUNTY, OHIO.

COLUMBUS, OHIO, October 28, 1918.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of October 28, 1918, in which is en-

closed a lease of certain canal lands located in Pike County, Ohio, to W. V. Ferguson, said lease being in triplicate. You request my approval of the same.

I have carefully examined the lease, find it correct in form and according to law and have therefore endorsed my approval thereon and am returning it to you.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1537.

APPROVAL OF PROCEEDINGS FOR SALE OF PORTION OF ABANDONED HOCKING CANAL, LANCASTER, OHIO.

COLUMBUS, OHIO, October 28, 1918.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of October 23, 1918, in which you enclose, for my approval, a record of certain proceedings leading up to the sale of a portion of the abandoned Hocking canal at Lancaster, Ohio.

I have carefully examined said record of proceedings, find the proceedings correct in form and legal and am therefore endorsing my approval upon the resolution providing for the sale of said property.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1538.

BOARD OF EDUCATION—TITLE TO SCHOOL PROPERTY OF TOWNSHIP AND SPECIAL DISTRICTS VESTED IN RURAL DISTRICT.

When rural school districts were constituted from the township and special districts by the enactment of section 4735 G. C., the title to the school property which formerly belonged to said township and special districts became vested in the rural district.

COLUMBUS, OHIO, October 29, 1918.

HON. J. L. HEISE, *Prosecuting Attorney, Circleville, Ohio.*

DEAR SIR:—Your request for my opinion reads:

"A question of the title of the present boards of eudcation of rural school districts of certain townships in this county, to school lots or school lands, which were conveyed to the boards of education of township school districts before the enactment of the rural school code of 1914, is being discussed in this county and as the question is one of state importance and affects school lands all over the state, I consider it of sufficient importance to submit the

question to you for a formal opinion, so that the matter may be settled so far as the school officials are concerned.

Before the enactment of the rural school code of 1914, the legal title to the land of a township school district was vested in the board of education of said township school district. Said rural school code of 1914 abolished township school districts, and provided that (section 4735 G. C.) 'the present existing and special school districts shall constitute rural school districts until changed by the county board of education,' but nowhere in said rural school code of 1914 is any legislation, tending to transfer the legal title from the said boards of education of township and special school districts of school lots and lands belonging to them, and vest that legal title in boards of education of rural school districts.

Said section 4735 G. C. continues, 'and all officers and members of boards of education of such existing districts shall continue to hold and exercise their respective offices and powers until their terms expire and until their successors are elected and qualified.' If this part of said section was intended to continue the legal rights and powers of said township boards, it would end at the expiration of their terms of office and as soon as their successors are elected and qualified.

The legal title to all township and special school district property was vested in those boards of education and their successors, or individual members thereof and their successors in office, but upon said township and special school districts being abolished and no express legislation transferring or vesting that legal title in the successor of said township and special school districts, to-wit, in the boards of education of rural school districts, where is that legal title now? Does the legal title transfer itself automatically and vest in the successor, that is, in the rural school districts or boards of education thereof, or does it require express legislation to accomplish that?

Suppose a board of education of a rural school district, under section 4758 G. C., decides to dispose of real estate over which it now exercises control, but the title to which was by deed of conveyance vested in a board of education of a township school district or in the individual members thereof as such, and their successors in office, during the year 1910, or any year prior to the going into effect of said rural school code of 1914, and would comply with the provisions of that section 4758, would the deed of said board of education of said rural school district convey any legal title to said real estate? Nowhere is there any direct legislation vesting any legal title to school land the board of education of rural school districts.

Section 4735–2 G. C., it will be observed, covers the legal title of school property which is affected by section 4735–1 G. C.

In the case of Crofton v. Board of Education of Cincinnati, 26 O. S. 571, the question of successor in title to school property was discussed, the question having been raised in that case, but in the act of May 1, 1873, then being construed, which was an act for the reorganization and maintenance of common schools, the 39th section of said act provided that 'all property, real or personal, which has heretofore vested in and is held by any board of education, or town or city council, for the use of public or common schools in any district, is hereby vested in the board of education provided for in

this act, having, under this act, jurisdiction and control of the schools of such district.' The court in that case properly held that said board of education of Cincinnati succeeded to all rights of the city in and to the school property in question. But in the rural school code of 1914 no such legislation as that contained in said section 39 is embodied.

Section 4683 G. C. provides for vesting the title of former village school districts in the board of education of the rural school district of which it becomes a part.

Section 4749 G. C. refers to corporate powers of a board of education and empowers them to acquire and dispose of real estate, etc., but it cannot dispose of real estate to which it has no title, and my inquiry is, in what manner is the title to township and special school district property as it existed before the enactment of the rural school code of 1914 now transferred to and vested in their successors, to-wit, the board of education of rural school districts?

We have in this county several school lots which the boards of education of rural school districts desire to dispose of, the title to which was by deed of conveyance vested in the township board of education and its successor in office, but the attorney for a prospective purchaser discovered what seemed to him to be a defect in legislation, as above stated, so the purchaser and several boards of education desire to know further and for that reason a legal opinion is requested of you, and I hope you will be able to give it soon."

Section 4735 G. C., to which you refer, reads:

"The present existing township and special school districts shall *constitute* rural school districts until changed by the county board of education, and all officers and members of boards of education of such existing districts shall continue to hold and exercise their respective offices and powers until their terms expire and until their successors are elected and qualified."

By the authority of said section what formerly constituted township and special school districts in Ohio were constituted as rural school districts. School districts in Ohio are purely creatures of legislation, that is, they are established by statutory law. New districts may be formed, but only as is provided by statute and when the legislature provided that what was then township and special districts should constitute rural districts, the rural districts were by that act as completely established as though they had been newly formed districts from territory not theretofore constituting entire districts.

The word "constitute" means to establish, to make, to create. It is composed of the words *con*, meaning together, and *statuere*, meaning to set.

In Galveston, etc., Railroad Company v. State, 77 Texas 367, Staton, J., defines "constitute" as follows:

"The word constitute * * * is equivalent of the words 'compose, make up, be;' the unit composed of the several constituents which it is declared shall be perpetual, continuing indefinitely, without cessation or interruption by the department of government and subject to diversion only by the will of the people, which may be expressed in some future organic law."

In In re East and West India Dock Company, 38 Ch. Div. 576, Chitty, J., defined the word constitute as follows:

> "The term constitute is not equivalent to incorporated. It is of wider import. It seems to be equivalent to established."

In Kepner v. Commissioners, 40 Pa. St. 129, the court said:

> "The act says that the council may 'make, ordain, constitute, establish and pass' ordinances, etc., but all these verbs mean the same thing and any one of them would have been sufficient."

So that, when the legislature provided that the present township and special school districts should "constitute" rural school districts, it thereby established the rural school districts the boundaries of which were exactly the same as the township and special districts from which the same were so established. Provision was further made that such rural districts should continue until changed by the county board of education and that change can occur in any one of several ways; first, it is provided by section 4735-1 that when a petition, signed by not less than one-fourth of the electors residing within the territory which constitutes a rural school district, is presented to the board of education of the district, or when the board, by a majority vote of its entire membership,shall decide to submit the question, then and in either of the above cases the question of dissolving said district and joining the same to contiguous territory may be submitted to the electors of the district. If the question is so submitted and carries, then section 4735-2 provides that the legal title of the property of such rural school district which is so dissolved and joined shall become vested in the board of education of the rural or village district to which such district is so joined. Section 4692 provides for a transfer of territory from one school district to another by the county board of education and also makes provision for an equitable division of the funds and indebtedness by the county board of education. Section 4696 provides for a transfer of territory from certain school districts to others by the boards of education thereof and also provides for an equitable division of the funds or indebtedness before such transfer is completed. Section 4736 G. C. provides for the arranging of school districts by the county board of education and also authorizes the county board of education to direct an equitable division of the funds and indebtedness at the time of such arrangement, so that whenever territory is taken from or added to a rural school district or when the entire district is transferred or abolished, provision is made for an equitable division or distribution of whatever funds or indebtedness the district may have.

The general rule of law is that whenever a district is created from territory which formerly constituted another school district or districts, or parts thereof, the school property located within the territorial lines passes to the school officers of the new district.

1st Dillon Municipal Corporations, section 188;
2d Wendell 109;
109 Indiana 559;
110 Indiana 67;
23 Pick. 62;
1st Allen 49;
22 Me. 564;
156 Calif. 416;
86 Indiana 582;
43 Kansas 138.

Under our laws, however, provision is made in certain instances for school property to remain the property of the board of education from which the transfer is made until certain conditions are complied with. To illustrate:

Section 4690 provides that when territory is annexed to a city or village, such territory thereby becomes a part of the city or village school district, but the legal title to the school property in such territory for school purposes "shall remain vested in the board of education of the school district from which such territory was detached until such time as may be agreed upon by the several boards of education, when such property may be transferred by warranty deed." It is true that section 4683 makes provision that when a village district is dissolved, the territory formerly constituting the village district shall become a part of the contiguous rural district and that all school property shall pass to and become vested in the board of education of such rural district, but the fact that specific provision is made therefor does not in any manner vary the general principle of law which attaches thereto.

In Crofton v. Board of Education, 26 O. S. 571, the board of education of the city of Cincinnati had, by authority of the act of May 1,1873, succeeded to the school property of the city of Cincinnati. The court held:

> "The defendant in error succeeded to all the rights of the city in and to the school property and funds of the district, and was the proper party to sue for and recover the amount overpaid to Crofton on account of the building of the school-house."

In the case under consideration the districts are changed only in name. The property is the same after the districts become rural as it was when the districts were township or special. The board of education remains the same until the successors to the members thereof are property elected and qualified. There is a complete succession of interest passing from the old to the new district. The old township and special districts went out of existence by name only. The rural districts came into existence by name only. There was no legislation in relation to the transfer of the property and none was needed. The boards continued to exercise their powers exactly the same under the new name as they had exercised them under the old. The districts being creatures of statute, the legislature had perfect authority to make the change.

I can come to but one conclusion and that is that the property of the old township and special school districts vested completely in the boards of education of the rural school districts at the time such rural districts were formed from said old districts.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1539.

DISAPPROVAL OF RESOLUTION FOR ROAD IMPROVEMENT IN HIGHLAND COUNTY.

COLUMBUS, OHIO, October 30, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of October 24, 1918, to which you attach the final resolution adopted by the county commissioners of Highland county, in reference to the improvement of Section C-1, I. C. H. No. 258.

I am returning said resolution, without my approval, for the following reason: The resolution was adopted on September 26, 1918, while the certificate of the county auditor, to the effect that money was in the treasury to take care of the obligations assumed by the county under said final resolution, was made on October 4, 1918. This is not in harmony with section 5660 G. C., which provides that the county auditor must first certify that the money required for the payment of the obligation is in the treasury, to the credit of the fund from which it is to be drawn.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1540.

APPROVAL OF BOND ISSUE OF SOUTH EUCLID VILLAGE SCHOOL DISTRICT—$4,000.00.

COLUMBUS, OHIO, November 1, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

In Re: Bonds of South Euclid Village School district in the sum of $4,000.00, for the purpose of improving certain school property in said school district.

GENTLEMEN:—I have given careful consideration to the corrected transcript of the proceedings of the board of education of South Euclid Village School district relating to the above issue of bonds and find said proceedings to be in conformity to the provisions of the constitution and laws of Ohio relating to bond issues of this kind. I am therefore of the opinion that bonds properly prepared according to the bond form submitted covering the above issue will, when the same are executed and delivered, constitute valid and binding obligations of South Euclid Village School district, to be paid in accordance with the terms thereof.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1541.

APPROVAL OF BOND ISSUE OF BROOKLYN HEIGHTS VILLAGE SCHOOL DISTRICT, CUYAHOGA COUNTY, OHIO—$10,000.00.

COLUMBUS, OHIO, November 1, 1918.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In Re: Bonds of Brooklyn Heights Village School district, Cuyahoga county, Ohio, in the sum of $10,000 for the purpose of enlarging and repairing certain school houses in said district.

I have carefully examined the corrected transcript of the proceedings relating to the above issue of bonds, and find the same to be in conformity to the provisions of the constitution and laws of the State of Ohio applicable to bond issues of this kind, and I am therefore of the opinion that bonds properly prepared according to bond form submitted covering the above issue will, when the same are executed and delivered, constitute valid and binding obligations of said school district to be paid in accordance with the terms thereof.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

1542.

APPROVAL OF BOND ISSUE OF CITY OF LAKEWOOD, OHIO—$15,000.

COLUMBUS, OHIO, November 2, 1918.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In Re: Bonds of the City of Lakewood, Ohio, in the sum of $15,000 purchased by the Industrial Commission of Ohio as a part of an issue of $60,000 authorized by the council of said city for the purpose of erecting certain buildings for the fire department, purchasing or condemning the necessary land therefor, purchasing fire engines and paying the cost of placing underground wires and other signal apparatus.

I have carefully examined the transcript of the proceedings of the council of the city of Lakewood, Ohio, relating to the above issue of bonds, and find said proceedings to be in conformity to the constitution and laws of the State of Ohio relating to bond issues of this kind.

I am therefore of the opinion that properly prepared bonds covering the above issue will, when the same are executed and delivered, constitute valid and binding obligations of said city, to be paid in accordance with the terms thereof.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

1543.

MUNICIPAL CORPORATION—CITY—EMERGENCY POLICE AND FIREMEN NOT ENTITLED TO WORKMEN'S COMPENSATION.

Emergency policemen and firemen, appointed by the city of Dayton because of the inability of the city to secure qualified persons through civil service channels for regular membership in the police and fire departments, are not entitled to participation in the benefits of the Workmen's Compensation Law, for the following reasons:

1. *Assuming their appointment as "emergency" policemen and firemen to be lawful, they would not be "regular" members of these departments, and the benefits of the Workmen's Compensation Law are extended only to regular members of such departments.*

2. *Inasmuch as the city of Dayton maintains policemen's and firemen's pension funds, this fact alone would disqualify any of its policemen and firemen from receiving the benefits of the State Workmen's Compensation Law, whether particular policemen and firemen are entitled to the benefits of the local pension funds or not.*

COLUMBUS, OHIO, November 8, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your letter of October 5th submitting for my opinion the following question:

> "Are emergency policemen and firemen appointed or employed temporarily in a municipal corporation, and not being regular members of the departments in which they are respectively employed, entitled to the benefits of the provisions of the Workmen's Compensation Law of the State?"

In order to reach the question which you desire me to consider I shall have to assume certain things respecting the government of the city of Dayton, which is provided for by charter.

First, the power to appoint emergency policemen and firemen is a little broader under the Dayton charter than it is under the general law. The provisions relating to policemen and firemen are, respectively, as follows:

> (Sections 70 and 72 Charter of City of Dayton):
>
> "In case of riot, emergency, at time of elections or similar occasions, the director of public safety may appoint additional patrolmen and officers for temporary service who need not be in the classified service."
>
> "In case of riot, conflagration, or emergency, the director of public safety may appoint additional firemen and officers for temporary service who need not be in the classified service."

Dayton also has a civil service code of its own which is embodied in its charter, and is therefore not subject to the general civil service law of the state which provides for the making of provisional appointments to fill temporarily regular positions in the service of the city. (Section 486-14 General Code).

The facts stated in the communication which give rise to your inquiry are that an emergency is deemed to exist in the city of Dayton because of the effect of the selective service draft law and regulations thereunder, which makes it virtually impossible to comply with the requirements of the civil service of the city of Dayton in filling vacancies in positions in the regular police and fire departments; there-

fore recourse is to be had to the appointment of emergency policemen and firemen. I would seriously doubt whether this state of affairs would amount to an emergency under the general law, which is somewhat different from the charter provisions which I have quoted.

But I am assuming for the purposes of this question that such an interpretation of that charter as would make legal the proposed action would be correct. In this connection the fact that provisional appointments to fill regular positions for a temporary period can not be made must be taken into consideration.

I have gone over this matter because the question which is thus raised invokes consideration of section 1465-61 of the General Code, which provides, in part, as follows:

> "The terms 'employe,' 'workman' and 'operative' as used in this act, shall be construed to mean:
>
> 1. Every person in the service of the state, or of any county, city, township, incorporated village or school district therein, including *regular* members of lawfully constituted police and fire departments of cities and villages, under any appointment or contract of hire, express or implied, oral or written, except any official of the state, or of any county, city, township, incorporated village or school district therein. Provided that nothing in this act shall apply to policemen or firemen in cities where policemen's and firemen's pension funds are now or hereafter may be established and maintained by municipal authority under existing laws.
>
> 2. Every person in the service of any person, firm or private corporation, including any public service corporation employing five or more workmen or operatives regularly in the same business, or in or about the same establishment under any contract of hire, express or implied, oral or written, including aliens, and also including minors who are legally permitted to work for hire under the laws of the state, but *not including any person whose employment is but casual* and not in the usual course of trade, business, profession or occupation of his employer. * * *."

It will be observed that in dealing with public employes the general assembly did not omit from the catalog of persons who should be considered as "employes," "workmen" or "operatives," within the meaning of the act, persons whose employment is but casual; that is, as a general rule the legislature did not see fit to exclude casual public employes from the benefits of the law.

But in dealing with the police and fire departments the legislature saw fit to restrict the definition so as to include only "regular" members thereof. I say that the definition is restrictive in this particular because, though perhaps the general phrase

> "Every person in the service of any * * * city * * * incorporated village or school district * * * under any appointment or contract of hire, * * * except any official * * *"

would by itself be broad enough to include all members of the fire department and the police department, both regular and temporary, yet the legislature has seen fit to deal particularly with the members of the police and fire departments and in so dealing with them to use the word "regular" in the context from which it has been quoted.

The distinction is thus drawn, not between temporary or casual service and permanent service as in the case of private employment, but between incumbents of

regular positions and those of emergency positions; that is to say, as to public employments the status of the *position* in the police or fire department seems to determine the application of the Workmen's Compensation Law to its incumbent; while in the case of private employments the duration of the service may be an element to be taken into consideration in determining whether or not it is "casual."

Assuming, as I have done, that the positions to be created may lawfully be considered as those of emergency patrolmen and firemen, it would follow on this ground alone that their incumbents would not be entitled to the benefits of the Workmen's Compensation Law of the state.

However, there is another ground equally conclusive upon which the same conclusion must be based. It appears from the letter of the civil service board of Dayton, attached to your letter, that that city does maintain policemen's and firemen's pension funds. The letter states that the emergency policemen and firemen to be appointed would not share in the benefits of those funds—a statement which I accept as one of fact based upon the rules of the respective funds. However, section 1465-61 G. C., as I have quoted it, clearly withdraws from the Workmen's Compensation Act policemen and firemen in cities where policemen's and firemen's pension funds are established and maintained, without regard to whether or not particular policemen and firemen are entitled to the benefits of such funds.

Therefore, for the reason that the city of Dayton does maintain policemen's and firemen's pension funds, I am of the opinion that none of its policemen and firemen are entitled to the benefits of the Workmen's Compensation Law, whether particular policemen and firemen are entitled to share in the benefits of such local pension funds or not.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1544.

ROADS AND HIGHWAYS—STATE HIGHWAY COMMISSIONER—NOT AUTHORIZED TO CANCEL CONTRACT FOR IMPROVEMENT, WHEN.

In a case where the state, through the state highway commissioner, has agreed to furnish brick for a road improvement and the contractor has never made a demand upon the state for brick and has a vast amount of work to do before he is ready for the brick, and the state, through its departments, declares that it has brick which will meet the plans and specifications required and can furnish it at any time, the state highway commissioner is not authorized in releasing the contractor from the obligations of his contract, merely upon his representation that the state may not be able to furnish the brick when he is ready for the same.

COLUMBUS, OHIO, November 8, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of September 26, 1918, which reads as follows:

"For your information I beg to quote the following entry from the journal of the advisory board as of September 4, 1918, with reference to

the request of Swank & McIntyre for cancellation of their contract for the improvement of Section 'J', Inter-County Highway No. 357, Lancaster-New Lexington road, Perry county, Ohio:

'PERRY COUNTY—I. C. H. No. 357, Section "J", Lancaster-New Lexington road—Contractors request cancellation of contract.

A letter to Commissioner Cowen from H. S. Atkinson was presented attached to which was brief and argument of Swank & McIntyre for the cancellation of their contract for the improvement of Section "J", Inter-County Highway No. 357, Lancaster-New Lexington road, Perry county.

The secretary was authorized to submit the brief of Swank & McIntyre together with a statement of the facts as understood by the highway department to the Attorney-General of Ohio for an opinion as to the proper procedure to be followed by this department.'

I am attaching hereto statement of Swank & McIntyre, through their attorneys, Atkinson & Smith, together with statement signed by Chief Highway Engineer H. D. Bruning of this department.

I respectfully request an opinion from you as to what action, if any, may be taken by this department in response to Swank & McIntyre's request."

There is considerable correspondence attached to your letter, which is too lengthy to quote in full. Hence in the consideration of the question submitted to me I shall deduce those facts therefrom which I deem to be essential in arriving at the correct answer to your question.

The question is whether there is anything connected with the contract entered into by and between the state highway commissioner, for the State of Ohio, and Swank & McIntyre, for the improvement of Section J, I. C. H. No. 357, Lancaster-New Lexington road, Perry county, Ohio, that would warrant the state highway commissioner in cancelling this contract, the contractors, Swank & McIntyre, requesting that they be relieved from the obligations of the same.

The provision of the contract which gives rise to the question is as follows:

"Brick to be furnished the contractors f. o. b. cars at Junction City or New Lexington on T. & O. C. R. R."

In other words, the state, through the state highway commissioner, agreed that it would furnish the brick for the construction of this particular highway, and while the contract does not so specifically state, it was contemplated that these bricks would be furnished by the board of administration from the plants which it operates by means of prison labor. In reference to this particular provision, the contractors Swank & McIntyre, through their attorneys Atkinson & Smith, set forth the following in the facts:

"During the progress of the above work, it developed that the brick produced by the State of Ohio at its Junction City plant was not making the test above set forth and required by the state highway department. It is also a fact, that at no time during the life of this contract, has the state been in a position to deliver brick to these contractors that will meet such test. It is a further fact, that even now, the state is not producing brick that meet such test.

* * * * * * * * * * *

Immediately upon ascertaining the inability of the state to furnish the brick according to the contract, specifications and test, the contractors suspended further operations."

From these statements, as set out by the attorneys, they arrive at the following conclusions:

> (1) "The contractors are entitled to a cancellation of this contract, because of the inability of the state to furnish brick to meet the prescribed test.
>
> (2) Because of the inability of the state to furnish brick to meet the prescribed test, the contractors were justified in not proceeding with the work."

I might state in the beginning that if the statements made by the contractors, through their attorneys, were to be given their full force and effect, and could be taken for all they import, I think the conclusions drawn by the attorneys are correct and that the contractors should be released from the obligations of their contract.

We will first consider the matter from the standpoint of the contractors. The contract was let on July 21, 1916, and the date set for the completion of the same was July 1, 1917. The time for completion was extended by the state highway commissioner at two different times, one to September 15, 1917, and another to March 15, 1918.

The contractors received payments based upon estimates made by the state highway commissioner in a total amount of $6,477.76, the last payment being made on December 8, 1917, no work having been done on said contract since that date. About forty per cent. of the rough grading has been completed and the greater part of the bridges and culverts upon said improvement have been constructed. It will require something like $40,000.00 worth of work upon the part of the contractors, before they will be in a position to lay the brick upon said improvement. This last statement of fact is set out by Swank & McIntyre, through their attorneys.

The contractors never made any demand upon the state for brick, either in writing or orally; neither did they ever serve notice in writing upon the state highway department that they had decided not to complete the contract, owing to the fact that the state could not furnish brick to comply with its part of the contract; neither is there anything set out indicating at what time the contractors decided they would not proceed with the contract owing to the fact that the state was not able to furnish brick.

When we consider that no request or demand had ever been made upon the state for the furnishing of brick and that $40,000.00 worth of work remained to be done by the contractors before they would be in a position to require brick, and that the State of Ohio never refused to furnish the brick required, it would seem that the question is prematurely raised by the contractors in reference to this matter.

The contractors state that they hesitate to proceed with the improvement on the ground that other brick concerns are ready to enjoin them from laying brick upon said road as soon as they begin to lay them. Just how other brick concerns might have a right to enjoin the contractors from laying the brick furnished by the state, I am not able to understand, unless they follow the old familiar course that is followed by so many parties who are liable to suffer financial loss due to some course of the state or a county, and persuade a taxpayer to bring a taxpayer's suit against the contractor and the state officials.

We will now consider the other contracting party involved in this matter, namely, the State of Ohio, through the state highway department. The Ohio board of administration states it as a fact that it can furnish the state highway commissioner with all the brick that he may need for the completion of this contract, upon very short notice, and can furnish brick that will not only meet the specifications required by the state highway commissioner, but will more than meet the required tests.

The state highway commisioner has adopted a rule that brick must meet such a test that they will not lose more than twenty-two per cent. of their volume when placed in a certain tester with iron and revolved at a certain rate for a specified length of time. The board of administration has had tests made of the brick manufactured by it and has submitted four of these tests to this department, in which respective tests the brick lost as follows: 21.8 per cent., 20.1 per cent., 18.6 per cent., and 19.2 per cent. These tests indicate that the board of administration has brick on hands which more than meet the test required by the state highway commissioner.

The board of administration also represents to this department that at all times for more than a year last past it has had brick which would meet the test required by the state highway commissioner, and in quantities more than sufficient to construct the road in question. The state highway commissioner himself has had tests made of the brick manufactured by the board of administration and has also submitted the same to this department. These tests show the board of administration is manufacturing brick which meets the tests required by the state highway commissioner.

In view of all the above, I do not believe as a matter of law that you as state highway commissioner have authority to release the contractors from the obligations of their contract. Of course if the contractors are so released, the bond which the contractors gave for the faithful performance of the obligations of their contract would be of no force and effect and the parties signing the same would also be released. This undoubtedly under the present conditions would work great financial loss to the State of Ohio and the other parties interested and would be brought about through no fault of the State of Ohio.

It is suggested by the contractors that the state ought to deal fairly with those parties with whom it contracts. They use this language:

> "There is every reason for the state assuming the attitude of absolute fairness in its dealings with its citizens. Simply because the state has the power to insist upon the last pound of flesh and not be held responsible therefor in law, is not sufficient reason, moral or otherwise, for exercising such drastic authority."

I am in full accord with this observation. I believe that the state ought to deal just as fairly and equitably with the parties with whom it contracts, as would a private individual, and I might say even more so; but this principle does not warrant the state, without any consideration whatever, in releasing a contractor from the obligations of his contract because they have become burdensome to him.

If these contractors should proceed with their work and are enjoined by the courts from laying the brick furnished by the state, owing to the fact that they do not meet the specifications required by the state highway commissioner; or, if it should develop that the state would not be able to furnish the brick that would meet the required test, I could not imagine any state official or general assembly that would refuse to make the contractors absolutely whole for all the loss they might incur because of the fact that the state had failed to meet the obligations resting upon it under the contract between it and the contractors. However, at the present time and under the conditions now existing, I do not believe as a matter of law or equity that you should release these contractors from the obligations they assumed under this contract.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1545.

APPROVAL OF BOND ISSUE OF AKRON CITY SCHOOL DISTRICT. $166,500.00.

COLUMBUS, OHIO, November 8, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

In Re: Bonds of Akron City School district in the sum of $166,500.00 for the purpose of purchasing sites for and erecting and equipping school houses in said school district.

GENTLEMEN:—I have carefully examined the corrected transcript of the proceedings relating to the above issue of bonds and find the same to be in conformity to the provisions of the constitution and laws of the state of Ohio relating to bond issues of this kind. I am therefore of the opinion that properly prepared bonds covering said issue will, when the same are executed and delivered, constitute valid and binding obligations of Akron City School district to be paid in accordance with the terms thereof.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1546.

APPROVAL OF BOND ISSUE OF CITY OF MIDDLETOWN, O.—$19,643.68.

COLUMBUS, OHIO, November 9, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

In Re: Bonds of the city of Middletown, O., in the sum of $19,643.68, in anticipation of the collection of assessments for the improvement of certain streets in said city .

GENTLEMEN:—I have carefully examined the transcript of the proceedings of the council and other officers of the city of Middletown, O., relating to the above issue of bonds and find the same to be in conformity to the provisions of the constitution and the laws of Ohio in regard to bond issues of this kind.

I am therefore of the opinion that properly prepared bonds covering said issue will, when the same are executed and delivered, constitute valid and binding obligations of said city of Middletown, O.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1547.

DISAPPROVAL OF BOND ISSUE OF TRUMBULL COUNTY, O.—$30,000.

COLUMBUS, OHIO, November 9, 1918.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In Re: Bonds of Trumbull county, Ohio, in the sum of $30,000 for the stated purpose of providing a fund for paying the county's portion of improving, maintaining, dragging and repairing roads under the provisions of the Cass Highway law.

I am herewith returning to you without approval transcript of the proceedings of the board of county commissioners of Trumbull county, Ohio, relating to the above issue of bonds. From recitals contained in the resolution providing for this issue of bonds, it appears that at the general election held November 2, 1915, the electors of Trumbull county voted in favor of a tax levy for the county road fund, the same not to exceed one mill for a period of five years; and it further appears that this issue of bonds is under the assumed authority of said sections of the General Code. This action was taken under favor of sections 5649-5 et seq, of the General Code, the same being a part of the Smith One Per Cent. law so-called. There was ample authority in the provisions of the sections of the General Code above noted for this action, and pursuant to the authority of said vote, the commissioners were authorized to make an additional levy of taxes for road purposes not to exceed one mill for a period of five years, which levy would be outside of the three and ten mill limitations of the Smith law, and subject only to the fifteen mill limitations thereof. However, there is nothing in the provisions of said section or elsewhere in the statutes of this state authorizing an issue of bonds in anticipation of the collections of an additional tax voted and authorized under the provisions of the Smith law, and for want of any statutory authority whatever authorizing this issue of bonds, I am compelled to disapprove the same.

Yours very truly,

JOSEPH MCGHEE,

Attorney-General.

1548.

APPROVAL OF FINAL RESOLUTION FOR ROAD IMPROVEMENT IN HANCOCK COUNTY.

COLUMBUS, OHIO, November 9, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of November 8, 1918, in which you enclose final resolution upon the following named improvement and ask my approval thereon:

Lima-Sandusky Road, I. C .H. No. 22, Section C-1, Hancock county.

I have carefully examined said resolution, find the same correct in form and legal and am therefore returning it to you with my approval endorsed thereon, in accordance with the provisions of section 1218 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1549.

BOARD OF EDUCATION—SCHOOLS—TEACHERS ENTITLED TO COMPENSATION DURING TIME SCHOOL CLOSED ON ACCOUNT OF SPANISH INFLUENZA.

Teachers must be paid for all time lost when the schools in which they are employed are closed owing to an epidemic. The Spanish influenza condition was an epidemic in certain school districts in the State of Ohio.

COLUMBUS, OHIO, November 13, 1918.

HON. BENTON G. HAY, *Prosecuting Attorney, Wooster, Ohio.*

DEAR SIR:—I have your request for my opinion which reads:

"The board of education of a village school district of this county desires to have your opinion on the question of whether the board is compelled to pay its teachers on account of the schools being closed by reason of the Spanish influenza, the schools perhaps being closed for a month or more. The board believes this lost time should be adjusted in fairness to both the teachers and the board. I informed the board that it was under legal obligations to pay the teachers for any lost time caused by the closing of the schools by reason of the provisions of section 7690 of the General Code, but that perhaps the teachers would be willing to make up a part or all of this time. I am enclosing the letters of the clerk of the board which show what information the clerk desires."

The clerk's letter reads in part:

"We are familiar with the section and the opinion that you quote and with this only as a basis, we cannot see where there would be any reason for presuming that instructors would be willing to make up lost time when there is no legal incentive to cause them to do so. If they should do so it would be unadulterated generosity on their part and the average instructor who follows teaching as a profession in which to make a livelihood does not usually emphasize this grace very strongly.

We call to your attention at this time the fact that it was on the recommendation of the Wayne County Tax Budget commission, of which commission you were a member in attendance, that our board permitted our tax levy for the coming year to be lowered to the point where we shall incur an indebtedness of two thousand dollars in the current running expenses of our schools for the present school year. Presuming that funds cannot be secured by borrowing to meet this deficiency, will a certificate of indebtedness be a very acceptable substitute for cash in the payment of the salaries of our teachers?

It is not clear to us how an individual can legally claim payment for a service or services that have not been rendered when there is an express written agreement to the effect that payment will be rendered only after such service has been performed. We admit the willingness of both parties to the agreement to do their part, but being restrained from doing so by the local health authorities. If one party to the contract is released or held by same why should not reciprocal release or binding become an obligation on the part of the other party? It is difficult for us to witness a gratuitons expenditure of public funds in this connection that in connection with any other object would undoubtedly carry a penitentiary sentence therewith.

While we do not question the application of the section and the opinion above referred to in connection with the circumstances under which they were rendered, we cannot see where the diploma of a school that may be deprived of two months of its work would amount to more than "a scrap of paper" nor the wisdom of continuing same through a period of time when this continuation will avail nothing and mean an additional usless expense, unless there can be some legal working arrangement devised that will make due provision for an exigency of this nature.

As the epidemic of influenza through which our state is now passing is very generally prevalent throughout the state we anticipate that this matter will be up for consideration in the very near future, as there are undoubtedly other boards of education that will have the same problem to deal with that we have.

We shall ask therefore that you secure an opinion from the Attorney-General in regard to these matters and that you advise us as to the opinion rendered. We feel that such an opinion would be of interest not only to ourselves, but of service and general application to the problems of other boards in our county who may be situated in circumstances similar to ours"

Section 7690 G. C.,as amended in 107 O. L., page 47, reads in part:

"* * * Teachers must be paid for all time lost when the schools in which they are employed are closed owing to an *epidemic* or other public calamity."

The only question which seems to call for any consideration is, is the Spanish influenza an epidemic?

An epidemic is defined as "wide spread occurrence of a disease in a certain region; spreading among the people; affecting a large number in a community at once, but of a limited period."

The above definition seems to cover precisely the conditions which have existed in relation to the said Spanish influenza and but one conclusion can be arrived at and that is that the conditions in relation to the disease which is called Spanish influenza has been an epidemic in this state recently.

Answering your question, then, I must advise you that the teachers must be paid during the time the schools have been closed on account of the existence of Spanish influenza in the school districts.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1550.

TAXES AND TAXATION—CORPORATION OR INDIVIDUAL CANNOT DEDUCT FEDERAL TAXES FROM CREDITS.

A corporation or individual, in determining the amount of credits to be listed for taxation for the year 1918, *may not deduct, from the sum of all its legal claims and demands, the amount of income or excess profits tax due and payable to the federal government on or before June* 15, 1918.

COLUMBUS, OHIO, November 13, 1918.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Some time ago you submitted for my opinion the following question:

> "In determining the amount of credits to be listed for taxation for the year 1918, may a corporation deduct from the sum of all its legal claims and demands the amount of income tax or excess profits tax due and payable to the federal government on or before June 15, 1918?"

In your letter you referred to the opinion of the Attorney-General to the prosecuting attorney of Fairfield county, under date of April 23, 1913, found at p. 1235 of the Annual Report of the Attorney-General for that year. In that opinion it was held that unpaid taxes levied under the authority of the state itself, including, of course, county and local taxes, do not constitute debts which may be deducted from gross credits, for the purpose of ascertaining the taxable amount of such credits. With the conclusions of that opinion I agree and proceed therefore to the consideration of the question as to whether or not its principles are applicable to the question which you now submit. In my opinion they are so applicable.

The cases relied upon in that opinion were those of Peter vs. Parkinson, Treas., 83 O. S. 36, and Bailies vs. Des Moines, 127 Ia. 124. As stated in said opinion, these cases proceed upon the theory that the word "debts," when used in statutes like the one under consideration, imports an obligation *ex contractu*—one arising upon a contract express or implied and enforceable accordingly by a process in theory at least binding upon the person of the obligor. A tax lacks these characteristics. As an obligation it is created *in invitum*, i. e., without the concurrence of the will of the obligor.

In most instances it is not in theory enforceable by process *in personam*, but its collection may be secured only by seizure of specific property. This latter, however, is not always the case. The statutes frequently make the tax list equivalent in force and effect to a judgment *in personam*, to the extent that property other than that on account of which the tax is levied may be seized as upon execution for its satisfaction. But the courts in the cases cited attached no weight to this circumstance as giving to a tax the characteristics of a debt; and notwithstanding the remedy by distress or the creation of a statutory right of action against the taxpayer individually, to recover a judgment for taxes enforceable against his property generally, the essential character of the obligation remains unchanged; and, moreover, such a judgment while enforceable against the goods and chattels, and perhaps the lands of the persons against whom judgment might be rendered, would not be such a judgment as would have been, but for the statutes and constitutional provisions abolishing imprisonment for debt, enforceable by process against the body.

In the case of the federal income and excess profits taxes, it appears from the acts of Congress under which these taxes are levied—which I do not take time to quote—that the collector may seize and sell any property of the taxpayer in satisfaction of the tax. I do not find, however, that the acts of Congress authorize the bringing of suit against the taxpayer to obtain personal judgment. Such a remedy would not seem to be necessary, save for the purpose of reaching lands.

However, upon the broad grounds upon which the cases which were cited in the other opinion were decided, it is clear that their principles apply to the solution of the present question just as fully as they do to the solution of that considered in the former opinion, unless there is something in the character of the federal government and its relation to the taxes now under consideration which would force the adoption of a different rule in this case. I can think of no principle which could be based upon such a foundation, though I have given the question very careful consideration.

It will be borne in mind that the whole matter of the deduction of debts for the purpose of taxation is one of grace and not of right. There is nothing to prevent the state from taxing credits in gross without any deduction whatsoever. In fact it was at one time seriously doubted whether debts could be deducted even from credits.

> Exchange Bank vs. Hines, 3 O. S. 1; Opinions of Bartley, C. J., and Thurman, J.

Later on it became settled that the term "credits," as used in the constitution, might with propriety be defined by the legislature so as to be limited to the net choses in action other than investments in bonds owned by the taxpayer; but it has never been contended, nor could it be in my opinion, that the legislature is required to allow any deduction. It is certainly not required to do so as to taxes assessed by the federal government, any more as against "credits," than as against any of the other assets of the taxpayers.

In other words, I can think of no reason arising out of the framework of our national government and the relation of the government of the United States to that of the States, which would compel the States to allow a deduction for property taxation purposes of the amount of taxes due to the federal government at a given time, from the "credits" of the taxpayer, that would not likewise operate to compel the State to allow such a deduction from any other property of his. The burden, if any, upon the activities of the federal government in the one case would be no greater than in the other. It would follow, therefore, that if there is anything in the nature of the federal government that in anywise limits the taxing power of the state on account of taxes levied by the authority of the federal government, that thing would so operate as to exempt from taxation for state purposes any and all assets of a given taxpayer up to the amount of the federal tax; for suppose that at the day as of which taxes are assessed in Ohio a given taxpayer has no credits at all. It is obvious that if at that time the federal government should attempt the collection of a previously assessed income or excess profits tax by compulsory process, it would have to seize other personal property of the taxpayer, such as machinery or stocks of goods. Would it therefore be claimed that a taxpayer could hold exempt from state taxation, under these circumstances, goods and chattels equivalent in value to the amount of the federal tax, on the ground that to deny him this privilege would produce a clash between the paramount federal power and that of the state? This question I think must be answered upon reason in the negative. This being true, it is obvious that any argument that could be predicated upon the relation of the state and federal governments would prove too much and would have to be rejected.

Arguments have been addressed to me, in connection with this question, based upon provisions of the bankruptcy act and other considerations of a similar character, which have the same weakness, in that all of them would tend to prove, if they prove anything, that a deduction should be allowed for federal taxes, not only as against credits, but as against any of the assets of the taxpayer which would otherwise be taxable under the laws of the state. As stated, such arguments prove too much because it can not be contended that upon any account whatsoever can an Ohio taxpayer deduct any obligation as a "debt" or otherwise, from investments in bonds, etc., or tangible personal property.

For these reasons, then, I am of the opinion that the principles of the former opinion apply to the question which I have been discussing, and that a corporation or individual, in determining the amount of credits to be listed for taxation for the year 1918, may not deduct, from the sum of all its legal claims and demands, the amount of income or excess profits tax due and payable to the federal government on or before June 15, 1918.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1551.

APPROVAL OF ABSTRACT OF TITLE COVERING LOT NO. SIXTY-EIGHT OF WOOD BROWN PLACE SUBDIVISION, COLUMBUS, FRANKLIN COUNTY, OHIO.

COLUMBUS, OHIO, November 13, 1918.

HON. CARL E. STEEB, *Secretary, Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—I am in receipt of abstract of title covering the following parcel of land located in the city of Columbus, county of Franklin and State of Ohio, and described as follows:

> Being lot No. sixty-eight (68) of Wood Brown Place subdivision, as the same is numbered and delineated upon the recorded plat thereof, of record in plat book No. 5, page 196, recorder's office, Franklin county, O.

I have examined said abstract and find no material defects in the chain of title to said premises as disclosed thereby.

Said abstract does not show any liens or encumbrances on said property, except the taxes for the year 1918, which are undetermined and unpaid, and a special assessment for Ridgview road improvement amounting, as shown by the abstract to 42c.

I am of the opinion that said abstract disclosed on November 12, 1918, a good title in Charlotte Rushmer, widow of Benjamin Rushmer, to the premises hereinbefore described.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1552.

PROBATE JUDGE—CLERK HIRE—NOT ENTITLED TO INCLUDE FINDING PAID IN ESTIMATING CLERK HIRE.

During a certain year a finding was paid by the probate judge into the probate judge's fee fund, the same being for fees received by him and not accounted for during a previous year. HELD: This amount so paid in could not be used as a basis for allowance for clerk hire by the county commissioners under section 2980-1 *G. C.*

COLUMBUS, OHIO, November 13, 1918.

HON. NATHAN B. GILLILAND, *Probate Judge, Portsmouth, Ohio.*

DEAR SIR:—I have your letter of the 9th inst. as follows:

"I would be pleased to have your opinion in regard to fixing the amount upon which to base the salary of deputy clerk under section 2980-1.

Last year, in addition to the amount paid into the county treasury, there was paid by Thos. C. Beatty, my predecessor, the sum of $1,726.33, being the amount found due by the examiners, upon examination of his books.

Should this amount be included in the total in making the estimate for the next year?

The above sum was paid into the treasury by Mr. Beatty January 25, 1918, almost one year after the time he went out of office. Should he have paid interest upon the same?'

Section 2980-1 G. C. reads:

"The aggregate sum so fixed by the county commissioners to be expended in any year for the compensation of such deputies, assistants, bookkeepers, clerks or other employes, except court constables, shall not exceed for any county auditor's office, county treasurer's office, probate judge's office, county recorder's office, sheriff's office, or office of the clerk of the courts, an aggregate amount to be ascertained by computing thirty per cent. on the first two thousand dollars or fractional part thereof, forty per cent. on the next eight thousand dollars or fractional part thereof, and eighty-five per cent. on all over ten thousand dollars, of the fees, costs, percentages, penalties, allowances and other perquisites collected for the use of the county in any such office for official services during the year ending September thirtieth next preceding the time of fixing such aggregate sum; provided, however, that if at any time any one of such officers require additional allowance in order to carry on the business of his office, said officer may make application to a judge of the court of common pleas, of the county wherein such officer was elected; and thereupon such judge shall hear said application and if, upon hearing the same said judge shall find that such necessity exists, he may allow such a sum of money as he deems necessary to pay the salary of such deputy, deputies, assistants, bookkeepers, clerks or other employes as may be required, and thereupon the board of county commissioners shall transfer from the general county fund, to such officers' fee fund, such sum of money as may be necessary to pay said salary or salaries."

It will be noted that in this section the aggregate sum to be fixed by the county commissioners for clerk hire in the different county offices is based upon a certain percentage "of the fees, costs, percentages, penalties, allowances and other perquisites collected for the use of the county in any such office for official services during the year ending September 30th next preceding the time of fixing such aggregate sum." The amount of $1,726.33, to which you refer, was not collected in the probate judge's office for the use of the county last year, but was collected during the administration of your predecessor. It is true that this money did not find its way into the county treasury until last year, when it was paid into the same by him upon the finding of the Bureau of Inspection and Supervision of Public Offices, but it was, nevertheless, collected in the probate judge's office during the administration of your predecessor and cannot, therefore, in my opinion, be used as a basis for allowance by the county commissioners at this time.

You ask further whether or not your predecessor should have paid interest upon the amount of $1,726.33, found due the county by the state examiners. The bureau informs me that this amount was paid by your predecessor at the time the finding was made, and inasmuch as the examiners did not see fit to include any interest in their finding, I am inclined to look upon this question as closed.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1553.

DISAPPROVAL OF BOND ISSUE OF VILLAGE OF JOHNSTOWN, OHIO. $6,000.00.

COLUMBUS, OHIO, November 13, 1918.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In Re: Bonds of the village of Johnstown, Ohio, in the sum of $6,000, for the purpose of purchasing equipment for and making improvements in the water and light plant of said village.

I have carefully examined the transcript submitted of the proceedings of the council of the village of Johnstown, Ohio, relating to the above issue of bonds, and find that I am compelled to disapprove said issue of bonds specifically for the reason that the ordinance providing for this issue of bonds does not make provision for an annual levy of taxes to pay the interest on said bonds and to create a sinking fund to retire said bonds at maturity as required by the affirmative provision of section 11 of Article XII of the State Constitution, which reads as follows:

> "No bonded indebtedness of the state, or any political subdivision thereof, shall be incurred or renewed, unless, in the legislation under which such indebtedness is incurred or renewed, provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds, and to provide a sinking fund for their final redemption at maturity."

I find a number of other objections in the proceedings of such a nature as to prevent my approval of this issue of bonds without further information obviating

the manifest defects disclosed. However, inasmuch as I am required to disapprove this issue of bonds for the specific reason first above mentioned, it will not serve any useful purpose for me to discuss the other objections disclosed in this transcript of the proceedings relating to this issue of bonds.

The transcript submitted is herewith returned.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

1554.

STATE HIGHWAY COMMISSIONER—USE OF ROTARY FUND.

The rotary fund created by the last general assembly, as found in 107 *O. L.* 187, *cannot be used for the purpose of paying the state's proportion of the cost and expense of a road improvement, but only for paying the cost of completing an improvement when taken over under section* 1209 *G. C.* (107 *O. L.* 126).

COLUMBUS, OHIO, November 15, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of October 31, 1918, to which you attach final resolution of the county commissioners of Highland county, pertaining to the improvement of the Hillsboro-Chillicothe road, Section C-1, I. C. H. No. 258, Highland county, and ask my approval of the same, in accordance with the provisions of section 1218 G. C.

This resolution is in all respects legal and correct in form and I might therefore be justified in endorsing my approval thereon, under said section 1218 G. C.; but there is a matter in connection therewith which in my opinion is so directly in violation of the statutes that I feel I should call attention to the same. Because of this irregularity I am not approving the resolution of the commissioners.

The following statement is appended to the resolution:

"To the Attorney-General:

I do hereby certify that there has been appropriated from the Rotary fund of the State Highway department of Ohio the sum of $40,130.98 to the credit of Highland county.

H. L. Hastings,
Chief Clerk, State Highway Department."

Dated October 24, 1918.

It will be seen that the State Highway department expects to use the sum of $40,130.98 from the rotary fund provided by the General Assembly, to take care of the portion of the cost and expense of the improvement to be borne by the state. I am of the opinion that said fund can not be used in this way.

In 107 O. L. 187 there is an act which was passed by the General Assembly "to make general appropriations." Section 5 of said act (p. 351) contains the following language:

"The term 'rotary fund' as used in this act means a fund set aside to

enable a department or institution to carry on a function or an activity, self-sustaining in its nature, the receipts from which are to be used for the function or activity for which the rotary fund is established.

Money obtained from the function or activity for which a rotary fund is provided shall be turned into the treasury, and such monies so turned into the treasury between July 1, 1917, and July 30, 1919, both inclusive, are hereby appropriated for the purpose for which such rotary fund is herein established. * * *."

The legislature made provisions for a rotary fund in the following language (p. 217):

"Rotary Fund—To pay when necessary the federal government's share of any estimate due contractors on road improvement under the Shackleford-Bankhead act, and

To pay when necessary the cost of completing any road improvement when the contractor has defaulted or has been removed therefrom, $50,000."

From the provisions above quoted it will be noted that the rotary fund was created by the General Assembly for specific and definite purposes, viz:

(1) To pay in the first instance any estimate that might be due the contractors on a road improvement, for which the federal government would be liable after it had passed upon said estimate.

(2) To pay the cost of completing an improvement when the original contractor fails and the State Highway department takes the same over under the provisions of section 1209 G. C.

Of course under this last provision as soon as the state realizes from the contractor and his surety, the money is turned back into the rotary fund. But there is no provision for the State Highway Commissioner's using money from the rotary fund to pay the cost and expense of an improvement to be assumed by the state. The cost and expense to be borne by the state must be paid from the amount which goes to each county of the state under the provisions of section 1221 G. C., and not from the rotary fund.

On account of this irregularity, although it is not directly connected with the final resolution and therefore does not strictly come within the provisions of section 1218 G. C., I am returning the resolution to you, without my approval thereon.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1555.

DISAPPROVAL OF BOND ISSUE OF BARBERTON CITY SCHOOL DISTRICT.—$36,000.

COLUMBUS, OHIO, November 15, 1918.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In Re: Bonds of Barberton City School district in the sum of $36,000 for the erection and equipment of a school building in said school district.

An examination of the transcript of the proceedings relating to the above issue of bonds discloses that the same is an attempted issue of bonds of the Barberton City School district in the amount and for the purpose above stated, without a vote of the electors of the school district under the assumed authority of section 7629 General Code. The resolution providing for said issue of bonds was adopted at a regular meeting of the board of education by the vote of three members only of said board. Section 7629 contains the following provision:

> "The order to issue bonds shall be made only at a regular meeting of the board and by a vote of two-thirds of its full membership taken by yeas and nays and entered upon its journal."

The board of education of Barberton City School district consists of five members. Under the provisions of section 7629 above quoted, it is apparent that the affirmative vote of at least four members of the board of education was required to legally adopt the resolution providing for this issue of bonds, and that the vote of three members only was wholly ineffectual for that purpose.

It follows from this that said issue of bonds is invalid, and the same is herewith disapproved.

The transcript submitted is herewith returned.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

1556.

MUNICIPAL CORPORATIONS—COUNCIL OF VILLAGE CANNOT EMPLOY LEGAL COUNSEL TO DEFEND MARSHAL.

The council of a village is without power to employ legal counsel to defend the village marshal against a complaint for shooting with intent to kill, arising out of the performance by the marshal of his duties as a conservator of the peace and in the enforcement of the state law, or of an ordinance passed by the council in the exercise of the police power delegated to it by the state.

COLUMBUS, OHIO, November 15, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your letter of recent date and brief prepared by the solicitor of the village of Hanford and requesting my opinion upon the following question:

> "In the proper discharge of his duties the marshal of the village fired upon a person who was resisting arrest. An affidavit was filed against the said marshal for shooting with intent to wound. The hearing on said affidavit was set for a day certain in the police court of the city of Columbus, where the complaint was pending. Meanwhile the council of the village unanimously adopted a resolution employing the person who at that time was acting under general employment as village solicitor to defend the marshal on said charge.
>
> The solicitor accepted the employment and successfully defended the

marshal, so that the complaint against the latter was dismissed by the police court for lack of probable cause.

Was the employment of the solicitor by the council legal and may the funds of the village lawfully be applied to the discharge of the obligation thus attempted to be created?"

The opinion of Hon. Timothy S. Hogan, former Attorney-General, found at page 1461 of Volume II of the Report of the Attorney-General for the year 1914, contains a very complete discussion of the principles upon which the answer to this question must be predicated. It is true that Mr. Hogan did not have before him the exact facts of this case. He was considering the question as to whether or not judgments obtained against police officers in civil actions for false arrest growing out of their mistaken but bona fide conduct in the course of their official duties could lawfully be paid by the council of a municipal corporation. His answer was that such claims could not be paid.

In the present case the proceeding against the police officer was criminal, not civil; the complaint against the marshal was dismissed, and not found sufficient in law as in the cases considered by Mr. Hogan; and the action of council is limited to the exoneration of the officer from the expenses of his defense, and does not go so far as to embody the indirect assumption of civil liability for an act done by the officer.

All these considerations serve to distinguish the question now presented from the one considered by Mr. Hogan. However, the distinction which exists is shown by the authorities cited by Mr. Hogan to be without a legal difference in result; for many of the cases cited therein were cases in which the action of the municipal legislative authority was limited to exoneration of the officer from expenses incurred by him in defending cases; and some of them presented the exact situation which now arises, in that the council was attempting to employ legal counsel for the defense of the police officer.

The principle laid down in all these cases, which must be regarded as settled so far as authority is concerned though perhaps not definitely so in Ohio, is that the right of the legislative body of a municipal corporation to incur expense for the purpose of saving one of its officers harmless as against legal expenses incurred by him in defending his official conduct is limited to cases in which the official conduct called in question is of such character as to be representative of the municipality in its corporate or proprietary aspect. That is to say, a police officer, though appointed locally and perhaps constituting a part of the machinery of the local municipal government, does not represent the municipality as such when preserving the public peace and enforcing the criminal laws of the state by pursuing offenders against them for the purpose of arrest. In such undertakings he represents the state itself and not the municipality as a quasi corporation. Therefore, it is not a matter of municipal concern that the police officer should be saved harmless from expenses incurred by him in defending his acts as an agent of the state. The situation of the marshal under the statutes of the state brings out this distinction very clearly. His compensation for services in state cases is not paid by the village, though the council may, if it chooses, give him "additional compensation" which, presumably, is referable to the services which he renders to the village, as such, by way of enforcing its ordinances and the like (see section 4387 G. C., which at least attempts to set up by appropriate reference a schedule of fees for the services performed by marshals in state cases). The validity of this statute may be doubted, but it shows at least the dual character of the office of marshal and the relation of the village, as such, to the duties of that office. In short, the compensation of the marshal under the statute for enforcing the criminal laws of the state and preserving the public peace

is that which comes to him by way of fees, if any. These fees are presumed to compensate him for all the risks involved in the proper performance of his official duty.

From all the foregoing it appears that we are driven to the conclusion that if the marshal in the transaction out of which the complaint against him arose was engaged in enforcing the state laws the village was without authority to employ legal counsel for his defense. The facts submitted to me do not show clearly whether or not this was the case. The resolution of council recites that the charge "arises out of an attempted arrest by said marshal * * * for disturbance of the peace and quiet of said village." If this recital is correct, it may be assumed that the marshal was attempting to make the arrest by virtue of a warrant drawn under a village ordinance; for there is no such public offense under the general criminal laws of the state as that described, while municipal corportions are authorized by sections 3664 et seq. of the General Code to provide by ordinance for the punishment of persons disturbing the good order and quiet of the corporation in certain ways. If this is the case, the general principle relied upon by Mr. Hogan and quoted by him with approval from Mechem on Public Officers, section 879, will have to be more carefully applied to the facts at hand. The principle is put in Mechem as follows:

> "It is well settled that the public, such as towns or cities, have the *power* to indemnify their officers against liability which they may incur in the bona fide discharge of their duties, and may * * appropriate * * moneys raised for general purposes, even though the result may show that the officers exceeded their legal authority. But the subject must be one concerning which the municipality has a duty to perform, an interest to protect or a right to defend, and in which it has a pecuniary or corporate interest.
>
> "Where, however, the subject matter is one in which the municipality has no interest and in reference to which it has no duty or authority; where it has no direction or control of the officer, is not responsible for his fidelity, gains nothing by his diligence and loses nothing by his want of care; where the duties are imposed specifically upon the officer by statute and the municipality has no duty to perform, no right to defend and no interest to protect, in such case the right to indemnify does not exist, and any attempt to do so, or any vote or contract to that effect will be void."

This principle still leaves the subject in some doubt. As stated, it would appear to require the concurrence of a pecuniary interest in the subject-matter involved in the officer's conduct with the existence of a more or less academic public interest. In the case at hand the municipality, as the source of the legislation which was being enforced by the officer, did have apparently some duty or authority in the premises. It did have direction and control over the officer, in that he was serving its process; it did gain by his diligence, in that the public need that gave rise to the adoption of the ordinance was a municipal need and was being subserved by his official conduct; and, conversely, it would have lost by his want of care because his failure to enforce the ordinance and to serve the processes of the village would have amounted to a public loss to the municipality. But the concern which the municipality has in the enforcement of its police regulations is in no sense corporate and proprietary; rather, such regulations, though adopted by the municipality, constitute an exercise of the police power of the state which is merely delegated to municipal councils in deference to the difference between conditions in incorporated communities and those in rural communities.

Thus, if the municipality had been sued civilly for any conduct arising out of the discharge by the marshal of his duty in enforcing the police ordinances of the municipality, the action would have been unsuccessful upon the well settled principle that a municipality is not liable for the conduct of its officers in the course of their official employment while representing it in its governmental capacity rather than in its proprietary capacity.

Of course, the analogy furnished by the rule as to municipal liability or non-liability for the acts of officers or agents may not be a trustworthy one; for the power to indemnify might exist independently of the question of municipal liability.

But the cases cited by Mr. Hogan in his exhaustive opinion seems to adopt a principle which, if not analogous to the one just stated, is at least parallel to it in reasoning and result; while some of them go so far as to deny the power to indemnify upon grounds which might apply even in case the expense or liability of the officer were incurred in the course of representing the municipality in the exercise of its proprietary functions. To this effect is Lunkenheimer vs. Comptroller et al., 23 Bull., 433.

On the whole, though the question is not free from doubt, I am impelled to the conclusion as a matter of law (though as the present case is circumstanced my sympathies are the other way) that the council of the village was without power to make the employment which it attempted to make, and that the treasurer can not be compelled to pay the claim based thereon.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1557.

MUNICIPAL CORPORATIONS—VILLAGE—MAYOR CAN FILL VACANCIES.

Under section 4252 G. C. (103 O. L. 65) the mayor is authorized to fill a vacancy caused by death, resignation, removal or disability of any officer of a village, unless otherwise provided by law.

COLUMBUS, OHIO, November 15, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I am in receipt of letter from Hon. Fred Gribbell, mayor of the village of Deshler, asking me for an opinion as to how a vacancy should be filled in the office of a village. I am addressing the opinion to you and will forward copy to the mayor.

Prior to the enactment of section 4252 G. C. in 103 O .L. 65, there was no section of the statute that provided for the filling of vacancies caused by the death, resignation, removal or disability of an officer in a village, as that section then read as follows:

> "Section 4252.—In case of death, resignation, removal or disability of any officer or director in any department of a city, unless otherwise provided by law, the mayor thereof shall fill the vacancy by appointment, and such appointment shall continue for the unexpired term and until a successor is duly appointed, or duly elected and qualified, or until such disability is removed."

This section provided how vacancies should be filled in such offices in a city.

The identical question was presented to one of my predecessors, Hon. Timothy S. Hogan, as disclosed by an opinion found in Volume II, Annual Report of the Attorney-General for 1912, p. 2003. That opinion was to the effect that there was no authority to fill a vacancy in the office of village marshal, and further there was no authority to call a special election to fill such vacancy. In that opinion Mr. Hogan said that it was expected that the next legislature would cure this defect. Presumably following some suggestion along this line, the succeeding legislature, as shown in 103 O. L. 65, amended section 4252 G. C. to read as follows:

> "Section 4252.—In case of death, resignation, removal or disability of any officer or director in any department of any municipal corporation, unless otherwise provided by law, the mayor thereof shall fill the vacancy by appointment, and such appointment shall continue for the unexpired term and until a successor is duly appointed, or duly elected and qualified, or until such disability is removed."

True, section 4252 G. C. is found in Tit. XII, Div. 5, Subdiv. 2, Ch. 2, and under the heading "Mayor," subheading "Cities"; but as the provision already cared for vacancies arising in cities, there can be no question but that the amendment broadening the section to include vacancies "of any municipal corporation" was intended to cure the omission in the statute, and so provided for the filling of vacancies by the mayor in villages in the same manner as in cities.

It will be noted that the authorization for filling vacancy by mayor under section 4252 G. C. is further limited by the provision "unless otherwise provided by law." An examination of the statutes does not disclose any such provision.

It is therefore my opinion that section 4252 G. C., as amended, gives the authority to the mayor to fill the vacancy caused by death, resignation, removal or disability of any officer of the village.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1558.

DISAPPROVAL OF BOND ISSUE OF THE VILLAGE OF COAL GROVE, LAWRENCE COUNTY, OHIO.—$5,000.00.

COLUMBUS, OHIO, November 16, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

> In Re: Bonds of the village of Coal Grove, Lawrence county, Ohio, in the sum of $5,000 for the purpose of funding certain bonded indebtedness of said village.

GENTLEMEN:—I have carefully examined the transcript submitted of the proceedings of the council of the village of Coal Grove, Ohio, relating to the above issue of bonds and regret to say that I am compelled to disapprove said issue specifically for the reason that the resolution providing for said issue of bonds does not make any provision for annual tax levies for interest and sinking fund purposes with respect to said bonds, as required by the provisions of section 11 of Article XII of the State Constitution, which reads as follows:

"No bonded indebtedness of the state, or any political subdivision thereof, shall be incurred or renewed, unless, in the legislation under which such indebtedness is incurred or renewed, provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds, and to provide a sinking fund for their final redemption at maturity."

Calling your attention to another defect in the proceedings, I note that sections 3923 and 3924 G. C. provide that the bonds of a municipal corporation shall be first offered to the board of trustees of the sinking fund of a municipality and to the board of commisioners of the sinking fund of the school district of such municipality before such bonds are otherwise disposed of. These statutory provisions are consistent with those of section 1465-58 G. C. which authorize you to purchase only such municipal bonds as shall have first been offered to the board of trustees of the sinking fund and the board of commissioners of the sinking fund of the school district. In this case it appears that these bonds were offered to the trustees of the village sinking fund and rejected. Thereupon the bonds were offered to the board of education of the village school district. This was erroneous. From the fact that the bonds were offered to the board of education of the village school district I infer that the school district has no board of commissioners of the sinking fund appointed by the common pleas court under the provisions of section 7614 G. C. Under such circumstances the board of trustees of the village sinking fund and not the board of education of the school district would have the right to act as the board of commissioners of the sinking fund of the village school district, and these bonds after they were offered to the board of trustees of the sinking fund in its capacity as such should have been offered to the board of trustees of the sinking fund of the village in its capacity as the board of commissioners of the sinking fund of the village school district and should have been rejected in that capacity.

This last objection is one which might be corrected by further proceedings in line with the suggestions above made, but the objection first noted is one which affects the validity of the resolution providing for this issue of bonds and for this reason I have no discretion to do otherwise than to disapprove the issue and advise that you should not purchase the same.

I am herewith returning the transcript.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1559.

APPROVAL OF BOND ISSUE OF VILLAGE OF MILTON, MIAMI COUNTY, OHIO.—$2,500.00.

COLUMBUS, OHIO, November 16, 1918.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In Re: Bonds of the village of Milton, Miami county, Ohio, in the sum of $2,500 for the purpose of procuring real estate and building for fire department purposes.

I have carefully examined the transcript of the proceedings of the council and other officers of the village of Milton, Ohio, relating to the above issue of bonds and find said proceedings to be in conformity to the provisions of the constitution and laws of the State of Ohio relating to bond issues of this kind.

I am therefore of the opinion that properly prepared bonds covering said issue will, when the same are executed and delivered, constitute valid and binding obligations of said village to be paid in accordance with the terms thereof.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

1560.

INDUSTRIAL COMMISSION—NOT AUTHORIZED TO MAKE CASH DISTRIBUTION OF UNEARNED PREMIUM SURPLUS.

The Industrial Commission, exercising the powers of the State Liability Board of Awards, is not authorized by rule or otherwise to make a cash distribution of an unearned premium surplus, but is authorized to distribute such unearned premium surplus shown by actuarial computations to be not necessary to the solvency of the state insurance fund nor needed to protect against contingencies by way of credits on future premium payments.

COLUMBUS, OHIO, November 16, 1918

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—You submit the following request for my opinion:

> "The Industrial Commission desires to have your interpretation of the third paragraph of section 1465-54 G. C., as amended.
>
> As you will note in our July communication to subscribers, we made the statement that certain risks would participate in a refund to the amount of $336,452.46.
>
> Before authorizing this refund we should like to have your opinion as to whether we are within the law in doing so, calling your particular attention to Rule 16 found on page 9 of our insurance manual, which makes provision for such refunders resulting from the application of adjustment rates.
>
> For your convenience, I enclose herewith copy of our communication as well as the insurance manual containing rules effective July 1, 1917."

Rule 16 to which you refer provides as follows:

> "Disbursements will be made only to employes of subscribers to the state insurance fund who are injured in the course of their employment, or their dependents in the event death results from such injury within the period of two years from the date thereof; for refunders provided for in the last preceding rule; *for refunders resulting from the application of adjustment rates;* and for bonds of the United States, the State of Ohio, or any county, city, village or school district of the State of Ohio when purchased in accordance with the provisions of section 11 of the Act approved by the Governor, March 14, 1913."

Acting under this or other authority the commission proposes to refund to existing subscribers to the Ohio state insurance fund a part of a large surplus in the fund representing the amount of unearned premium over all losses, and indicating by actuarial computation that in aggregate the rates of premium fixed by the commission in past years have been too high, i. e., more than sufficient to carry the risk as developed by actual experience.

I regard the question thus presented as involving the interpretation of the statutes under which the Industrial Commission, as the State Liability Board of Awards, is operating. Any rules which the commission may have adopted must, therefore, be laid on one side as not pertinent to the question. If the formal rules already in force do not justify the measure which is contemplated and the statutory power is present, another rule may, of course, at any time be adopted by the commission for the purpose; but the validity of such a rule as well as that of any rule now in force which might seem to sanction what the commission proposes to do depends ultimately upon the law which governs the commission.

Therefore the real question is as to the power of the commission, by rule or otherwise, to make cash refunders to subscribers to the state insurance fund by which a part of the unearned premium representing surplus may be distributed among them. Obviously, therefore, as has been said, the rules of the commission as they now exist do not afford any basis upon which a conclusion may be reached.

These statements make it clear, then, that the Workmen's Compensation Law of Ohio must be searched for authority, express or implied, to take the action inquired about; for though it be premised that the scheme of workmen's compensation which exists in Ohio is a kind of insurance so that insurance principles must be regarded as applicable to its administration, yet the whole enterprise is the creature of statute, so that we must still look to the statute to see just what kind of insurance it is and just how in detail the general assembly of the state, which created the scheme, may have provided for its administration.

I quote the following sections of the Workmen's Compensation Act as bearing upon this general question:

> "*Section* 1465-53.—The state liability board of awards shall classify occupations with respect to their degree of hazard, and *determine the risks of the different classes and fix the rates of premium of the risks of the same, based* upon the total payroll and number of employes in each of said classes of occupation *sufficiently large to provide an adequate fund* for the compensation provided for in this act, and *to maintain a state insurance fund from year to year.*"
>
> "*Section* 1465-54.—It shall be the duty of the industrial commission of Ohio, in the exercise of the powers and discretion conferred upon it in the preceding section, *ultimately* to fix and maintain, for each class of occupation, or industry, *the lowest possible rates of premium consistent with the maintenance of a solvent state insurance fund and the creation and maintenance of a reasonable surplus,* after the payment of legitimate claims for injury and death that it may authorize to be paid from the state insurance fund for the benefit of injured and the dependents of killed employes; and, in order that said object may be accomplished, said commission shall observe the following requirements in classifying occupations or industries and fixing the rates of premium for the risks of the same:
>
> 1. It shall keep an accurate account of the money paid in premiums by each of the several classes of occupations or industries, and the losses on account of injuries and death of employes thereof, and it shall also keep an account of the money received from each individual employer and the

amount of losses incurred against the state insurance fund on account of injuries and death of the employes of such employer.

2. Ten per cent. of the money that has heretofore been paid into the state insurance fund and ten per cent. of all that may hereafter be paid into such fund shall be set aside for the creation of a surplus until such surplus shall amount to the sum of one hundred thousand dollars ($100,000.00) after which time the sum of five per cent of all the money paid into the state insurance fund shall be credited to such surplus fund, until such time as, in the judgment of said commission, such surplus shall be sufficiently large to guarantee a solvent state insurance fund.

3. On the first day of July, 1917, and annually thereafter, a *revision of rates* shall be made *in accordance with the experience of said commission* in the administration of the law *as shown by the accounts* kept as provided herein; *and said commission shall adopt rules governing said rate revisions, the object of which shall be to make an equitable distribution of losses among the several classes of occupation or industry, which rules shall be general in their application.*"

"*Section* 1465-56.—The treasurer of state shall be the custodian of the state insurance fund and all disbursements therefrom shall be paid by him upon vouchers authorized by the industrial commission of Ohio and signed by any two members of said commision; * * *."

"*Section* 1465-62.—Every employer mentioned in subdivision one of section thirteen hereof (section 1465-60 G. C.) shall contribute to the state insurance fund in proportion to the annual expenditure of money by such employer for the services of persons described in subdivision one of section fourteen hereof (section 1465-61 G. C.) the amount of such payments and the method of making the same to be determined as hereinafter provided."

Section 1465-69.—Except as hereinafter provided, every employer mentioned in subdivision two or (of) section 1465-60, General Code, shall, in the month of January, 1914, and semi-annually thereafter, pay into the state insurance fund the amount of premium determined and fixed by the industrial commission of Ohio for the employment or occupation of such employer the amount of which premium to be so paid by each such employer to be determined by the classifications, rules and rates made and published by said commission; and such employer shall semi-annually thereafter pay such further sum of money into the state insurance fund as may be ascertained to be due from him by applying the rules of said commission, * * *."

"*Section* 1465-72.—The state liability board of awards shall disburse the state insurance fund to such employes of employers as have paid into said fund the premiums applicable to the classes to which they belong, who have been injured in the course of their employment, wheresoever such injuries have occurred, and which have not been purposely self-inflicted, or to their dependents in case death has ensued. * * *."

"*Section* 1465-89.—In addition to the compensation provided for herein, the industrial commission of Ohio shall disburse and pay from the state insurance fund, such amounts for medical, nurse and hospital services and medicine as it may deem proper, not, however, in any instance, to exceed the sum of two hundred dollars unless in unusual cases, * * *; and, in case death ensues from the injury, reasonable funeral expenses shall be disbursed and paid from the fund in an amount not to exceed the sum of one hundred and fifty dollars, and such commission shall have full power to adopt rules and regulations with respect to furnishing medical, nurse and

hospital service and medicine to injured employes entitled thereto, and for the payment therefor."

While there may be other provisions of the Workmen's Compensation Law which might bear remotely upon the question under consideration, the foregoing constitutes, I believe, a sufficient quotation of the provisions of the act which need to be considered in this connection.

Power to adopt rules governing various matters is conferred by specific enumeration throughout the above quoted sections. None of them, however, expressly authorizes the adoption of rules for the making of refunders of the kind now contemplated. The problem is to determine whether the power to make such rules or to authorize the refunders without formal action by rule may fairly be implied from the express provisions of the act or from the controlling principles of the law as a whole. In this connection I observe that section 1465-54 G. C., which was amended in 1917, formerly provided as follows:

"3. On the first day of July, 1914, and semi-annually thereafter, a readjustment of the rates shall be made for each of the several classes of occupation or industry which, in the judgment of the board, have developed an average loss ratio in accordance with the experience of the board in the administration of the law as shown by the accounts kept as provided herein.

"4. Should any such accounting show a balance remaining to the credit of any class of occupation or industry, after the above mentioned amounts have been credited to the surplus fund, and after the payment of all awards for injury or death lawfully chargeable against the same, the premium rate for such class shall be reduced; and, each individual member of such class, who has been a subscriber to the state insurance fund for a period of six months or longer prior to the time of such readjustment, and whose premium or premiums so paid to the fund exceeds the amount of the disbursements from the fund on account of injuries or death to his employes during such period, shall be entitled to a credit on the installment or installments of premium next due from him, the amount of which credit shall be such proportion of said balance as the amount of his prior paid premiums sustains to the whole amount of said premiums paid by the class to which he belongs since the last readjustment of rates."

These paragraphs of the section were in the place now occupied by sub-section 3 thereof as above quoted. So long as the section provided as it formerly did the answer to your question was plain. The commission certainly did not have the power under former sub-sections 3 and 4 of section 1465-54 to make a cash distribution of an unearned premium surplus, but in case any periodical accounting and readjustment of rates by actuarial computation should disclose the existence of such a balance it was the duty of the commision to reduce the rate for the class of subscribers represented in the surplus, and it became the right of each subscriber of six months' standing or longer to receive a credit on the installment or installments of premium next due from his representing his proportion of the balance.

I may interpolate here that if the calculations made in years prior to 1917 were correctly made and this section was complied with, I am unable to see how there can be any considerable surplus to distribute at the present time, unless it has accumulated within the past year or unless the calculations of a previous year had disclosed a surplus too large to be absorbed by credits on premiums under the previous law. However, I can not, of course, question the facts stated by the com-

mission, and I am assuming that whether from revision of actuarial computations or otherwise, the most recent calculations of the commission have disclosed the state of affairs indicated by the action which is now proposed.

In case of doubt as to the meaning of a statute it is often true that legislative intent can be gathered with some accuracy from the history of the provision in question. In this instance we find that the legislature has stricken out the provision for distributing an unearned surplus by crediting the amount thereof on future premium payments and has substituted therefor the language which we find in the present act. Instead of the semi-annual process being called a "readjustment of rates" it is now called a "revision of rates"; otherwise the first clause of paragraph 3 of the amended section is substantially identical in purport with paragraph 3 of the section as formerly in force. Instead of the hard and fast rule for crediting balances remaining to the credit of any class of occupation or industry on future premiums by classes and in strict proportion to prior paid premiums, we have a direction to the commission to adopt rules "governing said rate revisions, the object of which shall be to make an equitable distribution of losses among the several classes of occupation or industry, which rules shall be general in their application."

Undoubtedly the amended section is broader and more elastic in its import than the old one was. For one thing, the new section does not give to the individual subscriber the absolute right to share in the refund in proportion to the premiums which he has paid in the past. Whatever his rights may be they result from the command that the distribution of losses shall be "equitable * * * among the several classes of occupation"; he is not mentioned by description as he was before. Moreover, under the old law the only subscribers entitled to participate in the distribution by credit on future premiums were those "whose premium or premiums so paid to the fund exceeds the amount of the disbursements from the fund on account of injuries or death to his employes during such period"; whereas, unless this requirement be involved in the rule that the distribution of losses shall be "equitable," the new section does not limit the right to participate in the rate revision with a view to making an equitable distribution of losses to those whose premiums paid in may have exceeded the losses incurred on account of injuries or death to their employes during the period of six months referred to in the old statute.

These and perhaps other evidences of intent show that the legislature meant to enlarge the power of the commission to deal with the subject of the revision or readjustment of rates. The question now is as to whether or not this enlargement of power went so far as to authorize the commission to distribute such a surplus by cash payments instead of by premium credits.

This question depends in turn upon the further question as to whether or not the specific provision of the former law, to the effect that premium adjustments should result in the distribution of surplus through premium credits, was in the legal sense a restriction upon the power which the commission would otherwise have had, or, on the other hand, a grant of power, so that the commission would have no power at all in the premises but for such provision. I do not mean to say that the question now under consideration can be fully answered by applying this test, but it will at least afford a serviceable background for the further investigation of the question at hand.

To get at the answer to the question last suggested, then, let us imagine for a moment that neither sub-paragraph 4 of section 1465-54 as it existed prior to 1917 nor the latter part of paragraph 3 of the same section as it now exists were in the law; what would be the power of the commission in the premises? With these subtractions we would have the following provisions upon which to base an answer to this question:

(1) The rates of premium are to be fixed so as to be "sufficiently

large to provide an adequate fund for the compensation provided for in this act, and to maintain a state insurance fund from year to year." (Section 1465-53).

That is, in the strict sense, the state liability board of awards and the industrial commission as its successor is and at all times has been without power consciously to fix premium rates larger in amount than might be sufficient to attain these two objects.

(2) More particularly and with a view to the accomplishment of these purposes the commission must "ultimately fix and maintain, for each class of occupation, or industry the lowest possible rates of premium consistent with the maintenance of a solvent state insurance fund and the creation and maintenance of a reasonable surplus, after the payment of legitimate claims." (Section 1465-54—General provisions)

Here we have the same thing stated in another way—positively rather than negatively. It is the commission's express duty ultimately to fix and maintain the lowest possible rates of premium consistent with the maintenance of a solvent fund, etc. That is, the ultimate aim of the commision must be to get the rates down to the lowest possible level consistent with solvency and the maintenance of a reasonable surplus. The word "ultimately" is entitled to weight here; its meaning as given in the Standard Dictionary is:

"In the end; at last; finally."

That is, it denotes an object to be attained, as soon as possible to be sure, but in all likelihood not immediately; but rather at the end of a process of experimentation. Putting it in another way: the *object* of the discharge by the commission of its duties under section 1465-53 is to secure in time the lowest possible rates of premium consistent with the maintenance of a solvent state insurance fund, etc. When the legislature enacted this language it understood perfectly that state workmen's compensation insurance was a new venture and that the experience upon which actuarial computations might be based was lacking. The legislature understood perfectly well that the first premium rates established by the state liability board of awards must be in the very nature of the case more or less tentative. No one could say just what the proper rate for a given class of occupation measured by the criteria of solvency and the maintenance of a reasonable surplus might be; no one could even say at the outset what a reasonable surplus would be; it would take several years' experience to bring out the facts upon which the legislative command which fixed the policy of the law in this respect could be carried out. Therefore the legislature sensibly did not attempt to require anything like accuracy at the outset, but merely enjoined upon the state liability board of awards and its successor the duty of working toward a goal through a period of years.

This interpretation of the clause now under consideration is made very clear when other language of section 1465-54 is taken into account. For example, the last clause of the general part of the section says that "in order that said object may be accomplished, said commission shall observe the following requirements in classifying occupations or industries and fixing the rates of premium for the risks of the same." Here the law speaks of an object to be accomplished—and in the light of the earlier part of the section not immediately but *ultimately;* and the accomplishment of the object is to be worked out by observing certain requirements in classifying occupations and fixing rates of premium. In other words, the legislature makes very clear in this part of the statute the idea already disclosed in the

earlier part of the section, namely, that in fixing premium rates and classifying occupations the commission shall have a definite object in view, an object not to be attained at once but ultimately—at the end of a sufficient number of repeated processes as may afford a groundwork of experience sufficient to enable the commission to formulate a judgment upon the required point.

Going on in section 1465-54 we find certain detailed directions to the commission which are to be observed "in order that" the "object," which is *ultimately* to fix and maintain * * * the lowest possible rates * * * "may be accomplished." These detailed directions appear in the remaining paragraphs of section 1465-54, as follows:

> (a) The commission is directed to keep an accurate account of premiums paid in by each of the several classes and by each individual employer, and also an account of the losses both by classes and by individual employers.
>
> (b) The commission is required to set aside ten per cent. of the premiums paid into the fund for the creation of a surplus until the surplus shall amount to one hundred thousand dollars, after which five per cent. of the money paid in is to be credited to the surplus until such time as in the judgment of the commission the surplus shall be sufficiently large to guarantee a solvent state insurance fund.

Here is a provision which looks to an ultimate goal, and a goal the attainment of which can not be foreseen. Indeed, the goal—the accumulation of a sufficiently large surplus to guarantee the solvency of the fund—is a thing the very existence of which can be predicated only upon experience through a series of years. The commission could have nothing at the outset upon which to base a judgment as to whether or not a given amount would constitute a reasonable surplus, sufficiently large to guarantee the solvency of the fund. Here is another thing which is to be "ultimately" arrived at.

> (c) An annual revision of rates, or—as the old law had it—a semi-annual readjustment is to be made.

This adjustment or revision was under the old law to be by classes. The new law is broader in this respect, but we are not interested in this aspect of the case. Both the old law and the new law required the semi-annual or annual process to be carried through "in accordance with the experience of the board in the administration of the law as shown by the accounts kept as provided herein." Here again is clearly expressed the idea that the ability of the commission to arrive at accurate results is to be expected to enhance from period to period as its experience under the law accumulates. Each revision or readjustment of rates is naturally expected to approach more closely to the ideal than its predecessor. Bear in mind that the revision of rates or the readjustment of rates—whichever it be called—is itself a means to an end, just as everything provided for in the sub-paragraphs of section 1465-54 is declared to be a means to an end, namely, the ultimate fixing and maintenance for each class of occupation of the lowest possible rates of premium consistent with the maintenance of a solvent state insurance fund and the creation and maintenance of a reasonable surplus. In other words, there is to be an annual or semi-annual changing of rates with a view ultimately to arriving at the lowest possible rates.

Now if we stop here and ask ourselves the question as to whether or not, in the absence of anything about distribution of what accumulated experience may

demonstrate to be an unnecessary surplus, the state liability board of awards or the industrial commission is authorized to make such a distribution, it seems to me that we must answer this question in the negative. It will be remembered that we are now working upon a hypothesis that requires us to ignore both the provisions of the old law respecting the distribution of surpluses by premium credits and the admittedly broader provisions of the new law that authorizes the adoption of rules governing rate revisions with the object of making an equitable distribution of losses, etc. In other words, we are supposing for the time being that the law is perfectly silent in respect to the subject, and we are seeking for implications in one direction or another with respect to the question as to what the power of the board or commission would have been in such a state of the written law. We are doing this for the purpose of determining whether sub-section 4 of section 1465-54 was a grant of power on the one hand or a restriction upon the power which would otherwise exist on the other hand.

I say that the question last suggested would have to be answered negatively in the light of sections 1465-53 and 1465-54 as they would be without anything in them on the subject of refunding, for the following reasons:

These sections, which contain the entire law so far considered with respect to the functions of the commission in its rate-making capacity, deal solely with the functions of fixing rates of premium. They say that ultimately the lowest possible rates of premium shall be maintained. They therefore infer that while the experience upon which only an accurate judgment as to what rates may be the lowest possible rates is being accumulated rates may be fixed which shall not be the lowest possible rates. The legislature did not intend that the commission should err on the side of low rates at the beginning of the experience of the state under the law. On the other hand, it clearly intended that solvency and the creation of a reasonable surplus should be the first objects to be achieved; then, and after experience had demonstrated the bases for proper actuarial computations, there was to be, through a series of readjustments or revisions, an approach to an ultimate goal, which should be the lowest possible rates consistent with the maintenance of a condition of solvency and a reasonable surplus. The legislature might well have made provision for any unnecessary surplus that might be shown to have been accumulated by the perfected experience of the commission in the administration of the law. In point of fact it did do so by express provision in the old law, but we are now supposing that such provision is lacking. We are left with the question as to whether the legislature's silence, together with the express provision that there shall be an annual or semi-annual revision with the ultimate object of fixing the lowest possible rates, can be made the predicate of a successful claim of implied authority to refund a surplus accumulated during the period of experimentation. I base my conclusion that this could not be done not only upon the legislature's silence, but also upon the fact that the legislature has limited the commission's authority to the accomplishment through rate revisions of an ultimate goal.

Now, rates are fixed for the future. Other provisions of the law which I have quoted extensively and to which I do not need to refer again make this very clear. When the commission fixes a rate of premium it is determining what a subscriber to the fund must pay in order to obtain the protection which it affords for a period of time running in the future. This idea pervades the whole act. I can not give to the phrase "fix and maintain" any meaning other than that which these related provisions indicate, namely, the determination of a rate that shall be applied to the payroll of a given class of employes for a particular period of time in the future.

I am aware of the fact that an unearned premium might be said in a sense to belong equitably to him who has been required to pay it. This statement, however,

must be taken with considerable reservation and is not strictly true in law. What the early subscribers to the fund were legally and equitably entitled to was no more than the fair exercise of judgment and discretion on the part of the commission in fixing premium rates based upon the then accumulated experience of the commission. If it could be shown that the commission had not exercised reasonable discretion, but had fixed exorbitant rates, a different question would be presented; but I take it and am therefore assuming that the commission did nothing of the kind but that the rates fixed by it for any semi-annual period in the past were such rates as then appeared to the commission, in the exercise of reasonable discretion based upon its then accumulated experience, to be the proper rates. I do not see how any equitable rights or legal rights could be predicated upon the payment of a premium so fixed, even though it should ultimately turn out after an experience of several years had afforded additional ground for more accurate actuarial computations that such premiums had been too high.

But, it may be asked, if no legal or equitable right in such unearned premium surplus belonged to the subscribers whose premium payments helped to create it, to whom does it belong? The answer to this question will be further elaborated in the course of this opinion. At the present time it is sufficient to say that whenever any premium is paid to the state industrial commission it thereby become a part of the state insurance fund, together with all accretions thereto caused by the profitable investment of such fund. In short, then, all moneys coming into the fund become a part of the fund, whether that fund be divided into reserve, surplus and capital or otherwise. The fund can be used for those purposes to which it is dedicated by the provisions of the law under which it was collected, and to those only. In this sense it is a "trust fund." The legislature of Ohio could not without violating this trust authorize the fund to be used in any manner inconsistent with the objects for which it was collected. It could not be used to enhance the general revenues of the state. It could not be used even to pay the necessary overhead expenses of administering the fund, for these by provisions of the law which have always been a part of the workmen's compensation act are a charge upon the general revenues of the state. But it could be used without violating anybody's legal or equitable rights in paying compensation claims, because this is the object for which it has been collected; and this statement so far as I am able to see applies just as well to the accumulated unearned premium surplus as to any other part of the fund. For example, A was a subscriber to the fund, but no longer is; he paid premiums in his proper classification greater in amount than was necessary to constitute his proper contribution to a solvent insurance fund and a reasonable surplus, as subsequently ascertained by the commision in the course of its rate revisions with a view to fixing ultimately the lowest possible rates of premium; yet A, who is no longer a member of the fund, could hardly be said to have a right to have any part of his contribution to the fund returned at such later date as at which this fact might appear; and if A has no equitable rights in the premises I am unable to see that B, who has continued to be a subscriber, has any greater equitable rights than A would have.

Now if these supposititious persons have no equitable rights, I am unable to see how the industrial commission can be said to have any power in the premises in the absence of express provision of statute and in the face of express provisions limiting its authority to the fixing and revision of rates with an ultimate goal in view. Therefore, I repeat my conclusion on this point, which is that so far as sections 1465-53 and 1465-54, without the last provision of the latter section either in its present form or in the form in which it existed prior to 1917, are concerned they do not in my opinion authorize the commission to make a cash distribution of the unearned premium surpluses.

I have not found any case strictly in point on this question, but I do feel that some light on it is shed by the decision and reasoning of the Court of Appeals of New York in *Greeff* vs. *Equitable Life Assurance Society,* 160 N. Y. 19; 46 L. R. A. 288. In that case the plaintiff, who was a member of a mutual life insurance company, filed a complaint against the company alleging its mutual character, setting up the contract of insurance by which he became a member of the company, asserting that the company had accumulated a large surplus which ought to have been distributed among the members, and praying for an order to compel the defendant to appropriate to plaintiff's policy its share of the surplus in the defendant's possession. The law of New York, under which the defendant company was organized and by which it was governed, provided, among other things, that annually or at other intervals such companies should have power "to ascertain * * * the proportion of surplus accruing to each policy from the date of the last to the date of the next succeeding premium payment, and to distribute the proportion found to be equitable either in cash, in reduction of premium, or in reversionary insurance, payable with the policy, and upon the same conditions as therein expressed at the next succeeding date of such payment." In holding that the plaintiff's complaint stated no cause of action against the defendant the court, per Martin, J., employed the following language:

> "It is to be observed that the agreement (embodied in the policy) was that the plaintiff should participate, not in the whole surplus, but in the distribution of the surplus, or in other words, in the surplus which, according to the defendant's methods and principles, was to be distributed. * * *
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> * * * the complaint * * discloses that the defendant has never divided among its policy holders its entire surplus, but has * * * retained a portion thereof in its own hands. The purpose for which it was retained does not appear. It may have been to insure the defendant's continued solvency, * * * or because the fund so retained was dedicated to other classes of insurance, or to its annuity fund. Presumptively, it was for some proper and lawful purpose.
>
> It is manifest that by the terms of the plaintiff's policy the only right he acquired was to share in an equitable distribution of the accumulated surplus. Until a distribution was made by the officers or managers of the defendant, the plaintiff had no such title to any part of the surplus as would enable him to maintain an action at law for its recovery. We think the principles which control the disposition of the surplus earnings of a stock corporation are applicable here. In those cases it has often been held that until dividends have been declared a stockholder had no right of action at law to recover any part of the fund applicable to that purpose, and that when directors have exercised their discretion in regard thereto the courts will not interfere unless there is bad faith, or wilful neglect, or abuse of such discretion. * * *
>
> The learned appellate division, * * * held that as the fund remaining in the defendant's hands had been denominated by it as surplus, instead of a reserve fund, all the usual powers and authority of its directors and managers * * * were spent, and hence they were required, as matter of law, to distribute the entire amount among its policy holders. We are not disposed to agree with that conclusion. * * * In a sense, all the funds in the possession of a mutual insurance company, over and above its immediate and present liabilities, may be regarded as surplus, yet it is not for that reason understood as belonging to, or to be immediately distributed among, the policy holders, either by them or by the company. * *

> The word 'surplus,' like the word 'liabilities,' has acquired a special meaning in this branch of the insurance business. Under the provisions of this policy, it is plain that the surplus and the distributable surplus are regarded as two distinct and separate funds. The liabilities of a life insurance company are calculated upon rules based upon experience, which are dependent upon various contingencies. As applied in that class of insurance, the liabilities of a company do not represent the full amount of outstanding policies. So the word 'surplus' is used to designate the amount of funds in the hands of the company after deducting its liabilities, as ascertained by certain rules adopted by the insurance department for determining the value of each risk. Obviously, the word 'surplus' was * * * used in the defendant's charter or policy * * * to represent the amount which should remain after certain calculated liabilities were deducted. When that amount was ascertained, it became the duty of the officers of the defendant to determine the portion of such surplus which should be distributed and the portion which should be retained for the benefit and security of the company and its members."

There is more in the opinion that might be quoted, but enough has been taken from it to show that even under a statute which authorizes and perhaps requires a mutual life insurance company to make an equitable distribution of a surplus, no member—policy holder—has any direct equitable and proprietary interest in any specific part of the surplus until a decision to distribute it has been made by the governing authorities of the company.

We have before us a supposititious statute (for it will be remembered that we are dealing, not with the law as it is or has been, but with the law as it might be if certain provisions which have been and are in it were left out of it) which says nothing whatever about distributing surpluses, but in point of fact used the word "surplus" in a sense which shows that so far from being distributable it was intended to be held as a reserve for contingent losses.

The case also may be taken rather remotely as an index to the powers of the industrial commission as the administrator of the state insurance fund in Ohio. It will be remembered that the state insurance fund is not an insurance company, mutual or otherwise, and that the state liability board of awards or the industrial commission as its successor does not occupy the same position that the directors or trustees of any kind of an insurance company would occupy. On the contrary, they are public officers responsible primarily to the state and not to the subscribers to the state insurance fund. But even if they were the directors of a private corporation they would have no greater power to distribute the legally accumulated assets of the corporation among its members than the fundamental law of the corporation might by express provision or necessary implication give them. Therefore, the plaintiff in the case from which quotation has been made was obliged, and properly obliged, to predicate his theory for recovery upon the law which stated what distribution should be made.

Another thought may be stated here, though it may amount to a repetition of what has already been said: The state insurance fund does not constitute the capital stock of a private enterprise; it is public money in the custody of a public officer. Therefore, although the general principles of private corporation law might be sufficient to raise an implied power in the managers of a corporate fund to distribute the surplus above necessary working capital and contingent liabilities among the members of the corporation, who are in a sense the equitable owners of the fund (though as the case shows such principles could not have enough operation to give the members any absolute right to compel such distribution); yet such prin-

ciples can have no application to determine the implied power of a public officer to deal with public money, even though such public money is devoted upon principles at least approximating those of the law of trusts to certain specified objects. In other words, the right to distribute the surplus of a mutual insurance corporation arises from the fact that *it is a corporation,* and not because it is in the *insurance business.* The principles governing such cases are the same as those governing all mutual corporations, whether insurance companies or not. But the state insurance fund and its subscribers are not a corporation (See: State vs. Standard Life Association, 38 O. S. 281).

Without discussing this phase of the case further I conclude, therefore, as I have already stated, that authority to distribute a surplus the existence of which has been determined in the manner which I have described must be predicated upon some positive provision of the Workmen's Compensation Law and can not be based upon any supposed general principles of equity.

We come, then, back to the statutes in their present form and fix our attention again upon section 1465-54 with the consciousness that nothing therein, down to the third paragraph at least, can be regarded as the source of the power in question. The third paragraph of the section, which it will be remembered supplanted two sub-paragraphs of the section in its former state and quite evidently was intended to create a more elastic state of the law on the point with which it deals, is, in full, as follows:

> "3. On the first day of July, 1917, and annually thereafter, a revision of rates shall be made in accordance with the experience of said commission in the administration of the law as shown by the accounts kept as provided herein; and said commission shall adopt rules governing said rate revisions, the object of which shall be to make an equitable distribution of losses among the several classes of occupation or industry, which rules shall be general in their application."

I call attention to the grammatical structure of this section, which on its face at least is free from any ambiguity. The commission is annually to revise rates of premium. This revision is to be made in accordance with the experience of the commission; that is. the experience of the commission is to be employed for the purpose of determining what the revised rate shall be, it being the grand object of the whole process as indicated by the first clause of section 1465-54 ultimately to arrive at the lowest possible rates of premium. The revision of rates is not to be, as it formerly was, governed by statutory rules, i. e., it is not to be made by classes exclusively and it is not to give rise to certain fixed rights on the part of subscribers as formerly. Instead, the revision shall be made in accordance with rules which the commission shall adopt to govern it. I stop here to observe that the authority of the commission to adopt rules herein conferred is, so far as the law in its present form is concerned, limited to such rules as may govern rate revisions. If the language "governing said rate revisions" were not here one might easily infer that the commission might adopt such rules as might achieve the object next mentioned in the statute, whether such rules were confined strictly to the subject of rate revision or not. But the phrase just mentioned is in the statute, and I can give it effect only as a limitation, for it has that necessary effect both grammatically and logically.

The section now goes on to say that the object of the rules shall be to "make an equitable distribution of losses among the several classes of occupation or industry." Just what this means I do not feel able to say, except that it can not logically mean anything more than that the equitable distribution which shall be the object of the

rule is a distribution of losses—not moneys—in the state insurance fund, and that it is such distribution of losses as can be effected through rate revision and that only. Unless, then, the process of rate revision naturally and in and of itself results in disbursement from the state insurance fund, I can not see that anything can be claimed in favor of the power under consideration from this part of the section.

I am aware of the fact that formerly a distribution of the surplus was provided for upon a hard and fast basis; so that it can with great show of reason be argued that the legislature must have intended in doing away with these hard and fast rules to authorize a distribution of the unearned surplus upon any basis that might appear to be equitable. Here is one source of an implication—not an expression—in favor of the existence of the power. Another like implication may be drawn from the fact that the computations necessary to revise the rates might show, and in this instance have shown, the existence of the unneeded surplus which had perhaps been theretofore unsuspected. In other words, the mathematical processes necessary in order to determine the basis of rate revisions disclose the existence of the unearned premium surplus, partial distribution of which is deemed advisable. Therefore it might be argued that a rule providing for the distribution of such surplus would be a rule governing a rate revision because it would be a rule disposing of a surplus disclosed by the rate revision. If an implication in favor of the power to base a rule on this subject arises here, however, it must be conceded that it is very remote.

These implications, if they may be called such, are opposed by considerations already alluded to. The word "revision" in its natural and ordinary meaning is defined in the Standard Dictionary as follows:

> "The act * * * of revising; examination or re-examination with correction or change."

To revise rates, therefore, is to re-examine the rates as they exist in the light of new experience with a view to changing them when experience shows that they are incorrect. The rates for fixed past premium paying periods have expended their force. The thing that is done when a rate is revised is to change the rate for the next premium paying period so as to accord with correct principles. A premium rate is merely a statement of what an employer is required to pay, based on his total payroll, for insurance for a future period, as I have said. When the payment has been made the rate has served its purpose. I do not see that it can be said to be subject to revision in any proper sense.

However, I recognize the existence of some argument tending to find an implication from which the power to do the thing contemplated can be drawn.

I now proceed to the examination of further provisions of the act with a view to ascertaining whether or not such implications, if they are valid, are strengthened or weakened by anything else that appears in the law. Without quoting them for the moment I now refer the commission to sections 1465-55, 1465-56, 1465-58 and 1465-72, all of which deal in one way or another with the authority of the commission, as the state liability board of awards, to "disburse" the state insurance fund. I propose to look at these sections now with the following questions in mind:

(1) What is the state insurance fund? Is an unearned premium surplus a part of such fund?

(2) What does the word "disburse" mean as used in the law?

(3) Has the industrial commission authority to make any "disburse-

ments", under favor of a rule or otherwise, for which the law does not expressly provide?

I think it is rather clear, as I have already intimated, that the state insurance fund includes all the money which has been paid into that fund by way of premiums or otherwise. The fact that actuarial computations may show a part of that fund to be in such state as that if it were the funds of a private corporation it would be proper to distribute it as dividends does not in any way, legally or equitably, sever it from the state insurance fund and make it anything but a part of that fund. Indeed, if such undivided surplus is not a part of the state insurance fund it does not belong in the custody of the treasurer of state, for his responsibility is that of "custodian of the state insurance fund" and he has no right to hold moneys that do not constitute a part of that fund. It is clear, therefore, that for the purposes of the act the phrase "state insurance fund" can mean but one thing, viz: the moneys in the custody of the treasurer of state which have come to him by way of premium payments or by way of interest on investments of the principal fund.

The meaning of the word "disbursement" is made rather clear by section 1465-56, which provides that "all disbursements therefrom shall be paid by him upon vouchers authorized by the industrial commission of Ohio and signed by any two members of said commission * * *." It is apparent from this that the word is used in its natural and ordinary sense, as a paying out by check or voucher. It is not equivalent to the word "distribution," which may be on the credit basis. In other words, that is not a "disbursement" which does not result in an order to the treasurer of state to pay out moneys in the state insurance fund.

We come therefore to the third and most vital of the three questions last suggested. As bearing upon this question I find the following statutory phraseology:

> *Section* 1465-72.—"The state liability board of awards *shall disburse* the state insurance fund to such employes," etc.
>
> *Section* 1465-58.—"The treasurer of state shall honor and pay all vouchers drawn on the state insurance fund for the payment of such bonds, * * *."
>
> *Section* 1465-55.—"The state liability board of awards shall adopt rules and regulations with respect to the collection, maintenance *and disbursement* of the state insurance fund; one of which rules shall provide that in the event the amount of premiums collected from any employer at the beginning of any period * * * is ascertained * * * by using the estimated expenditure of wages * * * as a basis, that an adjustment of the amount of such premium shall be made at the end of each six months' period and the actual amount of such premium shall be determined in accordance with the amount of the actual expenditure of wages * * *; and, in the event such wage expenditure for said period is less than the amount on which such estimated premium was collected, then such employer *shall be entitled to receive a refunder from the state insurance fund* * * * or to have the amount of such difference credited on succeeding premium payments at his option."

Here are three classes of disbursements expressly authorized by law—indeed they are commanded by law in a sense. Looking at the subject from the viewpoint of the treasurer of the state, who is the custodian of the fund and in a sense the disbursing officer thereof, he is authorized thereby to honor vouchers for the payment of compensation claims, etc., for the purchase of bonds, and for the making

of refunders when premium amounts have been calculated on estimated payrolls and it subsequently develops that the actual payroll was less than that estimated. If this were all there would be no doubt in my mind that the subject-matter of disbursements, having been fully dealt with in the law, is one which would be withdrawn thereby from the power of the industrial commission. That is to say, the general principle of law applicable to the subject of dealing with public moneys is that the expression of one thing is the exclusion of others; so that certain disbursements being authorized, others not mentioned are impliedly forbidden. Putting it in still another way: the question of disbursement, involving as it does the paying out of moneys essentially public though charged with a particular trust, is one of power.

But on the other hand we have the declaration of section 1465-55 that the state liability board of awards shall adopt rules and regulations with respect to the subject of disbursement. The section provides that one of the rules shall deal with the subject of disbursements by way of refunder of excess premiums collected on the basis of estimated payrolls, etc., from which it might be argued that another of such rules might deal with the subject of disbursements by way of refunder in the distribution of unearned premium surpluses. The question which must be solved here is involved in some doubt; yet on the whole I am of the opinion that the authority to make rules with respect to the collection, maintenance and disbursement is not equivalent to authority to provide for other collections and other disbursements than those specifically authorized by law. For example, one of the bases of the premium is the payroll (section 1465-53, supra); it could not be claimed that the authority to adopt rules and regulations with respect to the "collection" of the state insurance fund granted in section 1465-55 is broad enough to enable the commission to reject the payroll as a proper basis for the calculation of premiums and to substitute some other criterion in place thereof. In other words, it seems to me that the authority to adopt rules and regulations conferred by section 1465-55 is limited to dealing with the mode or manner in which authorized collections shall be made. So also with the subject of disbursements. The commission may regulate the manner of disbursement, but it seems to me that it is without power to provide by rule for a disbursement which the law does not specifically authorize.

Whatever implication there is, then, arising out of the manner in which the related statutes deal with the subject of disbursements tends at least to neutralize, if not entirely to overthrow, the slight implications which can be discerned in the law in the direction of authorizing a cash distribution of the unearned premium surplus in the state insurance fund, which would be *pro tanto* a "disbursement" of the state insurance fund. Short of making a disbursement, i. e., ordering money to be paid out of the fund, I am clearly of the opinion that the broad and elastic provisions of present sub-paragraph 3 of section 1465-54 do authorize the commission to distribute such a surplus. That is to say, the commision may make the distribution by reducing premium rates or by crediting the amount of the distribution on premium payments. This it can do because such action would not go beyond the fair boundaries of a rule governing a rate revision and because, secondly, such action would not involve any *disbursement* of the state insurance fund already in the custody of the treasurer of state, the disbursing officer.

I find myself in full sympathy with the policy and purpose of the commission in its desire to make a partial cash distribution of the surplus in question. I think I realize fully the substantial advantages by way of assisting in the enforcement of the safety measures which the industrial commission is also required by law to administer which will accrue through making such a cash refunder and will probably not, in like degree at least, accrue from making a distribution in any other way. Nevertheless, as the foregoing discussion has disclosed, I can not bring my-

self to the conclusion that the Workmen's Compensation Law as framed authorizes such refunders to be made.

I therefore advise the commission that under the law as it now is the commission is without authority to order the treasurer of state to pay out of the state insurance fund any money in his custody by way of refunder to subscribers of their respective shares of a distributable unearned premium surplus in such fund; but I am further of the opinion that the power of the commission is broad enough to authorize it to distribute such surplus indirectly by allowing credits on future premium payments of such subscribers.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1561.

COUNTY RECORDER—SOLDIER'S DISCHARGE—WHAT "SOLDIER" INCLUDES—PERSON "DISCHARGED FROM DRAFT" NOT INCLUDED.

1.—*The endorsements required by sections 2758 and 2771 G. C. should be placed on a soldier's discharge, the same as upon a deed, mortgage or other instrument of writing.*

2.—*The term "soldier" as used in section 2770 G. C. includes sailors, marines and aviators, as well as those persons connected strictly with the land forces of the army. It also includes army nurses, but not those persons generally termed Red Cross nurses.*

3.—*A person "discharged from the draft" does not come within the term "soldier," as used in section 2770 G. C.*

4.—*The county recorder must index the record of the discharge as provided in section 2770 G. C. He is not entitled to charge an index fee for such services.*

COLUMBUS, OHIO, November 19, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your communication in which you submit the following questions for my opinion:

> "1. Are the endorsements required to be made by sections 2758 and 2771 G. C. necessary on the soldier's discharge mentioned in section 2770 of the General Code?
>
> 2. Does the term 'soldier' as used in section 2770 G. C. apply to sailors, marines, aviators, army nurses, or any person who has been regularly inducted into some branch of the military service which issues a discharge at the termination thereof?
>
> 3. Is the discharge known as 'discharge from the draft' such a discharge as is contemplated by section 2770 G. C. and subject to record if presented to county recorders?
>
> 4. Is the record thus made required to be indexed and can the county recorder charge an index fee or does the fee for recording as mentioned in section 2779 G. C. cover all the charge that the recorder can make to the soldier, unless, of course, he asks for certified copy?"

Section 2770 G. C., upon which your questions are mainly based, is as follows:

> "Section 2770.—Upon request of any discharged soldier and presentation of his discharge, the county recorder shall record such discharge in a book to be furnished by the county commissioners for that purpose. Such record, or a certified copy thereof, shall be received in evidence in all cases where the original discharge would be received."

Under this section, whenever a discharged soldier presents his discharge it becomes the duty of the county recorder to record the same.

Your first question is as to whether the county recorder is under obligation to make the endorsements provided in sections 2758 and 2771 G. C.

Section 2771 G. C. reads as follows:

> "Upon the presentation of any instrument of writing for filing or record, the recorder shall indorse thereon the fee charged by him for filing or recording such instrument and also enter such fee upon the margin of the folio upon which the filing or recording of such instrument is entered."

This section is broad and inclusive in its terms, providing that the recorder shall endorse thereon certain things, "upon the presentation of any instrument of writing for filing or record." I believe this language is broad enough to include the provisions of section 2770 G. C., and that the county recorder should make the endorsements provided in section 2771.

Section 2758 G. C. provides in part as follows:

> "Upon the presentation of a deed or other instrument of writing for record, the county recorder shall indorse thereon the date and the precise time of day of its presentation, and a file number. * * * When a deed or other instrument is recorded, the recorder shall indorse thereon the time when recorded, and the number or letter and page or pages of the book in which it is recorded."

This language is broad also, in that it provides: "Upon the presentation of a deed *or other instrument of writing for record.*" The discharge of a soldier comes within this language inasmuch as it is presented for record.

Of course the particular object which the legislature had in mind in the first part of section 2758 would not obtain to the discharge of a soldier. This provision evidently was made with the purpose of definitely establishing the time at which the title to property, either by deed or mortgage, passes from one party to another. The latter part of this section, above quoted, would be as necessary in the case of a discharge as in the case of a deed or mortgage. Hence it is my view that while the first part of this section does not so strictly apply to a discharge as to a deed or mortgage, yet since the language is broad and inclusive, a county recorder should strictly follow the provisions of this section.

Your second question has to do with the construction to be placed upon the term "soldier." as found in section 2770 G. C., as to whether it could be made to apply to sailors, marines, aviators or army nurses. This term is used in different ways and with various meanings.

The Century Dictionary defines a soldier as follows:

> "(a) A person in military service. One whose business is warfare, as opposed to a civilian. (b) One who serves in the land forces, as opposed to one serving at sea."

Webster gives the following definition:

> "One who is engaged in military service as an officer or private; one who serves in the army; one of an organized body of combatants."

The Standard Dictionary defines the term in this way:

> "A person engaged in military service; a member of an army or organized military body. Specifically (1) a private in a military body, as distinguished from a commissioned officer. (2) One employed in military service on land, as distinguished from one who serves at sea; as soldiers and sailors."

From the above definitions it is readily seen that this term may be used in two ways—general and special.

When we consider the intent and purpose of section 2770 G. C., it would seem that the term "soldier" therein is used in its broad and general sense; that is in reference to a person in the military service or one whose business is warfare, as opposed to a civilian. Hence "soldier" in my opinion embodies not only those serving in the land forces of the army, but sailors, marines and aviators as well.

The question as to whether said term also includes army nurses is more difficult to determine. However, it is my view that said term includes a nurse that is employed by the military authorities and who forms a part of the organized body which is engaged in warfare. But I do not believe that it includes Red Cross nurses.

Section 9373 of the United States Revised Statutes provides among other things as follows:

> "The production of the honorable discharge of a deceased man shall be sufficient authority for the superintendent of any cemetery to permit the interment."

This section also provides:

> "Army nurses honorably discharged from their services as such may be buried in any national cemetery; and if in a destitute condition, free of cost."

Section 9070 of the United States Revised Statutes provides for pensions, under certain conditions, to those who were honorably relieved from service. Of course this section applies merely to the War of the Rebellion.

From these two sections it will be seen that the discharge of an army nurse might be as valuable to her in certain instances as is a soldier's discharge to him. Therefore it would be as essential to have a record of this instrument, in case of its being lost, as to have one of the discharge of a soldier. So that using the term "soldier" in its very broad sense, as found in section 2770 G. C., and keeping in mind the purpose and intent of the legislature in enacting the same, it is my opinion that said term includes what are strictly called army nurses.

On January 5, 1905 Congress passed an act providing for the incorporation and internal government of what is known as "The American National Red Cross." This act is embodied in sections 7697 to 7704 inc. of the United States Statutes.

On April 24, 1912 Congress passed an act which makes provisions enabling the President to use the persons in the American National Red Cross in times of war

or when war is imminent, under such rules and regulations as he may prescribe. When accepted by the President of the United States, the nurses shall be transported and subsisted at the cost and charge of the United States "as *civilian employes* employed with the said forces."

It will be noted that the Red Cross nurses do not become a real part and parcel of the army but are treated as civilians, notwithstanding they are granted many privileges and perform most valuable services to the army. Hence they can not be brought within the provisions of section 2770 G. C.

Your third question is as to whether a person "discharged from the draft" comes under the provisions of section 2770 G. C. I think not. This question is rather difficult to understand, but upon inquiry I find that it has to do with those persons who have never been accepted in the service of the United States but have been discharged from the obligations of the draft owing to the fact that they are aliens or alien enemies, or on account of physical unfitness or dependency and the like. These persons have never been inducted into the army and therefore never became soldiers.

In order for any one to come within the term "soldier", as found in section 2770, it is my opinion that he has to take an oath and be inducted into the service of the United States. He then becomes a part and parcel of the army and from that time on is a soldier. But prior to the time of his induction into the army he can not in any sense be considered a soldier, although he might be subject to a future draft. So I would say that the "discharge from the draft" which a person receives on account of being an alien, alien enemy, or on account of physical unfitness or dependency, etc., does not come within the provisions of section 2770 G. C.

Your last question pertains to indexing the discharges, as to whether the recorder is entitled to a fee for indexing the same, or whether the fee provided in section 2779 G. C. covers the entire cost.

In order to understand section 2779 G. C., it will be necessary for us to also note the provisions of section 2778. These two sections read as follows:

> "Section 2778.—For the services hereinafter specified, the recorder shall charge and collect the fees provided in this and the next following section. For recording mortgage, deed of conveyance, power of attorney or other instruments of writing, twelve cents for each hundred words actually written, typewritten or printed on the records and for indexing it, five cents for each grantor and each grantee therein; for certifying copy from the record, twelve cents for each hundred words. The fees in this section provided shall be paid upon the presentation of the respective instruments for record upon the application for any certified copy of the record.
>
> Section 2779.—For recording assignments or satisfaction of mortgage or discharge of a soldier, twenty-five cents; for each search of the record, without copy, fifteen cents; for recording any plat not exceeding six lines, one dollar; and for each additional line, ten cents."

Section 2778 G. C. provides a fee not only for recording a mortgage, deed or other instrument of writing, but also for indexing it; that is, five cents for each grantor and grantee therein named. But no provision is made in section 2779 G. C. for a fee to be charged for indexing the discharge of a soldier. Hence it is my opinion that the recorder can not charge for indexing the discharge of a soldier, and that twenty-five cents was intended by the legislature to cover the entire cost to a soldier presenting his discharge for record.

You also ask whether the recorder is obligated to index the discharge. I think he is. Section 2764 G. C. provides:

"Section 2764.—At the beginning of each day's business the recorder shall make and keep up general alphabetical indexes, direct and reverse, of all the names of both parties *to all instruments theretofore received for record by him.* * * *"

That is, he must make an index of all the names of all instrumentss received for record by him. This language is broad enough to include the indexing of the discharge of a soldier. I also think section 2770 G. C. is broad enough to cast this duty upon the county recorder. The recording of an instrument is of but little use or value unless the record can readily be found. It is well known that without an index it is very difficult, indeed almost impossible, to find the record of an instrument where many instruments are recorded in the same book. Hence the duty of the county recorder to index the instrument is inferred from the duty placed upon him to record the same.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1562.

APPROVAL OF BOND ISSUE OF WAYNE COUNTY, OHIO.—$125,500.00.

COLUMBUS, OHIO, November 21, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

In Re: Bonds of Wayne county, Ohio, in the sum of $125,500, in anticipation of the collection of taxes and assessments to pay the respective shares of said county, of Chester and Plain townships, and of the owners of benefited property assessed, of the cost and expense of the construction and improvement of I. C .H. No. 141, section A.

GENTLEMEN:—I have carefully examined the corrected transcript of the proceedings of the board of county commissioners of Wayne county, Ohio, and of other officers, relating to the above issue of bonds and find same to be in conformity to the provisions of the constitution and laws of the State of Ohio relating to bond issues of this kind.

I am therefore of the opinion that properly prepared bonds covering said issue will, when the same are executed and delivered, constitute valid and binding obligations of said county .

The bond form submitted is not entirely satisfactory to me and I am therefore holding said transcript for the preparation of proper bond form.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1563.

APPROVAL OF BOND ISSUE OF ALLEN COUNTY, OHIO.—$12,480.00.

COLUMBUS, OHIO, November 23, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In Re: Bonds of Allen county, Ohio, in the sum of $12,480.00, for the purpose of creating a fund for the payment of the cost of compensation, damages and expenses of the improvement of seven certain ditches.

I have examined the transcript of the proceedings of the commissioners of Allen county in the improvement of the David Aumstutz ditch No. 571, the Henry W. Ruhlen ditch No. 572, the W. E. Boughan ditch No. 575, the W. H. Nungester ditch No. 576, the A. C. Harruff ditch No. 577, the J. L. Cochrun ditch No. 578 and the Chas. J. Gossard ditch No. 581, and in the issuance of bonds to pay the cost of compensation, damages and expenses thereof issued in anticipation of assessments levied therefor, and beg to advise that I am of the opinion that the said bonds when issued will constitute valid and binding legal obligations of Allen county, Ohio, payable in accordance with the terms thereof.

No bond form has been submitted to me for examination.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1564.

APPROVAL OF BOND ISSUE OF EDEN TOWNSHIP RURAL SCHOOL DISTRICT.—$20,000.00.

COLUMBUS, OHIO, November 23, 1918.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In Re: Bonds of Eden Township Rural School district, in the sum of $20,000, for the purpose of furnishing and equipping centralized school building in said school district.

I have carefully examined the corrected transcript of the proceedings of the board of education of Eden Township Rural School district, Wyandot county, Ohio, relating to said bond issue, and find said proceedings to be in conformity to the provisions of the General Code of Ohio relative to bond issues of this kind.

I am therefore of the opinion that properly prepared bonds covering the above issue will, when the same are properly executed and delivered, constitute valid and subsisting obligations of said school district, to be paid in accordance with the terms thereof.

No bond form of the bonds to be printed covering said issue was submitted with the transcript, and I am therefore holding said transcript until proper bond form is submitted and approved.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

1565.

APPROVAL OF ABSTRACT OF TITLE COVERING LOT NO. EIGHTY-FOUR OF WOOD BROWN PLACE SUBDIVISION, COLUMBUS, FRANKLIN COUNTY, OHIO.

COLUMBUS, OHIO, November 23, 1918.

HON. CARL E. STEEB, *Secretary Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—I am in receipt of abstract of title covering the following lot of land located in the city of Columbus, county of Franklin and State of Ohio, and described as follows:

> Being lot No. eighty-four (84) of Wood Brown Place subdivision, as the same is numbered and delineated upon the recorded plat thereof, of record in plat book 5, page 196, recorder's office, Franklin county, Ohio.

I have examined said abstract and find no material defects in the chain of title to said premises as disclosed thereby.

Said abstract does not show any liens or encumbrances on said property, except the taxes for the year 1918, which are undetermined and unpaid, and a special assessment for Ridgview road improvement amounting to forty cents and two cents interest.

I am therefore of the opinion that said abstract disclosed on November 20 ,1918, a good title in Frances G. Murrell, to the premises hereinbefore described.

I am returning herewith the abstract submitted by you.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1566.

APPROVAL OF ABSTRACT OF TITLE COVERING LOT NO. SIXTY-TWO OF WOOD BROWN PLACE SUBDIVISION, COLUMBUS, FRANKLIN COUNTY, OHIO.

COLUMBUS, OHIO, November 23, 1918.

HON. CARL E. STEEB, *Secretary, Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—I am in receipt of abstract of title covering the following lot of

land located in the city of Columbus, county of Franklin and State of Ohio, and described as follows:

> Being lot No. sixty-two (62) of Wood Brown Place subdivision, as the same is numbered and delineated upon the recorded plat thereof, of record in plat book 5, page 196, recorder's office, Franklin county, Ohio.

I have examined said abstract and find no material defects in the chain of title to said premises as disclosed thereby.

Said abstract does not show any liens or encumbrances on said property, except the taxes for the year 1918, which are undetermined and unpaid, and a special assessment for Ridgview road improvement amounting to forty cents and two cents interest.

I am therefore of the opinion that said abstract disclosed on October 15, 1918, a good title in Alice M. Legg, to the premises hereinbefore described.

I am returning herewith the abstract submitted by you.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1567.

APPROVAL OF ABSTRACT OF TITLE COVERING LOT NO. SIXTY-THREE OF WOOD BROWN PLACE SUBDIVISION, COLUMBUS, FRANKLIN COUNTY, OHIO.

COLUMBUS, OHIO, November 23, 1918

HON. CARL E. STEEB, *Secretary, Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—I am in receipt of abstract of title covering the following lot of land located in the city of Columbus, county of Franklin and State of Ohio, and described as follows:

> Being lot No. sixty-three (63) of Wood Brown Place subdivision, as the same is numbered and delineated upon the recorded plat thereof, of record in plat book 5, page 196, recorder's office, Franklin county, Ohio.

I have examined said abstract and find no material defects in the chain of title to said premises as disclosed thereby.

Said abstract does not show any liens or encumbrances on said property, except the taxes for the year 1918, which are undetermined and unpaid, and a special assessment for Ridgview road improvement amounting to forty cents and two cents interest.

I am therefore of the opinion that said abstract disclosed on October 15, 1918, a good title in Samuel T. Legg, W. A. Legg, J. N. Legg, Mary Alice Slyh and Myrtle Howard.

I will call attention to two irregularities which could be technically considered as defects in the title to this lot:

(1) The lot was transferred to Minnie Legg by Daniel W. Brown, trustee, on October 17, 1893. From an affidavit filed with the county recorder of Franklin

county for record, it develops that said Minnie Legg died intestate on the 7th day of January, 1894, and that no administration was ever had upon her estate. Said lot descended to Samuel T. Legg, W. A. Legg, J. N. Legg, Mary Alice Slyh and Rena Ortman. This affidavit further states that said Minnie Legg was never married and left no debts of any kind. The date of her death being in the year 1894, I feel justified in passing favorably upon this abstract, as the question of claims against her estate could hardly arise at this late date.

(2) A second affidavit is attached to this abstract, which shows that Rena Ortman, one of the parties to whom this lot descended, died intestate on August 21, 1918, and that no administration has been had upon her estate, nor is there any administration being contemplated. The affidavit shows that Myrtle Howard is the only heir at law of said Rena Ortman and that Rena Ortman died leaving no debts excepting those of her last illness and funeral expenses, which have since been paid in full, and that she died seized of real estate unencumbered, to the value of $3,000.00, in addition to her interest in the lot in question.

This raises a more serious question than the one referred to above, because Rena Ortman has died recently; but inasmuch as the value of this lot is not great and the affidavit sets forth there are no debts remaining unpaid and that she died seized of real estate valued at $3,000.00 and unencumbered, I feel inclined to pass favorably upon the abstract and not put said Myrtle Howard to the expense and trouble of administering upon the estate of her deceased mother.

The principle is well established, as I held in another opinion to you, that the real estate of Rena Ortman would be liable for debts in the inverse order in which it is sold. Inasmuch as this lot is the first part of her real estate to be sold and hence the real estate valued at $3,000.00 would first be held for any claims that might arise against said Rena Ortman, it is my view that the interest of said Rena Ortman in this particular lot being liable for claims is so slight that it ought in this case to be overlooked.

However, I am passing favorably upon the abstract, notwithstanding the two irregularities above set out.

The two affidavits attached to the abstract have not been recorded and I suggest that this be done and the affidavits reattached to the abstract and made a permanent part thereof.

I am returning herewith the abstract submitted by you.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1568.

CITIZENSHIP—STATUS OF AMERICAN WOMAN MARRYING FOREIGNER.

The status of an American woman who marries a foreigner is controlled by the act of March 2, 1907, Chap. 2534, (United States Compiled Statutes, 1916, Volume 4, p. 4833) and under its provisions she takes the nationality of her husband.

COLUMBUS, OHIO, November 23, 1918.

State Liquor Licensing Board, Columbus, Ohio.

GENTLEMEN:—I have your letter requesting opinion upon an inquiry from the

Stark County Liquor Licensing board. It appears that Mrs. S. is a licensee under the liquor laws of Ohio, by transfer of license from her husband, Rudolph S., who was an American citizen holding a liquor license and who died. It appears further the present licensee, Mrs. S., has now married an unnaturalized person by the name of W. The question presented is, was Mrs. S., the licensee, divested of her citizenship by her marriage to an unnaturalized man?

Article XV, section 9 of the Ohio Constitution provides for license to traffic in intoxicating liquors and for the passage of license laws by the legislature. This section among other things specifically states that license to traffic in intoxicating liquors shall not be granted when a person, who at the time of making application therefor, is not a citizen of the United States and of good moral character.

Section 1261-34 G. C., which was section 19 of the act passed by the legislature in pursuance of the constitutional provision for license to traffic in intoxicating liquors, contains among other matters the constitutional provision that license shall not be granted to a person who is not a citizen of the United States or who is not of good moral character.

The common law doctrine was that no person by an act of his own, without the consent of the government, could put off his allegiance and become an alien, and prior to the passage of the act of February 10, 1855, marriage had no effect upon the citizenship of a woman.

Following the British act of 1844, Congress passed a law (1855) under which any woman capable of naturalization under our laws, and who is married to a citizen of the United States, was deemed to be a citizen and as said by the Supreme Court in Kelley vs. Owen, 7 Wall. 496, the object of the act was to allow the citizenship of the wife "to follow that of her husband without the necessity of any application for naturalization on her part." While the federal statute had provided for naturalization by marriage, the legislation did not touch upon expatriation by marriage.

Under the facts in the present case Mrs. S. at the time of the death of her husband was a citizen of the United States and she would still remain so unless her citizenship was lost by her marriage with an unnaturalized resident alien.

In Mackenzie vs. Hare, et al., 134 Pac. 714 (1913) will be found an illuminating decision on the question under consideration. As stated by Shaw, J., at p. 714:

> "(1) The statute of persons as citizens or aliens, respectively, is controlled entirely by the Constitution of the United States and the acts of Congress passed in pursuance thereof. We must look solely to them to ascertain whether or not the plaintiff is a citizen and, as such, a voter entitled to registration.
>
> (2) And in determining their meaning and effect the state courts are bound by the interpretation put upon them by the courts of the United States.
>
> (3) Prior to any legislation on the subject by Congress, there was some uncertainty and conflict of authority concerning the right of expatriation. The question first arose in 1795, in Talbot vs. Janson, 3 U. S. (3 Dall.) 133, 162, 1 L. Ed. 540, where Iredell, J., discusses it at length, stating his conclusion to be that a citizen could not denationalize himself without the consent of his government. The other justices expressed no opinion on the point. Similar views were stated in Shanks vs. Dupont (1830) 3 Pet. 246, 7 L. Ed. 666; Inglis vs. Sailors' Snug Harbour (1830) 3 Pet. 101, 125, 7 L. Ed. 617, and in United States vs. Gillies (1815) Pet .C. C. 161, Fed. Cases No. 15,206. In Shanks vs. Dupont, the court said, per Story, J.: 'The general doctrine is that no person can, by any act of their

own, without the consent of the government, put off their allegiance, and become aliens.' And on this ground it was held that the marriage of a woman citizen with an alien did not change her allegiance to the United States. There was at that time no legislation permitting expatriation. In Stoughton vs. Taylor, 2 Paine C. C. 661, Fed. Cas. No. 7,558, it is said that the right of expatriation is fundamental and inherent. To the same effect, see Alsberry vs. Hawkins, 39 Ky. (1 Dana) 178, 33 Am. Dec. 546. Other state courts were of the same opinion. The denial of the right of voluntary expatriation was somewhat inconsistent with the laws of the United States providing for the naturalization of foreigners, the first of which was enacted in 1779. Act March 26, 1790, c. 3, 1 Stat. 103. The question was practically set at rest by the act of July 27, 1868. 15 Stat. 223, c. 249; Rev. Stat. U. S. section 1999 (U. S. Comp. St. 1901, p. 1269). The preamble thereof declares that the right of expatriation is a natural and inherent right of all people. The body of the act declares further that any decision of any officer of the government denying, restricting, or impairing the right of expatriation is 'inconsistent with the fundamental principles of this government.' This language seems to be but little more than a legislative declaration of national policy. But it clearly is operative in this, that it gives the consent of the national government to the expatriation of any citizen by his or her voluntary act. If such consent of the nation is essential to a valid expatriation, this law is evidence thereof. The absolute right of expatriation is now recognized as the settled doctrine of this country. Browne vs. Dexter, 66 Cal. 40, 4 Pac. 913; Kane vs. McCarthy, 63 N. C. 302; Burton vs. Burton, *40 N. Y. 359; 1 Abb. Dec. (N. Y.) 271; Kelly vs. Owen, 74 U. S. (7 Wall.) 496, 19 L. Ed. 283; in re: Look Tin Sing (C. C.) 21 Fed. 905. In the case last cited the court says: 'The United States recognize the right of every one to expatriate himself and choose another country.' In view of the contention to be hereafter mentioned, it is to be noticed that this case was decided after the adoption of the fourteenth amendment.

* * * * * * * * * * *

(5) The act of 1855 determines the citizenship of an alien woman who marries a citizen. We have in this case the converse of the proposition; the effect of the marriage of a native female citizen to a man who is not a citizen, but is a subject of some other country. In Pequignot vs. Detroit (C. C. 1883) 16 Fed. 211, Judge Brown, afterward Justice of the United States Supreme Court, decided that an alien woman who had become a citizen under the aforesaid act of 1855 by marrying a citizen, and who was divorced from that husband, and thereafter married an unnaturalized alien, lost her citizenship by the last marriage and again became an alien, although both she and her last husband continued to reside in this country with the intention of remaining, * *. *."

As it frequently happened, when an alien and a citizen intermarried, they returned to reside, either temporarily or permanently, to the country of the alien spouse, which gave rise to questions concerning their rights as citizens or aliens of the respective countries, from which there have ensued international disputes to be discussed and settled by diplomatic correspondence between the United States and the foreign country. Under the different phases presented by the questions, diversity of opinions appeared from time to time in the correspondence of the state department, and the courts of this country held variant views, as is shown by Van Dyne in his work on Citizenship of the United States, Chap. 3, Naturalization by Mar-

riage. As stated by this writer, the authority is not entirely uniform, but the decided weight of authority is to the effect that the marriage of an American woman to an alien confers upon her the nationality of her husband (page 138).

The situation presented a case for federal legislation and the history of what transpired is succinctly stated by Shaw, J., in Mackenzie vs. Hare, supra, at p. 716:

> "* * * All the courts have agreed, however, that the entire subject of naturalization and expatriation, including the method by which each might or could be accomplished and manifested, is a matter within the exclusive control of Congress. Under these conditions, the United States Senate, on April 13, 1906, passed a joint resolution for the appointment of a commission to 'examine into the subjects of citizenship of the United States, expatriation, and protection abroad', and make a report with proposals for legislation thereon. In June, 1906, the house committee on foreign affairs, to which this resolution had been referred, requested the secretary of state to select three men connected with the state department, familiar with the subject, to investigate and make the desired report and recommendations. In pursuance of this request, Hon. Elihu Root, then secretary of state, directed Mr. James B. Scott, solicitor for the department of state, Mr. David Jaynes Hill, then minister to the Netherlands, and Mr. Gaillard Hunt, chief of the passport bureau, to make an inquiry, report, and proposals for legislation, as requested. These gentlemen proceeded, and on December 18, 1906, they made an elaborate and exhaustive report of 538 pages, with recommendations for legislation covering all the phases of the subject except that of naturalization, which was already provided for. With this document before it, Congress framed an act which became a law on March 2, 1907. Act March 2, 1907, c. 2534, 34 Stat. 1228 (U. S. Comp. St. Supp. 1911, p. 490). This act now controls the subject referred to, including that involved in this case. Section 3 thereof is practically decisive of the case before us, and it is as follows: 'That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein.'"

At present the act of March, 1907 (section 3960, page 4833, Volume 4, United States Compiled Statutes, 1916) is controlling. Under this section Mrs. S., when she married W., an unnaturalized resident alien, thereupon took the nationality of her husband and ceased to be a citizen of the United States. She must bow to the will of the nation as expressed by the act of Congress. Said act of March, 1907, was held valid in Mackenzie vs. Hare (1915), 36 Sup. Ct. 106.

From what has been said, the conclusion is clear that Mrs. S. is not a citizen of the United States, and answering the specific inquiry it is my opinion that she was divested of her citizenship by her marriage to an unnaturalized resident alien.

Very truly yours,

JOSEPH MCGHEE,
Attorney-General.

1569.

SHERIFF—CANNOT DEMAND OR RECEIVE REWARDS—IF RECEIVED NOT PART OF FEE FUND.

Public policy and sound morals alike forbid that a sheriff should demand or receive, for services performed by him in the apprehension of thieves of automobiles and the return of the stolen property, a remuneration or reward offered by the owners of said stolen property.

COLUMBUS, OHIO, November 23, 1918.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I have your communication in which you request my opinion as follows:

> "The owners of numerous automobiles which have been stolen offered various rewards for the apprehension of the thieves and the recovery of the machines.
>
> May a sheriff, incited to activity by the offer of said rewards, legally accept the same for any services rendered in connection with the apprehension of the thieves or the recovery of the machines?
>
> If you should hold that the sheriff may legally accept such rewards, is such money a perquisite of the office under the provisions of section 2977 G. C. and should it be paid into his fee fund?"

It is my opinion that your query should be answered in the negative. Such an answer would seem to be based upon a well settled principle of law as enunciated by the courts of our state as well as the courts of most of the other states.

In Gilmore vs. Lewis, 12 Ohio 281, we find the following stated in the syllabus:

> "* * * A reward offered for the apprehension of a thief, and money, cannot be claimed by a constable, who arrests the thief by virtue of a warrant delivered to him for that purpose."

In the opinion on p. 287 we find the following:

> "It is for the apprehension of the thief, and seizure of the money; and as this was done in virtue of his office, the plaintiff must be content with his legal fees, and the reflection that he has done the state some service."

The facts upon which the court based its opinion are almost identical, if not entirely so, with the facts set out by you. You ask whether a sheriff might receive a reward for the apprehension of the thieves or the recovery of the machines, while the important fact in Gilmore vs. Lewis, supra, was the offer of a reward for the apprehension of the thief and seizure of the money.

In Brown vs. Commissioners of Sandusky county, 2 C. C. (N. S.) 381, the syllabus reads as follows:

> "It is contrary to public policy and the law of this state, and generally of other states, that an officer be paid a reward for the performance of an act which his duty as such officer requires him to perform; and where a

sheriff of a sister state arrests a fugitive from justice at the request of the sheriff of the county in this state where the crime was committed, and performs no other duty than to go to the place indicated and make the arrest and hold the accused until the arrival of an officer from this state to whom the accused is surrendered, such sheriff does no more than is strictly within the line of his duty, and is not entitled to any further compensation than the fees allowed by law, and can not recover from the commissioners of the county a reward offered by them under section 918 for the arrest and conviction of such accused person."

Throop on Public Officers, section 485, sets forth the following principle:

"It is evident from what has been heretofore said, that where a reward has been offered by the public authorities or by an individual, for a service which is within the line of the officer's duty, he can not claim the reward although he may have performed the service."

In Bank vs. Edmund, 76 O. S. 396, the following is stated in the syllabus:

"Public policy and sound morals alike forbid that a public officer should demand or receive for services performed by him in the discharge of official duty, any other or further remuneration or reward than that prescribed and allowed by law.

The office of constable is not an office created for the private emolument of the holder. Every constable is a conservator of the peace, and it is his duty, within his jurisdiction, 'to apprehend and bring to justice all felons and disturbers and violators of the criminal laws of the state,' without other reward or compensation therefor than such as is fixed and allowed by law.

A constable who, within his jurisdiction, arrests a person who has committed a felony, will, in making the arrest, be presumed and held to act in his official capacity, whether such arrest be made by him under, or without a warrant. And the law will not permit him to claim that an arrest made, pursuant to official duty, was made by him in his individual capacity as a private citizen."

In this case the court held it to be against public policy and sound morals for a public officer either to demand or receive a reward for services performed by him in the discharge of his official duty.

The courts of most of the other states are as strict in enforcing this principle as are the courts of our state.

In in re Application of Russell, 51 Conn. 577, the court held in the syllabus:

"It is well settled that a public officer whose compensation is fixed or whose fees are prescribed by law can not legally contract for or demand a larger compensation or higher fees, in the form of a reward or in any other form, for services rendered within the scope of his official duties."

In this case some police officials arrested certain persons charged with crime, while the said officers were off duty, and hence in a strict sense they owed the city no duty or obligation at that time. Nevertheless the court held that it would be against the spirit of the law and of the ordinances of the municipality for said officials to receive a reward for the performance of duties which ordinarily devolve upon them.

In Hogan vs. Stophlet, 179 Ill. 150, the court said in the syllabus:

> "The compensation of a sheriff being prescribed by law, it is against public policy to permit him to recover a reward for the apprehension in his own county of a person committing a felony there, although he exercises extraordinary diligence."

On p. 156 the court say:

> "It is against public policy to allow a man to recover a reward for doing his duty as a public officer. It is also against public policy and illegal for a sheriff to receive, for services for which fixed compensation is prescribed by law, any other or further fees, although extraordinary diligence may have been exercised by him in the discharge of his duties."

To the same effect are:

Lees vs. Colgan, 120 Calif. 262.
Gould vs. County, 85 Miss. 123.
Malpas vs. Caldwell, Governor, 70 N. C. 130.

In the light of all the above, let us turn to our statutes in order to ascertain what the duty of the sheriff is along the line suggested by you.

Section 2833 G. C. provides in part:

> "Each sheriff shall preserve the public peace and cause all persons guilty of breach thereof, within his knowledge or view, to enter into recognizance with sureties to keep the peace and to appear at the succeeding term of the common pleas court of the proper county and commit them to jail in case of refusal. * * *."

Section 2834 G. C. reads as follows:

> "The sheriff shall execute every summons, order or other process, make return thereof as required by law and exercise the powers conferred and perform the duties enjoined upon him by statute and by the common law.

I am of the opinion that the services referred to in your letter come within the provisions of these two sections and that it would be the duty of the sheriff of any county to exercise the utmost activity in the apprehension of the thieves of automobiles or the recovery of the property stolen and hence he could not receive extra compensation, by way of a reward, for the services so performed.

Without quoting the statutes it can be said that the fees of the sheriff for the performance of his statutory duties are specifically fixed by law. Hence the principles enunciated by the courts in the above cited cases cover the facts set out by you, to the effect that a sheriff is not warranted in law, either in demanding or receiving a reward offered by the owners of machines, for the apprehension of the person who steals the same and the return of the property.

The answer I have given to the query set out in the first part of your communication makes it unnecessary for me to answer the latter part of said letter, inasmuch as I have held that the sheriff can not legally accept such rewards. Notwithstanding he can not accept rewards so offered by automobile owners, what re-

sults would follow if he did accept them? Would the money be considered a perquisite of his office and thus be paid into the fee fund of the county under the provisions of section 2977 G. C.? This section reads as follows:

> "Section 2977.—All the fees, costs, percentages, penalties, allowances and other perquisites collected or received by law as compensation for services by a county auditor, county treasurer, probate judge, sheriff, clerk of courts, or recorder, shall be so received and collected for the sole use of the treasury of the county in which they are elected and shall be held as public moneys belonging to such county and accounted for and paid over as such as hereinafter provided."

It will be noted that it is the "fees, costs, percentages, penalties, allowances and other perquisites *collected or received by law as compensation*" which must be turned into the officers' fee fund of the county. The reward which the sheriff would receive would in no sense be collected or received under the provisions of law, as held in the first part of this opinion.

It is further to be noted in this section that it is the fees, etc. "collected or received by law as compensation *for services*" which is to be turned into the officers' fee fund of the county. If the sheriff accepts the rewards referred to by you, he does not accept them for services rendered in his official capacity as sheriff, for the reason that the statute specifically and definitely fixes the compensation of the sheriff for the services he must perform by virtue of his office.

Hence I answer specifically that if the sheriff, notwithstanding the principle set forth in the first part of this opinion, accepts a reward, he is not under obligation to turn the same into the officers' fee fund of the county.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1570.

APPROVAL OF FINAL RESOLUTION FOR ROAD IMPROVEMENT IN HIGHLAND COUNTY.

COLUMBUS, OHIO, November 23, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—Your letter of November 16, 1918, received, in which you enclose for my approval, final resolution for the following named improvement:

> Hillsboro-Chililcothe Road—Section C-1, I. C. H. No. 258, Highland county.

I have carefully examined said resolution, find it correct in form and legal and am therefore returning the same to you with my approval endorsed thereon in accordance with the provisions of section 1218 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1571.

APPROVAL OF BOND ISSUE OF WARREN CITY SCHOOL DISTRICT. $89,500.00.

COLUMBUS, OHIO, November 27, 1918.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In Re: Bonds of Warren City School district in the sum of $89,500 for the purpose of funding a certain indebtedness of said school district, which from its limits of taxation said school district is unable to pay at maturity.

I have carefully examined the corrected transcript of the proceedings of the board of education of Warren City School district relating to the above issue of bonds, and as a result of my examination, I find the said proceedings are in conformity to the provisions of the constitution and laws of the State of Ohio relating to bond issues of this kind.

I am therefore of the opinion that properly prepared bonds covering said issue will, when the same are executed and delivered, constitute valid and binding obligations of said school district to be paid in accordance with the terms thereof.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1572.

APPROVAL OF BOND ISSUE OF THE VILLAGE OF MEDINA, OHIO. $6,000.00.

COLUMBUS, OHIO, November 27, 1918.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In Re: Bonds of the village of Medina, Ohio, in the sum of $6,000 for the purpose of creating a fund for improving, equipping and furnishing the waterworks of said village by installing a pumping engine, pumps and other machinery therefor.

I have carefully examined the corrected transcript of the proceedings of the council and other officers of the village of Medina, Ohio, relating to the above issue of bonds, and find the said proceedings to be in conformity to the provisions of the constitution and laws of the State of Ohio relating to bond issues of this kind.

I am therefore of the opinion that bonds properly prepared according to the bond form submitted will, when the same are properly executed and delivered, constitute valid and binding obligations of said village of Medina, Ohio.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

1573.

APPROVAL OF BOND ISSUE OF THE VILLAGE OF MEDINA, OHIO. $12,000.00.

COLUMBUS, OHIO, November 27, 1918.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In Re: Bonds of the village of Medina, Ohio, in the sum of $12,000 for the purpose of creating a fund for the purpose of purchasing a fire engine, for said village.

I have carefully examined the corrected transcript of the proceedings of the council and other officers of the village of Medina, Ohio, relating to the above issue of bonds, and find the said proceedings to be in conformity to the provisions of the constitution and laws of the State of Ohio relating to bond issues of this kind.

I am therefore of the opinion that bonds properly prepared according to the bond form submitted will, when the same are properly executed and delivered, constitute valid and binding obligations of said village of Medina, Ohio.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

1574.

APPROVAL OF BOND ISSUE OF WOOD COUNTY, OHIO.—$12,000.00.

COLUMBUS, OHIO, November 27, 1918.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In Re: Bonds of Wood county, Ohio, in the sum of $12,000 for the purpose of improving inter-county highways Nos. 220 and 282 into and within the city of Bowling Green, Ohio.

I have made a careful examination of the corrected transcript of the proceedings of the board of county commissioners and of other officers relating to the above issue of bonds, and to the improvements for which said bonds are issued. I find said proceedings to be in conformity to the provisions of the General Code of Ohio, relating to bond issues of this kind, and I am therefore of the opinion that properly prepared bonds covering said issue will, when the same are executed and delivered, constitute valid and binding obligations of said county to be paid in accordance with the terms thereof.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

1575.

APPROVAL OF BOND ISSUE OF WOOD COUNTY, OHIO.—$10,000.00.

COLUMBUS, OHIO, November 27, 1918.

The Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

In Re: Bonds of Wood county, Ohio, in the sum of $10,000 for the purpose of improving inter-county highway No. 57, into and within the village of Perrysburg, Ohio.

I have made a careful examination of the corrected transcript of the proceedings of the board of county commissioners and of other officers relating to the above issue of bonds, and to the improvements for which said bonds are issued. I find said proceedings to be in conformity to the provisions of the General Code of Ohio, relating to bond issues of this kind, and I am therefore of the opinion that properly prepared bonds covering said issue will, when the same are executed and delivered, constitute valid and binding obligations of said county to be paid in accordance with the terms thereof.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

1576.

APPROVAL OF BOND ISSUE OF WOOD COUNTY, OHIO.—$25,000.00.

COLUMBUS, OHIO, November 27, 1918.

The Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

In Re: Bonds of Wood county, Ohio, in the sum of $25,000 for the purpose of improving inter-county highway No. 282 into and within the village of Perrysburg, Ohio.

I have made a careful examination of the corrected transcript of the proceedings of the board of county commissioners and of other officers relating to the above issue of bonds, and to the improvements for which said bonds are issued. I find said proceedings to be in conformity to the provisions of the General Code of Ohio, relating to bond issues of this kind, and I am therefore of the opinion that properly prepared bonds covering said issue will, when the same are executed and delivered, constitute valid and binding obligations of said county to be paid in accordance with the terms thereof.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

1577.

BOARD OF EDUCATION—SCHOOL DEPOSITORY—SURPLUS AND UNDIVIDED PROFITS NOT PART OF "PAID IN CAPITAL STOCK."

The surplus and undivided profits of a bank, whether incorporated or unincorporated, do not constitute a part of its "paid in capital stock" for the purposes of the school district depository law.

COLUMBUS, OHIO, November 27, 1918.

HON. DEAN E. STANLEY, *Prosecuting Attorney, Lebanon, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of November 12th requesting my opinion upon the following question:

> In fixing the amount of the capital of an incorporated bank for the purpose of determining its eligibility to act as school district depository, is the surplus fund to be regarded as a part of the capital?

You refer to an opinion which I addressed to you on September 4, 1917, and which is found in Volume 2 of the Annual Report of the Attorney-General for that year, at page 1658. The question which you submit was indirectly passed upon in that opinion. Inasmuch as you now raise it independently, however, I am glad to proceed to the elaboration of my views thereon.

The only statute which needs to be considered in this connection is section 7604 of the General Code, which provides, in part, that

> "no bank shall receive a deposit larger than the amount of its *paid in capital stock* * * *."

In my opinion, this phrase denotes that corporate fund which represents payments in satisfaction of subscriptions to the capital stock, and accordingly excludes all corporate funds which consist of accretions to the assets of the corporation, as earnings on the business investment, whether any part of such accretions are held and set apart as not subject to distribution among stockholders or not. In my opinion, this meaning is definitely pointed out by the use of the phrase "paid in" in the statute. If the phrase "capital stock" stood alone some doubt might be engendered as to whether its meaning would be that just indicated or some broader meaning which might include all or a greater part of the corporate assets. I think, however, that the term "paid in capital stock" means what is defined in section 3404 of Thompson on Corporation, as follows:

> "The capital stock of a corporation may be said to be the amount stated in the articles of incorporation, and which, ordinarily, is to be subscribed and paid by those who wish to join in the enterprise and become members of the corporation. * * * While this limitation of capital prescribes the amount and subdivisions of the respective contributions of the corporators to the common fund, it also determines the power that each shall exercise in the control and management of the concern, and forms a basis for the apportionment of the profits of the undertaking. Thus measured, it announces to the community at large the extent of the means contributed and enables the public to judge of its ability to meet its engagements and

> fulfil its promises. The denominated amount, whether paid in cash or not, usually stands as a security for the promises of all undertakings on the part of the corporation. As to the creditors the corporation is presumed to have sought credit based upon its supposed capital actually paid in or due from stockholders. * * * An approved definition of capital stock is that it is * * * the money contributed by the corporators to the capital, and belongs to the corporation. It is said to be the money or property put into the corporate fund by the subscribers, and which fund becomes the property of the corporation. * * * The supreme court of New Jersey, in defining it, said: 'The capital stock is the sum fixed by the charter as the amount * * * to be paid in, by the stockholders for the prosecution of the business of the corporation, and for the benefit of the creditors of the corporation.' * * * It may be wholly in cash or in property, or both, which may be counted and valued; *but any surplus which the corporation has accumulated and holds as a reserve fund, and any undivided profits that it may have, cannot be regarded as capital stock.*"

Many cases are cited by the author of the above quoted text for each of the propositions advanced by him. That principally cited in support of the last of these propositions is *People* vs. *Coleman,* 126 N. Y. 433.

Of course, decisions are not lacking in which the phrase "capital stock" standing by itself is held to mean, as I have intimated, something broader than the money contributed or to be contributed by the subscribers. But where the phrase "paid in" is used, denoting as it does the act of the subscriber in making contribution to the capital, then no other meaning than that which I have just mentioned can be given to the phrase.

There would be no doubt about this proposition but for the decision of the Common Pleas Court of Franklin County in the case of *State ex. rel.* vs. *Madison Township School district,* 15 Ohio Dec. N. P., 720, in which it was held that the statute under consideration could have application to an unincorporated bank. The entire decision of Judge Dillon on the point is as follows:

> "As to the use of the word 'capital stock' it is evident to me the meaning of the legislature was not to limit the depositories to a corporation, but that the expression clearly means 'capital'. It was the amount of the capital, not the favor to corporations that was expressed by the legislature by the language used. The other construction would possibly render it unconstitutional."

I am, of course, not disposed to question the correctness of this holding, which is to the effect that an unincorporated bank may have a capital stock. I point out that Judge Dillon ignores the presence in the section of the phrase "paid in" in connection with "capital stock", and I would say that his decision goes to the very verge of the legal principles involved and could not be used to justify the substitution of the word "assets" for the phrase "paid in capital stock." Even as to an unincorporated bank, therefore, it would follow that there must be some fund contributed by the partners as a working capital on which business is to be done before such an association of individuals could qualify under the depository act. It was so held by Hon. Timothy S. Hogan in an opinion given by him to Hon. Arthur Van Epp, prosecuting attorney of Medina county, on March 8, 1912, (Annual Report of Attorney-General for that year, page 1197). In that opinion it was held, in the face of the Nisi Prius decision which has been cited, that so-called "bank" *owned by a single individual* could not qualify as a depository; he might be able to say that

he had set aside a fund on which he would do the banking business, but he could not have anything that would satisfy the statutory requirement of a "paid in capital stock."

In an earlier opinion, following Judge Dillon's decision, Mr. Hogan had held (Annual Report for the year 1911, page 1177) that an unincorporated bank "which has capital invested in the business thereof" could quality as a depository on the basis of the capital so invested. This holding would exclude the surplus and undivided profits from consideration in ascertaining the capital, for neither such surplus nor such undivided profits constitutes an "investment" on the part of the members of the association or corporation.

In the previous opinion to you to which I have referred I intimated the view which I now repeat, namely, that the surplus and undivided profits of a bank, whether incorporated or unincorporated, do not constitute a part of its "paid in capital stock" for the purposes of the school district depository law.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1578.

COLLATERAL INHERITANCE TAX—BEQUEST OF AMOUNT TO PURCHASE CEMETERY LOT AND ERECTION OF MAUSOLEUM THEREON NOT SUBJECT TO.

A bequest to executors of a sufficient amount for the purchase of a suitable cemetery lot, the erection thereon of a mausoleum and the cremation of the remains of the decedent's previously deceased husband and those of herself, and the placing of the resultant ashes in the said mausoleum, is not subject to the collateral inheritance tax.

COLUMBUS, OHIO, November 29, 1918.

HON. HARRY M. RANKIN, *Prosecuting Attorney, Washington C. H., Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of November 12th requesting my opinion upon the following question:

> Is a bequest to executors of a sufficient amount for the purchase of a suitable cemetery lot, the erection thereon of a mausoleum and the cremation of the remains of the decedent's previously deceased husband and those of herself, and the placing of the resultant ashes in the said mausoleum, subject to the collateral inheritance tax?

In this connection you submit a copy of a last will and testament which extends such authority to the testatrix's executors and limits the amount to be expended for the lot to $3,000 and the amount to be expended for the construction of the mausoleum to $6,000.

In my opinion, that part of the decedent's estate which is used without objection by the residuary or specific legatees for the purposes thus authorized, or attempted to be authorized, is not subject to the collateral inheritance tax. In the first place, the tax is laid, not upon the estate as a whole, but upon the distributive shares which pass to particular persons whose interests are taxable. In this case it is

obvious that the funds expended for these purposes never reach the residuary legatees, i. e., they do not represent "interests passing to" such legatees. Technically, of course, all of the estate which is necessary to pay debts and funeral expenses passes to the executors for this purpose, but it is universally held under a statute like that in Ohio, which taxes distributive shares instead of the whole estate, that the succession of the executors for this purpose is not taxable. This is the same thing as a holding to the effect that debts and proper funeral expenses are to be deducted from the estate for the purpose of assessing the tax.

Here, however, we have a case where the executors are to succeed to property of the testatrix for a purpose which goes somewhat beyond the payment of mere funeral expenses; yet upon careful analysis it will be observed that the only respect in which this is so lies in the fact that the remains of the husband are to find a last resting place in the structure to be erected and are to be cremated, if possible. Clearly, if the testatrix had limited her direction to her executors to the proper interment or cremation of her own remains, their succession to so much of her estate as might have been necessary to accomplish this result would have been controlled by the principles which I have described. I would say, of course, that a bequest to executors or a granting to them of authority to expend the funds of the estate for the purpose of providing a place of interment for friends or relatives of the testatrix generally would go too far to stay within these principles. I believe, however, that it is reasonable to permit these principles to apply to the construction of a proper mausoleum and proper placing therein of the remains of a decedent and his or her spouse. The universal custom of the country in such matters commands some deference.

I may say that while the amounts named are large they are, after all, merely outside limits upon the discretion of the executors. There is nothing to show that the purchase price of the lot was not that ordinarily paid for lots of this character in the cemetery designated. There is nothing *per se* unreasonable about the construction of a mausoleum, especially in connection with the fact that cremation was desired by the testatrix. I know of no principle of law by which one could draw a dividing line between ordinary burial and cremation as a reasonable means to dispose of the remains of the decedent.

I may add that the testatrix also directs that stained glass windows shall be placed in the mausoleum, which may be regarded as an extravagance. However, considered broadly, as I feel obliged to consider the question, it is very clear that neither the executors nor any other living person will ever obtain any benefit from the expenditure of the moneys thus authorized to be spent. The case is therefore not within the policy of the statute, and upon the principle which allows a deduction of burial expenses I arrive at the conclusion that the amount actually expended by the executors for these authorized purposes is not subject to the collateral inheritance tax. See 23 L. R. A. N. S. 474.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1579.

BOARD OF EDUCATION—SCHOOLS—EFFECT OF DIPLOMA GRANTED PUPIL AFTER REPEAL OF SECTION 7744 (104 O. L. 129).

The diploma granted by the county board of school examiners to a pupil who has finished the elementary course, is sufficient evidence to show that the said course

was completed, and this is true even though said diploma was granted after the repeal of section 7744 became effective, but prior to the time the county superintendent was selected.

COLUMBUS, OHIO, November 29, 1918.

HON. CLARE CALDWELL, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR:—I have your request for my opinion, which reads:

> "Section 7744, General Code, prior to its repeal in 1914, provided that a diploma could be issued to successful applicants entitling them to enter any high school in the state.
>
> I notice that this section was repealed in 104 Ohio Laws, page 129. This repeal became effective in May, 1914. I am unable to find any provision granting the authority to a board of county examiners subsequent to this repeal. The board of county examiners of Trumbull county, under date of June 27th, 1914, issued a diploma in substance as follows:
>
> 'The board of county examiners of Trumbull county, Ohio, hereby issues to E. E. S., who has successfully passed the examination as required in section 7740 of the General Code, this DIPLOMA which entitles the holder to admission to any high school in the state as provided in section 7740 of the General Code and further entitles the holder to FREE TUITION to a high school according to section 7748 of the General Code.'
>
> I desire your opinion as to whether or not the certificate is of any value to the holder during the school year 1917 and 1918. She attended the Warren high school and the question has been raised whether or not she should pay tuition, inasmuch as she is not a resident of the school district."

Your question involves a consideration of the sections of our General Code which deal with the furnishing to pupils who have completed an elementary course, certain evidence which shows that such elementary course was completed. That is to say, prior to the enactment of what is commonly called the new school code in 1914, section 7744 G. C. provided that:

> "The board of county school examiners shall provide for the holding of a county commencement not later than August fifteenth, at such place as it determines * * * at the conclusion of which a *diploma* shall be presented to each successful applicant who has complied with the provisions hereof. Such diploma shall entitle its holder *to enter any high school in the state.*"

Said section was repealed February 19, 1914, and the repeal became effective May 20th of the same year. In the same act in which said section was repealed, there was enacted section 7747, which provided for a new method of furnishing the evidence to the pupil that the elementary course was completed. Said latter section read in part:

> "The district superintendent shall certify to the county superintendent each year the names of all pupils in his supervision district who have completed the elementary school work, and are eligible for admission to high school. The county superintendent shall therefore issue to each pupil so certified a *certificate* of promotion which shall entitle the holder to *admission to any high school.* * * *."

So that, instead of the board of county school examiners granting the pupil who had finished the elementary course a diploma, under the new order the county superintendent grants the pupil a certificate. From the fact that the diploma was granted by the county board, I must assume that the course was entirely completed and all conditions in relation thereto were fully complied with, so that the pupil was entitled to some evidence that the course had been completed, which evidence should have been either in the form of a diploma or a certificate. The new law, which provided for the furnishing of the certificate, while becoming effective May 20, 1914, provided in what manner the county board of education should be selected and how the county board of education should divide the county school district into supervision districts and how the presidents or members of the boards of education, as the case might be, should elect a district superintendent and how the county board of education should select the county superintendent, but, under the provisions thereof it was impossible to have any county or district superintendent selected on June 27, 1914, and therefore impossible to issue the evidence of the completion of such course by such pupil.

I am informed by the superintendent of public instruction that in many instances the course which was followed by your board of county school examiners was followed by other boards, and I am of the opinion that there being no other way of furnishing the evidence to such pupil, and the pupil being entitled to the same, the county board of school examiners was authorized to furnish said diploma to said pupil. If, however, the county board of school examiners had attempted to furnish the same after a district and a county superintendent had been elected, then it is my opinion that the evidence should be furnished by the county superintendent in the form of a certificate, as provided by section 7747, instead of in the form of a diploma.

Answering your question specifically, then, I advise you that the diploma granted by the county board of school examiners to a pupil who has finished the elementary course, is sufficient evidence to show that the said course was completed, and this is true even though said diploma was granted after the repeal of section 7744 became effective, but prior to the time the county superintendent was selected.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1580.

BOARD OF EDUCATION— CANNOT ENTER INTO CONTRACT TO RENT WITHOUT CERTIFICATE OF CLERK THAT MONEY IN TREASURY— BONDS CANNOT BE ISSUED UNDER SECTION 7629 TO PAY RENT OF SCHOOL BUILDING.

Before a board of education can enter into a contract to rent a certain building for school purposes at a consideration of $10,500.00, *for the entire term of five years, the certificate of the clerk must be filed showing that the money required for the payment of such obligation is in the treasury to the credit of the fund from which it is to be drawn and not appropriated for any other purpose.*

Bonds cannot be sold under the provisions of section 7629 to pay the rental of school buildings.

COLUMBUS, OHIO, November 29, 1918.

HON. DEAN E. STANLEY, *Prosecuting Attorney, Lebanon, Ohio.*

DEAR SIR:—Your request for my opinion reads:

"The board of education of the village school district of Lebanon, Ohio, desires to enter into a contract of rental of certain property to be used by them for school purposes for a term of five years at a consideration of $10,500 for the entire term. I am informed that they have not in the treasury to the credit of the contingent fund that sum of money. I desire to inquire first whether or not the provisions of section 5660 G. C. apply to such a contract and require a certificate that the money is in the treasury. Second, whether or not under section 7629 G. C. (which authorized boards of education to borrow money for the purpose of *obtaining* school property) they would be justified in borrowing sufficient money to enable them to execute this contract."

Section 7620 of the General Code provides in part as follows:

"The board of education of a district may build, enlarge, repair and furnish the necessary school houses, purchase or lease *sites therefor* or * * * rent suitable school rooms * * * for the schools under its control."

Authority is given under the above section to boards of education to lease sites for school houses and also for the rental of suitable school rooms for the schools under their control. But you say in your request that the consideration passing from the board of education to the owner of the property is $10,500, and that there is not sufficient money in the treasury to cover said amount. Section 5660 G. C. provides in part:

"* * * The board of education of a school district shall not enter into any contract, agreement, or obligation involving the expenditure of money, or pass any resolution or order for the appropriation or expenditure of money unless the * * * clerk thereof * * * first certifies that the money required for the payment of such obligation or appropriation is in the treasury to the credit of the fund from which it is to be drawn, or has been levied and placed on the duplicate, and in process of collection and not appropriated for any other purpose; * * *. Such certificate shall be filed and forthwith recorded, and the sums so certified shall not thereafter be considered unappropriated until the * * * board of education is fully discharged from the contract, agreement or obligation, or as long as the order or resolution is in force."

Section 5661 G. C. provides:

"All contracts, agreements or obligations and orders or resolutions entered into or passed contrary to the provisions of the next preceding section, *shall be void,* but such section shall not apply to the contracts authorized to be made by other provisions of law for the employment of teachers, officers, and other school employes of boards of education."

So that, before the board of education could enter into the agreement to lease said property, in which lease it binds itself to pay $10,500, it is necessary that the certificate of the clerk of the board be filed and recorded, certifying that the money is in the treasury to meet the conditions of said obligation as the same are due and payable. The renting of a school room is not made an exception to the rule above stated as is the hiring of teachers or other school employes, and I must therefore

advise you, in answer to your first question, that the provisions of section 5660 of the General Code do apply to the matter in question.

Coming now to your second question, that is, as to whether or not under section 7629 the board would be justified in borrowing sufficient money to enable them to execute this contract, section 7629 reads in part:

> "The board of education of any school district may issue bonds to *obtain* or improve public school property, and in anticipation of income from taxes, for such purposes, levied or to be levied, from time to time, as occasion requires, may issue and sell bonds under the restrictions and bearing a rate of interest specified in sections seventy-six hundred and twenty-seven. The board shall pay such bonds and the interest thereon when due, but provide that no greater amount of bonds be issued in any year than would equal the aggregate of a tax at the rate of two mills, for the year next preceding such issue. * * *."

The only question to determine in relation to this section is whether the word "obtain" applies to the rental of school property. In a contract to lease school property, the property itself is not obtained, but only the use of said property for school purposes, and I am of the opinion that the word "obtain", as used in said section, means more than to simply acquire the use of. It is used in connection with the words "improve public school property" and title and ownership is meant rather than simply the use of same for the particular purpose.

Holding these views then, I must advise you that the provisions of section 7629 are not sufficient to warrant the raising of money thereunder to cover the consideration mentioned by you for the leasing of said property.

I might suggest, however, that your board of education could take a lease, say for one year, if you have sufficient money in the treasury to pay the rental for that time, and place in said lease an option in the board of education to have the use of said property from year to year for a period of five years and, as the board of education would exercise the option each year, the certificate of the clerk could be filed that the money was in the treasury to cover the obligation of said annual rental.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1581.

ADOPTION—PARENTS MUST GIVE CONSENT, WHEN—BOARD OF STATE CHARITIES MAY GIVE CONSENT, WHEN.

1. *Under the provisions of section* 8024 *G. C., the parent or parents of a child must give consent to its adoption unless they are hopelessly insane or intemperate or have abandoned the child.*

2. *If the parent or parents have abandoned a child, then the Board of State Charities to which a child was transferred from a county children's home may give consent to its adoption.*

COLUMBUS, OHIO, November 29, 1918.

Board of State Charities, Columbus, Ohio.

GENTLEMEN:—I have your communication of November 19, 1918, which reads as follows:

"On October 1st you gave to the Board of State Charities Opinion 1490 which, among other matters, related to the power of the Board of State Charities to consent to adoption of children. We are anxious to have your advice as to the proper method to pursue for the legal adoption of children as the following listed:

1. E. M. born at county infirmary July 13, 1915; transferred by infirmary officials to the county children's home, August 7, 1916. This child remained in the home until January 11, 1918, when by action of the board of trustees of said home, in accordance with section 3252-3 (1352-3), transferred said child to the Ohio Board of State Charities which consented to the adoption of the child which was consummated in the Probate Court on August 30, 1918. No action was taken in this case by the Juvenile Court.

2. W. C. was placed by his father in a county children's home. Father did not make any provision for the child's maintenance who was, therefore, considered abandoned in pursuance to the provision of section 3093. On August 20, 1917, the trustees of said home transferred said child to the Board of State Charities. Adoption proceedings were consummated in the Probate Court April 3, 1918, the consent thereto having been given by the Board of State Charities. No Juvenile Court decision in this case.

In accordance with our interpretation of your former opinion, these adoptions have not been properly made. As we are anxious to correct such defective adoption, your advice is awaited with interest."

In answer to your communication I will consider each case mentioned separately. The child mentioned in No. 1 was undoubtedly transferred to the county children's home from the infirmary of the county under the provisions of section 3091 G. C., and was afterwards transferred from the home to the Ohio Board of State Charities. This language is used:

"No action was taken in this case by the Juvenile Court."

From this language I take it that you mean that under the provisions of section 1352-3 G. C. the guardianship of the child was transferred to your board, not by an order of the Juvenile Court, but by the trustees of the home itself.

The only case in which the Juvenile Court must consent to a transfer of a child from a county children's home to the Board of State Charities is that in which the child was committed to the home by the Juvenile court. In this case the child undoubtedly was not admitted to the home from the county infirmary upon an order of the Juvenile Court, and this would not be essential under the provisions of section 3091 G. C. and hence it would not be essential for said court to consent to the transfer of the guardianship of the child from the home to your board.

With these preliminary statements made, I will suggest that in the adoption of this child the provisions of section 8024 G. C. must be followed by the Probate Court. This section reads as follows:

"Any proper person not married, or a husband and wife jointly, may petition the Probate Court of their proper county, or the Probate Court of the county in which the child resides, for leave to adopt a minor child not theirs by birth, and for a change of the name of such child. A written consent must be given to such adoption by the child, if of the age of fourteen years, and by each of his or her living parents who is not hopelessly insane, intemperate, or has not abandoned such child, or if there are no such parents, or if the parents are unknown, or have abandoned the child,

or if they are hopelessly insane or intemperate, then by the legal guardian, or if there is no such guardian, then by a suitable person appointed by the court to act in the proceedings as the next friend of the child."

In the opinion to which you call attention, namely, Opinion No. 1490, I used the following language in placing a construction upon said section:

"We note here that if there are no parents living, or if the parents are unknown, or if they have abandoned the child, or if they are hopelessly insane or intemperate, then the consent may be given by the legal guardian of the child. It is my opinion that the board becomes the legal guardian of a child transferred to it under the provisions of section 1352-3 G. C., and therefore if the conditions obtain as set out in section 8024 G. C. then the board might give its consent, it being the sole and exclusive guardian of the child and being its legal guardian. But if it has parents living who are not hopelessly insane or intemperate, or who have not abandoned the child, and they are not unknown, then the parents would have to give the consent to the adoption of the child, even though it was at the time under the jurisdiction of the Board of State Charities."

Hence, if the child in question had a parent or parents living who were not hopelessly insane or intemperate, or who had not abandoned the child, and who were not unknown, then the parent or parents if both living would have to give their consent to the adoption of the child, and the consent of the Board of State Charities would not be sufficient in law, even though the child at the time was under the jurisdiction of said board. In the case suggested, undoubtedly the court could yet act upon the matter as based upon the petition which was filed asking for the adoption of the child. The part of the proceedings which was based upon the consent of the Board of State Charities, as I view it, would be irregular and void, but the parent or parents could file their consent by way of answer, and the court then could make the proper finding in reference thereto.

To be sure, as said in Opinion No. 1490, if the parents had abandoned the child, or if the parent or parents are unknown, then your board would have authority to give consent to the adoption of the child.

In the second case mentioned by you, it seems clear that the parents have abandoned the child; at least, the statement so indicates. If this is the case, then under the provisions of section 8024 G. C. and under the opinion heretofore rendered by me, namely 1490, your board would have authority to give consent to the adoption of the child, because it, under the law, is the guardian of said child.

Therefore, under the facts as stated in your communication, I should take it that the adoption of the second child is entirely legal.

It is my opinion that the finding of the court should be based upon the fact that the child was abandoned by its parents in order to show that your board had jurisdiction in the premises to give consent to the adoption of the child. However, this latter is merely a suggestion.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

1582.

LLOYD LOAN ACT—APPLIES ONLY TO LOANS OF MONEY—BUT REAL FACTS MAY BE INVESTIGATED.

1. *The Lloyd Loan Regulation Act applies only to loans of money, and has no application to a case where chattels are sold, and an additional or higher price charged for same than a cash price asked.*

2. *If a pretended sale of chattels is made a mere cover of a transaction the real object of which is the collection of usurious interest, the law has application thereto.*

3. *If a pretended vendor of chattels made a practice of receiving title to chattels only at the moment of sale, and for the purpose of adding a substantial amount to the price in order to make usurious profit on his money, but did not acquire title otherwise or retain the same in the event of a failure to sell, such business would really be loaning money at usurious interest, and would come within the provisions of the law.*

COLUMBUS, OHIO, November 29, 1918.

HON. P. A. BERRY, *Commissioner of Securities, Columbus, Ohio.*

DEAR SIR:—Under date of October 10, 1918, you made to this department the following statement with request for an opinion thereon:

> "An investigation made by me with reference to a possible violation of the Lloyd Loan Regulation Act discloses the following facts:
>
> Mr. Smith is a money lender, at least his office directory says so and the city and telephone directory also say the same. The county recorder's records show whole pages of chattel mortgages with hardly a consecutive number missing.
>
> These mortgages are on second-hand automobiles generally.
>
> Mr. Smith has two other places of business designated as an auto exchange or a garage as the case may be, but each are in charge of a hired man and each of whom have no scruples whatever so far as the public is concerned, generally they do not know that Mr. Smith has any interest whatever in the second-hand automobile exchanges, or garages.
>
> Mr. Smith advertises an automobile or automobiles for sale or exchange at street number so and so almost daily and his advertisements state that these machines can be secured by paying a small payment down, and time and easy payments on the balance. This time or easy payments plan appeals to prospective purchasers who visit these sales places in great numbers.
>
> The prospective purchaser goes to this second-hand place because of the easy payment plan and naturally finds what he wants providing he is satisfied that he can meet their time payments.
>
> Mr. Smith's hired man gives the customer a time payment or easy payment plan price so customers universally say.
>
> As an illustration, this hired man and the customer get together on a second-hand Ford for the time or easy payment price of $250.00 upon condition that he pay $100.00 down and $30.00 per month on the balance, $150.00. At this stage of the transaction the hired man takes his customer up to Mr. Smith's loan office to execute the papers necessary to close the deal. The customer may or he may not know what interest if any Mr. Smith has in the second-hand automobile already purchased. When he is asked to

sign a note for the agreed balance of $150.00 he finds that $45.00 has been added to the agreed balance and that the note reads $195.00. The customer asks for an explanation of the new balance and refuses to sign for the time.

Mr. Smith's explanation is that the $45.00 is his commission or his drag as the case may be. The customer signs a contract and note for the latter amount of $195.00 under protest. This note bears interest at 6 per cent. and runs long enough to liquidate it at $30.00 per month. The face of the note draws interest until the last and final payment is made instead of permitting that customer to pay interest on the unpaid monthly balance. This interest plus the commission, $45.00, or what would be termed a charge under the Lloyd act amounts to $51.34 interest, or charge for the use of the $195.00 for six and a half months, or until paid off at $30.00 per month.

The customer or borrower while he did not borrow pays $51.34 interest or charges wherein $4.90 is the maximum he can be charged by a lender not a licensee.

If Mr. Smith has not violated the Lloyd Act directly he certainly has indirectly or by subterfuge or evasion.

I do not feel that the law contemplates that he can do indirectly what he cannot do directly.

Mr. Smith's defense, if he has any, is that the commission is the difference between the cash and time price of the machine and his contract is drawn for the purpose of enabling him to make that defense.

Every borrower says, however, that the contract does not state facts incident to the agreed time price, and in connection with the transaction.

He advertises only time and easy payments plans and the customer goes to the garage and gets his time prices only and proceeds to the loan office to close the deal at the price agreed upon at the garage.

Many concrete cases like the above can be presented to the grand jury in November and will be unless your Honor feels that Mr. Smith is not liable to prosecution under the Lloyd Act or that he can escape because of the indirect procedure."

To this is attached a chattel mortgage made by one of the customers alluded to, which is upon an automobile, and upon the same sheet below the mortgage, a bill of sale, being a printed blank filled in showing a sale of the automobile by Smith, to whom you allude, to the customer who signs the mortgage.

The first section of the Lloyd Act referred to by you is as follows:

> "Section 6345-1.—It shall be unlawful for any person, firm, partnership, association or corporation, to engage, or continue, in the business of making loans, on plain, endorsed, or guaranteed notes, or due-bills, or otherwise, or upon the mortgage or pledge of chattels or personal property of any kind, or of purchasing or making loans on salaries or wage earnings, or of furnishing guarantee or security in connection with any loan or purchase, as aforesaid, at a charge or rate of interest in excess of eight per centum per annum, including all charges, without first having obtained a license so to do from the commissioner of securities and otherwise complying with the provisions of this chapter."

The complete statement of facts set out by you clearly indicates a studied and carefully prepared evasion or attempt to evade this law. It does not appear, however, from that statement affirmatively that Smith is not the owner of the automobile, although there is very strong circumstantial evidence that he is not, and that the

transaction is a mere cover for usurious loan, and without compliance with the law. If Smith is actually in the second-hand automobile business and owns these machines and sells them to customers, he cannot be required to comply with this Act. If that be the case he is practicing deceit upon the public by pretending not to own property which he really does own, and offering it for sale at a price less than he intends to accept for it, and afterwards springing the price upon a doubtful state of mind of the customer as to whether he is buying the automobile of him or borrowing the money of him.

If it can be shown that he does not own these automobiles and that he is merely in a conspiracy or combination or arrangement of some kind with the owners of the machines whereby they sell them in this manner, then he is guilty of a violation of the law. Supposing, for instance, a given customer fails to take a machine. If Smith does not own that machine afterward his attempt was a violation of the law, and he is engaged in the business of loaning without complying with the law. Or even if he did not own the machine up to the moment of the sale, but by an understanding between him and the owner of a machine, the title passes through him to the customer, still what he is doing is an evasion of the law. But if the fact is as indicated in your statement that the man in charge of the garage or the automobile exchange, is merely Smith's employe, and Smith does own the machine all the time, then he is as to this transaction a dealer in the machines and not a loan shark, although he practices deceit to spring the price. Reprehensible as this conduct would be, it could not be brought within the letter of the law by an interpretation.

It would seem that it would not require a very great amount of detective work to ascertain the ultimate facts as to the ownership of this property. If he is the owner, it presents a case where nobody can get at him but the Legislature, which will soon be in session.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General

1583.

STATE HIGHWAY COMMISSIONER—MAY PURCHASE TOPOGRAPHIC MAPS WHEN.

Under the provisions of section 1180 *G. C. the state must furnish all necessary supplies for the office of the state highway department and under this provision topograhpic maps could be purchased, if necessary, to enable the state highway commisioner to perform the duties of the office, and the same can be paid for from the appropriation made for office supplies.*

COLUMBUS, OHIO, November 29, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR: --I have your communication reading as follows:

"For your information I beg to quote the following from the Journal of the Highway Advisory Board as of November 12, 1918:

'War Department—Authority requested to purchase topographic maps for compilation of statistics in preparation of military maps.

Chief Engineer Bruning referred to the action of the commissioner, approved by the board, as of September 11 in undertaking the preparation of statistics requested by the war department for preparation of a military map of Ohio.

Mr. Bruning stated that it is now desired to purchase three sets of topographic maps at a cost of approximately $75.00 for the purpose of properly preparing this compilation.

The secretary was authorized to request the advice of the Attorney-General of Ohio as to whether or not this department has authority to purchase these maps for this purpose, and if the department has authority from what fund payment for same shall be made.

The secretary was further authorized to send the Attorney-General copy of the entry on the Journal of the advisory board as of September 11, relating to this matter.'"

The only theory, as I view it, upon which you would be justified in purchasing the topographic maps referred to would be in considering them necessary office supplies to assist you to perform the duties of your office. This is not a legal proposition for this department, but a matter for you to decide.

Section 1180 G. C. reads as follows:

"The state highway commissioner shall be provided with suitable rooms for the use of the department. Such office shall be open at all reasonable times for the transaction of public business and be furnished by the state with necessary stationery, office supplies, fixtures, apparatus for testing material, engineering instruments and supplies. The salary of the state highway commissioner shall be four thousand dollars per annum. In addition to his salary, he shall be allowed his actual and necessary expenses incurred in the discharge of his official duties."

This section provides that the state must furnish the office of the state highway commissioner "with necessary stationery, *office supplies,* fixtures, apparatus for testing material, engineering instruments and supplies." Hence if the topographic maps are necessary to assist you in performing the duties of your office, you would be justified in law in purchasing the same.

You also inquire from what fund the money would be taken to pay for said topographic maps.

In 107 O. L. 292-293, we find that the General Assembly appropriated the sum of seven hundred dollars for office equipment of the state highway commissioner for the year 1918-1919. As I view it, the money necessary to purchase said topographic maps, should you decide to purchase the same, would be paid from the appropriation so made by the General Assembly. Under the law the state must furnish the highway department necessary office supplies. If topographic maps are essential to the performance of the duties of said department, there is authority in law for the purchase of the same, which would be paid for from the appropriation made by the General Assembly for the office of the state highway department.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1584.

STATE HIGHWAY COMMISSIONER—CANNOT COMPEL NEW OR ADDITIONAL BOND FOR HIGHWAY IMPROVEMENT.

1. *There is no provision in law whereby the state highway commissioner can compel a contractor for a road improvement to give a new or additional bond even though the surety on the original bond should become insolvent or the company giving the bond should cease to do business in this state.*

2. *The state highway commissioner owes material men and laborers no duty in the way of requiring a bond of the contractor, other than to comply with the provisions of section 1208 G. C. to the effect that he shall require a bond with sufficient sureties before entering into a contract for a road improvement.*

COLUMBUS, OHIO, November 29, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of November 12, 1918, which reads as follows:

> "For your information, I beg to quote the following from the Journal of the highway advisory board as of November 12th, 1918:
>
> 'Cuyahoga County—Section "a", I. C. H. No. 3, Cleveland-Sandusky Road—Letter from the Ohio Coal and Supply Company regarding insufficiency of bond.'
>
> The following letter from the Ohio Coal and Supply Company under date of November 1st was presented:
>
> 'We understand that the American Fidelity Company, Montpelier, Vermont, has ceased doing business, due to the state authorities of Vermont, and that the paving of Cleveland-Sandusky road, section 3, under contract with the Cleveland Trinidad Paving Company, dated November 1st, 1916, county contract number 3068, state contract number 1095, is now being done without any bond covering.
>
> As we are interested to the extent of furnishing the contractors with considerable material for this work, we will hold the state and county authorities liable unless another bond is given to cover the work.
>
> Please acknowledge receipt, and oblige,
>
> Yours very truly,
> The Ohio Coal and Supply Company.
> (Signed) E. E. Ellsworth.'
>
> The secretary was authorized to request the advice of the Attorney-General of Ohio as to the proper procedure to be followed in the matter."

Your communication naturally divides itself into two different propositions, first the relationship which your department sustains to the contractor, the Cleveland Trinidad Paving Company, as to whether you could demand the said contractor to give a new bond; and secondly, your relationship to the Ohio Coal and Supply Company as to whether you owe it any duty or consideration under the facts as set out in your communication.

The question as to whether you could compel a contractor to give an additional bond was carefully considered by my predecessor, Hon. Edward C. Turner, in an

opinion rendered by him to you as of date August 9, 1916, and found in Annual Reports of the Attorney-General, 1916, Volume 2, page 1346. In this opinion he arrived at the following conclusion:

> "There is no provision in either section, either requiring or authorizing the taking of an additional or supplementary bond in case the surety on the original bond should, subsequent to the execution of such bond, become insolvent or the affairs of a surety company signing such bond be thereafter placed in the hands of a receiver. Not only is this true, but it is also true that no method exists by which a contractor could be forced to give an additional or supplementary bond. It might be, indeed, that the contractors who have been successful in their work and who have found their contracts profitable would be willing to give additional or supplementary bonds if so requested, but contractors who find themselves so placed may be reasonably expected to complete their work and in such instances there will be no necessity for resorting to the bond. Contractors who through mismanagement, or otherwise, are not succeeding with their work and who are finding the same unprofitable would, especially if financially irresponsible, welcome a forfeiture of their contracts and if such contractors were to be requested to give additional bonds and were to refuse to do so, there would be no method of compelling compliance on their part with such a request and it might be reasonably expected that they would refuse to so comply. A forfeiture of their contracts under such circstances and for the sole reason that they had refused a supplemental bond, might, and indeed probably would, have the effect of releasing the surety on the original bond. It is therefore my opinion that there is no action which you can take at the present time in the premises."

The provisions of law insofar as they relate to the matter under consideration, are the same now as they were at the time Mr. Turner rendered his opinion. I am of the opinion that Mr. Turner was correct in his conclusion, and therefore advise you that you are not in a position to compel the Cleveland Trinidad Paving Company to give additional bond.

The question then arises as to whether you owe any duty in any respect to the Ohio Coal and Supply Company which is furnishing material to the contractor for the construction of the road mentioned in your communication.

It is my opinion that you owe no duty whatever to this company. The material furnished by this company to the contractor prior to the time that the American Fidelity Company ceased to do business in the state, was furnished in view of the bond, and therefore a company could not look to the state or to the county in reference to any liability for material so furnished. The material that has been furnished, if any, since the time that the American Fidelity Company ceased doing business in the state, has been furnished in the light of our statutes, which make no provision whatever for the demanding of an additional bond upon the part of the contractor, and hence neither the state nor the county interested would be liable for such material.

I might say further in reference to this matter that even though the state should be able to get additional bond from the contractor, yet this bond would not cover obligations entered into prior to the giving of the bond, hence at all events the material which is already furnished by the Ohio Coal and Supply Company would not be covered by a new bond.

If the said company continues to furnish material to the contractor, it does it in the light of the fact that the contractor has no bond, and hence the said com-

pany could not look to the state or to the county for payment, provided the contractor fails to pay for any material that may be so delivered.

In view of all the above, it is my advice to you that you permit the Cleveland Trinidad Paving Company to complete the work in accordance with its contract unless you are compelled to take it over under and by virtue of the provisions of section 1209 General Code.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

1585.

ROADS AND HIGHWAYS—PERSON USING SAME WITHIN LIMITS OF SECTION 7246 TO 7249 CANNOT BE ENJOINED NOR BE HELD LIABLE FOR DAMAGES.

If a person using the improved public streets, highways, bridges and culverts within the state keep within the limits and restrictions as set out in section 7246 to 7249 G. C., inclusive, he cannot be enjoined from the use of said streets and roads, neither can he be held in damages for the destruction of the same, even though the use to which he puts them is more than ordinarily destructive of the said streets and highways.

COLUMBUS, OHIO, November 29, 1918.

HON. HARRY S. CORE, *Prosecuting Attorney, Ottawa, Ohio.*

DEAR SIR:—I have your communication of recent date which reads as follows:

> "In a certain road from the south township line of Palmer township, directly through Palmer township to the north line, which is the county line between Putnam and Henry counties, Ohio, is located a public highway designated as 'Main Road, No. 6B and inter-county highway No. 491' in said Putnam county, Ohio.
>
> Said road has been improved by hauling stone and placing it on the road the full length of the part described herein, and used, causing the stone to become compact and making an improved road usually described as a traffic-bound pike, said road not having been taken over by the state nor having been improved in any manner other than above described.
>
> A concern at Napolean, Henry county, Ohio, purchased some forty acres of timber near the south end of the above described road, and are now removing the timber from said land with a motor truck and trailer. From the information I am able to get, the width of tire used by the truck would permit them to haul more than 12 ton, including the weight of the vehicle, and my construction of this law would be that they would not be entitled to haul more than 12 ton including the weight of the vehicle, without the consent of the county surveyor, and I will say now that they have not received the consent of the county surveyor for the hauling of a load of more than 12 ton.
>
> It appears from the road that the load hauled is much in excess of the strength of the road, and at numerous places the said pike has been broken

through and the road is rapidly being destroyed. It is almost impossible to determine the weight being moved over the road on these vehicles, and the question I wish to satisfy myself is, whether or not this concern is entitled to destroy the roads of Putnam county, or the road herein described, although they are loading their conveyance or vehicle within the sections provided in chapter 10, to-wit, 7246 to 7251 inclusive, without a remedy to either stop the destruction of the road or a recovery of damages."

Your question, as I understand it, is to this effect: Suppose persons using an improved street, highway, bridge or culvert within the state should comply strictly with the provisions of sections 7246 to 7249 G. C., but notwithstanding this fact the use to which the roads are put should be very destructive of the same, could said persons be enjoined from using the roads or would they be liable in damages for the destruction of the same. Without quoting same, these sections provide briefly as follows:

Section 7246 G. C. limits the total weight, including weight of vehicle, to 12 tons, when used upon the improved public streets, highways, bridges or culverts within the state.

Section 7247 G. C. provides that a vehicle of a greater weight may be used providing consent be obtained from the county surveyor of the county.

Section 7248 G. C. provides that the maximum weight of loaded vehicles shall vary in accordance with the width of the tire surface used upon the wheels of said vehicle.

Section 7249 G. C. provides the rates at which vehicles may travel over improved streets and roads, the rate depending upon the weight of the load carried. Now suppose any one using the improved streets and highways of the state keep strictly within the provisions of these four sections, but nevertheless greatly damages the same, could he be enjoined from the use of said roads or streets or be compelled to pay damages for the destruction of the same. It is my opinion that he could not be enjoined from the use of the improved streets and roads of the state under such conditions, neither could he be held in damages for the destruction of the improved streets and highways under such conditions. It might be held that under the principles of the common law, the traveling public would be compelled so to use the improved streets and highways of the state as not to unduly destroy them and thus do damage and injury to the public in general, but inasmuch as the legislature has seen fit to speak upon this question and has seen fit to lay down certain limits and restrictions within which the traveling public must keep themselves, it is my opinion that the matter is taken outside the domain of the common law and is strictly controlled by statute. It would seem that the legislature meant to give the traveling public the right to use the improved streets and highways of the state, provided they should keep within the limits and restrictions set out in these sections. This seems clear from the fact that the legislature laid down certain conditions and restrictions beyond which the traveling public must not go. While they cannot go beyond these limits and restrictions, it was evidently the intention of the legislature that the traveling public might use the improved streets and highways of the state provided they keep within these limits and restrictions.

Hence, answering your question specifically, it is my opinion that if a person complies strictly with the provisions of sections 7246 to 7251 inclusive, he cannot be enjoined from the use of the improved streets and highways of the state, neither can he be held in damages for the destruction of the same, and this even though the use to which he puts said highways is more than ordinarily destructive of the same.

In passing I might say that I note you suggest in your request that possibly trucks of greater than ten ton weight are being used upon said highway without

the consent of the county surveyor of the county. Of course if this be correct, the parties would be liable under the law. The above opinion is based upon the theory that the parties in question are keeping strictly within the provisions of the sections above referred to.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1586.

ELECTIONS—ABSENT VOTER—TIME WITHIN WHICH TO APPLY FOR BALLOT.

An absent voter has a right to make application for an absent voter's ballot at any time up to midnight of Saturday, where an election is held on Tuesday.

COLUMBUS, OHIO, November 29, 1918.

HON. E. E. LINDSAY, *Prosecuting Attorney, New Philadelphia, Ohio.*

DEAR SIR:—Your inquiry of November 12, 1918, is received. You submit the following question:

> "For the benefit of deputy state supervisors of elections I would like for you to interpret section 5078-1 as to the latest date before a general election a person may apply for an absent voter's ballot. In other words, is Friday or Saturday the latest date under this section that an application may be made for such a ballot?"

The act to which you refer is found in 107 O. L., page 52. Section 5078-1 of said act provides in part as follows:

> "It shall be lawful for any qualified elector who finds that he will be unavoidably absent from his home precinct on the day of any general, special or primary election to apply to the clerk of the board of deputy state supervisors of elections of his home county in writing or in person not earlier than thirty days and not later than three days prior to election day, stating the fact of his unavoidable absence from his precinct on election day and making application in writing for an absent voter's ballot. * * *."

The phrase to be construed is "not later than three days prior to election day." The rule to be applied in computing this time has been determined by the Supreme Court in the case of State vs. Board of Deputy State Supervisors and Inspectors of Elections, 93 O. S., 14, wherein the syllabus reads:

> "Under the provisions of section 5004 G. C., the period for filing nominating petitions does not expire until the end of the sixtieth day previous to the day of election, and it is the duty of the board of deputy state supervisors of elections to provide opportunity for the presentation of such petitions up to midnight of that day.
>
> Where a statute requires that an act be performed a fixed number of days previous to a specified day, the last day should be excluded and the

first day included in making the computation.

A nominating petition of one seeking to qualify as a candidate in an election to be held on November 2, may be filed as late as September 3."

On page 17 of the Opinion Matthias J. cites from the case of Cosgriff vs. Election Commissioners, 151 Cal. 407, wherein the phrase to be construed was "not less than twenty days before the day of election." And the phrase to be construed in the above case was that "nomination papers of candidates shall be filed * * * not less than sixty days previous to the day of election."

The above phrases are like the one now under consideration and in computing time, the last day shall be excluded and the first day included in making the computation. Under this rule Monday, where an election is held on Tuesday, would be the first day prior to the election, Sunday the second day prior thereto and Saturday the third day.

Therefore, an absent voter has a right to make application for an absent voter's ballot at any time up to midnight of Saturday, where an election is held on Tuesday.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1587.

COUNTY AUDITOR—NOT AUTHORIZED TO TRANSFER REAL ESTATE FROM ONE CORPORATION TO ANOTHER, WITHOUT EVIDENCE OF TITLE.

The county auditor is without authority to make transfer of real estate from an old corporation to a reorganized corporation, unless such corporation presents to the county auditor evidence sufficient under the statutes to show title to the real estate to be transferred to be in the new corporation.

COLUMBUS, OHIO, December 4, 1918.

HON. C. G. ROETZEL, *Prosecuting Attorney, Akron, Ohio.*

DEAR SIR:—I am in receipt of your letter in which you submit the following inquiry:

"Some 21 or 22 years ago a corporation was organized and formed in this city, known as The Peterson & Wright Company. Some years later, to-wit, about seven years ago, this company was reorganized and took the name of The Wright-Eddy Company. This existed for about one year, and the company was again reorganized and known as the W. E. Wright Company, and are now doing business under this name.

At the time of these various reorganizations, the real estate held by these corporations was not changed in name on the tax duplicate. The W. E. Wright Company has now made a request upon our county auditor that all of this property be placed on the tax duplicate in the name of the W. E. Wright Company. The county auditor is asking an opinion from this office as to whether or not this can be done without deeds being presented to him, showing a transfer of the property. I can find no statutory

authority for such a transfer, and even if there was, inasmuch as a number of the officers of the old organization are now dead, with the exception of Mr. Wright, I doubt if there is an officer living who was in the old organization.

My opinion was that this could be brought about by some action to quiet title, but The W. E. Wright Company, through their attorneys, seem to think there might be something done in another way, but they do not seem to be able to suggest a manner in which it can be done. Will you kindly inform me whether, under the existing conditions, the auditor has a right to make this transfer without a petition being filed in our Common Pleas Court to quiet title, or if there is any authority by which the auditor can transfer this property now in the name of the two previous corporations and place it on the duplicate in the name of The W. E. Wright Company, unless deeds setting forth a transfer of this property are filed with him."

The duties of the county auditor in reference to the transfer of property upon the tax duplicate is prescribed by section 2573 General Code, which reads as follows:

"On application and presentation of title, with the affidavits required by law, or the proper order of a court, the county auditor shall transfer any land or town lot or part thereof charged with taxes on the tax list from the name in which it stands into the name of the owner, when rendered necessary by a conveyance, partition, devise, descent or otherwise."

Under this provision it is the duty of a person or a corporation desiring to have property transferred on the tax duplicate, to make application therefor to the county auditor and to make presentation of title to the lands to be transferred.

In the case of Cincinnati College vs. LaRue, 22 O. S., 469, the second branch of the syllabus reads in part:

"Before the auditor of a county can be required to transfer real property from the name in which it stands charged on the duplicate, to the name of a party to whom it has been assigned or conveyed, evidence of the title of the party, to whom the transfer is to be made, must be presented to the auditor."

The same conclusion is reached in the case of Dye, Auditor, vs. State, 73 O. S., 231, wherein the second branch of the syllabus reads as follows:

"Where the vendee of the coal underlying lands, desires to have the part of the premises transferred into his name on the tax list of the county, it is incumbent upon him, under the provisions of said section, to present to the county auditor proper evidence of his title and make satisfactory proof to him of the value of such coal as compared with the valuation of the whole lands as charged on the tax list; and a written agreement between the vendor and vendee of the coal as to a division of the valuation on the tax list between them, is not binding upon the auditor. The evidence on which he is to act is prescribed by the statute, and he can be compelled to act on no other."

These cases clearly show that before the county auditor can be required to make a transfer of real property upon the tax duplicate, evidence of title must be produced. He cannot make a transfer upon any other conditions.

You state in your letter that the corporation in question was reorganized. By this, I understand that a corporation was organized, and that it took over the assets in some manner of the old corporation. The old corporation did not, as I take it from your letter, merely amend its charter by a change of name.

The effect of a reorganization is stated at page 281, Volume X of Cyc., as follows:

> "It is often a matter of great importance to determine whether the effect of a statutory provision or a corporate act is to revive and continue an old corporation or to create a new one. If it has the latter effect, the new corporation does not possess the rights and is not subject to the liabilities of the old one, but if the effect is simply to renew or continue an old corporation its identity remains unchanged and its liabilities unimpaired."

It appears from this citation that where a new corporation is formed, such corporation does not possess the rights and is not subject to the liabilities of the old one.

At section 5985 of Thompson on Corporations, second edition, it is stated:

> "So a new corporation organized by the officers and stockholders of an existing corporation for the purpose of acquiring its property, but which did not acquire the same by purchase at judicial sale, was held not a continuance of the old corporation."

Where a new corporation is formed, such corporation does not, as a matter of course, succeed to the rights and property of the old corporation. There are several methods of affecting a reorganization. Under each method there is usually an agreement entered into by which the property of the old corporation is transferred to the new and the stockholders of the old corporation secure for their rights, stock in the new corporation.

Whatever the method of reorganization may be, the property cannot be transferred from the old corporation to the new without some agreement of transfer. Where property consists of real property, under the statutes of frauds, it is necessary that the conveyance be made in writing.

Therefore, the county auditor is without authority to make transfer of real estate from an old corporation to a reorganized corporation, unless such corporation presents to the county auditor evidence sufficient under the statutes to show title to the real estate to be transferred to be in the new corporation.

Yours very truly,

JOSEPH MCGHEE,

Attorney-General.

1588.

MUNICIPAL CORPORATION—COUNCIL CANNOT ISSUE CERTIFICATES OF INDEBTEDNESS AGAINST TAX COLLECTION, WHEN.

The council of a municipal corporation may not under Section 3913 G. C. lawfully issue certificates of indebtedness against the tax collection for the first half of a given year and apply the proceeds to defray current expenses of the preceding fiscal year.

COLUMBUS, OHIO, December 4, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I have letters from you under recent dates raising the same general question, which may be phrased as follows:

> May the council of a municipal corporation under favor of Section 3913 G. C. lawfully issue certificates of indebtedness against the tax collection for the first half of a given year, and apply the proceeds to defray current expenses of the preceding fiscal year?

It appears that this practice has grown up to a considerable extent within the past year or so and that, doubt existing in your minds as to its legality, you desire my opinion as a guide for the future.

Section 3913 General Code provides as follows:

> "In anticipation of the general revenue fund in any fiscal year, such corporations may borrow money and issue certificates of indebtedness therefor, signed as municipal bonds are signed, but no loans shall be made to exceed the amount estimated to be received from taxes and revenues at the next semi-annual settlement of tax collections for such fund, after deducting all advances. The sums so anticipated shall be deemed appropriated for the payment of such certificates at maturity. The certificates shall not run for a longer period than six months, nor bear a greater rate of interest than six per cent., and shall not be sold for less than par with accrued interest."

The section as I have quoted it was enacted as a part of the Municipal Code of 1902 (Section 95-96 O. L. 51). Prior to that time Section 2700 Revised Statutes had contained a similar provision. It provided as follows:

> "Loans may be made by municipal corporations in anticipation of the general revenue fund; but the aggregate amount of such loans in any fiscal year shall not exceed, * * * in a village, fifteen thousand dollars, in a city of the second class, fifty thousand dollars, in a city of the third grade of the first class, one hundred thousand dollars, and in any other city of the first class two hundred thousand dollars; provided, however, that no new loans shall be made until the loan previously made under this section has been fully paid and canceled; and provided further, that no loan as aforesaid shall be made during any fiscal year in anticipation of such fund exceeding the amount of taxes, and revenue from other sources, due and payable into the fund *for the fiscal year.*"

Had your question arisen under Section 2700 Revised Statutes its answer would be pretty obvious. The borrowing power therein provided for was intended as an expedient whereby money actually levied for the purposes of a given fiscal year could during that year be brought into the treasury in advance of its collection, and applied to the proper purposes for which it had been levied. Section 2700 R. S. was never intended as a means whereby revenues levied for a subsequent year could be applied to the needs of a current year.

Putting it in another way: That section did not afford a method of borrowing money for real deficiencies, but only a method of bringing estimated revenues into the treasury in advance of their collection for expenditure for the purposes for

which they had been levied. This is made clear by the whole tenor of Section 2700 R. S., and particularly by the following language thereof:

> (1) First, the amount was limited not only by the precise enumeration of the various classes of municipalities, but also by the amount payable into the fund "for the fiscal year." That is, at a time in the fiscal year when no more revenue remained payable into the general revenue fund for that year, the last tax collection for that year having been made and no miscellaneous revenues being in sight, this limitation would prevent the making of loans.
>
> (2) The very word "anticipation" carries something of the same idea. While I am unable to find any judicial definition of this word in a context like the one now under consideration, it seems to me that its use implies that the revenues anticipated are to be expended for the purposes for which they were levied.

The practice of issuing bonds or notes in anticipation of special taxes is well established in the statutory law of this state, especially with regard to counties. I would have no difficulty in holding as to a special tax that a loan made in anticipation of it could not be expended for any other purpose than that for which the tax is levied. Now, in a sense, all tax levies are special; that is, they all relate to the expenditures to be made in a particular year. But whether or not it is accurate to speak of a general tax levy as special in this sense for every purpose, Section 2700 R. S. clearly made them so for its purpose.

This was the view apparently taken of Section 2700 by the Circuit Court of Warren county in *Dunham* vs. *Opes,* 3 C. C. 274, 282, in the opinion in which the following dictum is found:

> "We took it for granted that this section (2700 R. S.) which allows loans to be made in anticipation of *the general revenue fund levied for the current year* related to the same fund for which the council of a village, under the provisions of Section 2682 was authorized to levy a tax * * * 'for the general purposes of the corporation' * * * and distinguished from those taxes which it was authorized to levy for any of the purposes mentioned in Section 2683 * * *."
>
> (Italics are in the original)

It must be conceded, of course, that Section 3913 General Code, as adopted in 1902 and since codified, is dissimilar in phraseology to Section 2700 R. S., and can not be considered as a mere revision or codification of it; yet I think the same essential meaning is carried by Section 3913 G. C. as was expressed in Section 2700 R. S.

In the first place, we have again the phrase "in anticipation," which, as I see it, implies that which I have previously expressed. I may add at this point that neither Section 3913 G. C. nor Section 2700 R. S. contains any explicit expression regarding the *purpose* for which the loans may be made. Yet it would not be claimed, of course, that such loans might be made for any municipal purpose, and indeed this was one of the points directly involved in *Dunham* vs. *Opes,* supra, arising under Section 2700 R. S. On the contrary, it would have to be conceded that the purpose for which the loan is made must be one which at least pertains to the general revenue fund of the municipality; that is to say, it would not be lawful to borrow money in anticipation of the general revenue fund and expend it for a special purpose outside the pale of the general revenue fund. But I think, as I

have already stated, that more is implied here, not by the word "anticipation" itself, but by the phrase "in any fiscal year" which immediately follows the phrase "general revenue fund" in the first clause of Section 3913. What may be anticipated? Not the general revenue fund as a continuous fund, but that fund *"in any fiscal year."* In other words, the general revenue fund for each fiscal year is considered as a special and distinct subject of anticipation for the purpose of Section 3913.

We have it, then, that the word "anticipation" expresses the purpose for which the borrowing may be made and means that the loan may be made for any purpose for which the anticipated revenues could be expended lawfully; we have it also that the revenues to be anticipated under Section 3913 are those for a given fiscal year; it must follow, therefore, that the purpose of the borrowing must be one within the scope of the levy anticipated, i. e., it must be an expenditure of the fiscal year for which the levy is made.

This view is enforced by all that follows in Section 3913. For example, it is therein provided "that the sums so anticipated shall be deemed appropriated for the payment of such certificates at maturity." Ordinarily, an appropriation can be lawfully made only from a fund which is susceptible to such appropriation. It would not be lawful, for example, to appropriate for sinking fund purposes from the general revenue fund. The very idea of a fund carries with it a partial appropriation, in that the fund may be appropriated and expended only for the purposes for which it was levied. This result follows from the plain meaning of the terms under discussion, but it is enforced by the provision of Article XII, Section 5 of the Constitution, which provides, in part, as follows:

> Every law imposing a tax shall state distinctly the object of the same, *to which only it shall be applied."*

So that it would take at least very clear and unequivocal language to permit the result that moneys levied for the purposes of a given fiscal year could be appropriated for any other purpose than those for which they were levied; and the similar purposes of a different fiscal year would be other purposes within this principle.

Again, Section 3913 G. C. contains, in different form to be sure, practically the identical provision of old Section 2700 R. S. which made that section so clear on the point under consideration. I refer, of course, to the limitation upon the amount of the loans which may be made. This part of Section 3913 is as follows:

> "No loans shall be made to exceed the amount estimated to be received from taxes and revenues at the next semi-annual settlement of tax collections *for such fund,* after deducting all advances."

In order to get the full meaning of this clause the antecedent of the word "such" must be found. This appears to be the "general revenue fund in any fiscal year" as referred to in the first clause of the section. Thus expanded, the context now under examination would read as follows:

> "No loans shall be made to exceed the amount estimated to be received from taxes and revenues at the next semi-annual settlement of tax collections for the general revenue fund in any fiscal year."

We still have a slight ambiguity which leads me to say that, in my opinion, the phrase "in any fiscal year," used in connection with the phrase "in anticipation" as it is in the first clause of Section 3913 G. C., means substantially the same thing as was meant by the last clause of Section 2700 R. S. when it said:

> "No loan shall be made during any fiscal year in anticipation of such fund exceeding the amount * * * due and payable into the fund for the fiscal year."

the only difference being that under Section 2700 R. S. the entire income of the general revenue fund could be anticipated up to the amount limitations therein imposed; while under Section 3913 G. C. only receipts from taxes can be anticipated, and there is no amount limitation otherwise.

I do not take time to refer to the tax levying provisions of the Municipal Code as adopted in 1902 and as embodied in Sections 3787 to 3795, inclusive, nor to the appropriation provisions thereof found in Sections 3796 to 3798, inclusive, General Code. Suffice it to say that the general framework of these sections is consistent with all that I have said about the separation of fiscal years; the general intent running through all of them being that the needs of each fiscal year shall be estimated in budget form and that each fiscal year shall be considered as a separate time unit for the purposes of levying and appropriating. If Section 3913 G. C. should be interpreted in the opposite way from that in which I have interpreted it, it would constitute a striking exception to the general policy of the fiscal provisions of the Municipal Code in this respect.

But there are other evidences pointing in the same direction. To permit Section 3913 G. C. to be used as your question suggests that it has been used would be to allow it to be the means of borrowing money for the purpose of meeting deficiencies. This was never its intent, for the reason, as I have shown, that to anticipate revenues implies no such idea. But I am sure that it was never the legislative intention to permit Section 3913 G. C. to be so used, because special provision for the issue of deficiency bonds was found in Section 99 of the Municipal Code of 1902, now embodied in Section 3931 of the General Code, which provides as follows:

> "Council may issue deficiency bonds in such amount and denominations, for such periods of time, not to exceed fifty years and at such rate of interest not to exceed six per cent as it deems best when in the opinion of council it is necessary to supply a deficiency in the revenues of the corporation. The total amount of deficiency bonds issued by a corporation, outstanding at any time, shall not exceed one per cent of the total value of all property in the corporation as listed and assessed for taxation. The issuance of such bonds shall be approved by the votes of two-thirds of all the members elected to council, and approved by the votes of two-thirds of all the electors of the corporation voting upon such question at a regular or special election to be provided for by council."

We are, I think, not to look upon Sections 3913 and 3931 as roughly corresponding to provisions of the so-called "Longworth Act", Section 3939 et seq. of the General Code, under favor of one of which the council may issue bonds for specific purposes up to a certain limit and the electors by a two-thirds vote may authorize the issuance of such bonds beyond that limit but within certain further specified limits. Section 3931 does not say that the vote of the electors may be invited, at the option of council, nor that it shall be taken whenever the bonds to be issued exceed a certain amount. On the contrary, its mandate is that the issuance of deficiency bonds "shall be approved by the votes of two-thirds of all the members elected to council, and approved by the votes of two-thirds of all the electors of the corporation voting upon such question." In other words, the general assembly intended to impose very strict limitations upon the practice of borrowing money

for the purpose of supplying a deficiency in revenues. The whole tax levying machinery of a municipality had been so constructed in the sections to which I have referred but which I have not quoted as to make as nearly impossible as could be the creation of deficiencies. Municipal administrative officers would know long in advance just what their revenues would be during the year, and it was contemplated that the municipality should live within its revenues. Accordingly the strict checks which are found in Section 3931 G. C. were placed upon the borrowing of money to supply deficiencies. I attach no importance to the fact that Section 3913 G. C. deals with non-negotiable evidences of indebtedness, while Section 3931 deals with bonds. My point is that, having regard to the whole fiscal machinery of the Municipal Code, it will not do to hold that Section 3913 can lawfully be used for the purpose of supplying deficiencies in municipal revenues. It may, as I have said, be used only for the purpose of bringing revenues into the treasury before they would otherwise be collected.

What I have said makes it unnecessary for me to refer, except in a general way, to the Smith one per cent law, so-called, and particularly Section 5649-3a and succeeding sections of the General Code. While this law was passed some years after the Municipal Code of 1902 was enacted, yet its general purport is strikingly similar to that of the Municipal Code. Prior to 1911, when the "Smith Law" was enacted, a municipality was the only taxing sub-division of the state having a definite fiscal year, a budgetary system of levying and an annual and semi-annual appropriation-making. The Smith Law now extends this scheme to all taxing districts, and though it modifies in some particulars in which we are not now interested the law applicable to municipal corporations, as such, yet it is not too much to say that the fundamental idea of the Smith Law, in so far as its budget and appropriation provisions are concerned, is borrowed from the Municipal Code. In fact, the language of some of the sections of the Smith Law is palpably transcribed from the corresponding provisions of the Municipal Code to which I have referred. Like the Municipal Code, the Smith Law contains provisions to the effect that the levying authorities, including the council of a municipality, shall annually determine the needs of the subdivision for which they are levying for the ensuing fiscal year, and at the beginning of each half year appropriations shall be made from which all expenditures within the following six months shall be made. The Smith Law adds a new provision in this latter connection, in that it requires that no appropriation shall be made for any purpose not set forth in the annual budget.

We have it, then, that both the tax levying provisions of the Municipal Code and the subsequent and controlling provisions of the Smith Law have the effect of dedicating the levies for a particular year to the expenditures of that year. The fiscal year of a municipal corporation begins and ends on the first day of January, and the February tax settlement of a given year is for the purpose of running the government of the city for the first half of the calendar year in which it occurs.

Without going into detail, I conclude that under all the sections *in pari materia* money may not be borrowed in one fiscal year in anticipation of a tax settlement which belongs to a succeeding fiscal year, and applied to the needs of the municipality for the year in which the borrowing is made.

I am aware that this conclusion forces the result that between the date of the August settlement and the end of the year no money can be borrowed under Section 3913 G. C., because the next ensuing tax settlement would be for the purposes of the succeeding fiscal year. Nevertheless, I am of the opinion that the principle which I have laid down is correct, and that if the funds of the municipality are depleted during the second half of the fiscal year and after the August settlement, some other way to secure money must be found.

The foregoing conclusions are in a measure supported by the opinion of one of my predecessors, Hon. Timothy S. Hogan, to Hon. Edward C. Turner, prosecuting attorney, which is found in Volume II of Annual Report of the Attorney-General for 1912, at page 1128. Mr. Hogan was dealing with a condition existing in the finances of Franklin county. It appeared that there were overdrafts in certain funds represented by outstanding warrants stamped, "Not Paid for Want of Funds," under Section 2675 G. C., as previously in force.

Section 2677 G. C., as previously in force, provided that:

> "As soon as sufficient funds are in the treasury of the county to redeem the warrants drawn thereon, and on which interest is accruing, the treasurer shall give notice * * * that he is ready to redeem such warrants * * *."

In other words, the effect of outstanding warrants stamped "Not Paid for Want of Funds." upon moneys coming in at a succeeding tax settlement, was something like the effect of the certificate of indebtedness issued under Section 3913 G. C. upon the next succeeding tax settlement.

After pointing out that the treasurer could not give the notice provided for by former Section 2677 G. C. until there had been an appropriation under Section 5649-3d, Mr. Hogan came to the question as to whether or not the commissioners might make such an appropriation, and in that connection used the following language.

> "Inasmuch as the purpose of a levy under the Smith Law for a certain fund is, * * * in the absence of express language in the budget to the contrary, presumed to be provision for the needs of the fund for the incoming year; inasmuch as no appropriation can be made for any purpose not set forth in the annual budget; * * * I am clearly of the opinion that neither is it the duty of the auditor to credit any part of the February collection for taxes against the overdraft or deficiency in the treasury; nor is it within the power of the county commissioners to appropriate any such moneys for that purpose."

In short, overdrafts are simply illegal and can not have the effect, under the Smith Law, of depleting the funds levied for a given fiscal year. In my opinion, therefore, a certificate of indebtedness issued under the circumstances stated would be unauthorized.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1589.

MUNICIPAL CORPORATIONS—NOT AUTHORIZED TO LEVY ASSESSMENTS FOR STREET LIGHTING.

Municipal corporations in this state are not authorized to levy special assessments to pay any part of the cost of lighting streets.

COLUMBUS, OHIO, December 4, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—You have requested my opinion upon the following question:

"Statement of Facts.

A municipality of this state which has a municipal electric light plant makes its charges for public lighting by special assessment plan, assessing all properties of the municipality by property valuations. On this assessment no assessment bonds are issued, of course, and the plan is evidently to circumvent the limitations of the Smith one per cent tax law by assessing as described in preference to a general tax levy for lighting purposes. The assessments levied are certified to the county auditor for collection and when paid into the municipal treasury are transferred to the sinking fund trustees to apply upon the bonded debt of the municipality. There are some outstanding bonds of the municipal light plant but these revenues are not credited to these specific bonds but to general bonded debt.

Question: Is this procedure legal?"

Section 3812 of the General Code provides as follows:

"Each municipal corporation shall have special power to levy and collect special assessments, to be exercised in the manner provided by law. The council of any municipal corporation may assess upon the abutting, adjacent and contiguous or other specially benefited lots or lands in the corporation, any part of the entire cost of an expense connected with the *improvement* of any street, * * * or place by grading, draining, curbing, paving, * * * or laying of water pipe and any part of the cost of *lighting,* sprinkling, sweeping, cleaning or planting shade trees thereupon, and any part of the cost and expense connected with or made for changing the channel of, or * * * improving any stream or watercourse, and for constructing or improving any levee or levees, or boulevards thereon, or along or about the same, * * * which the council may declare conducive to the public health, convenience or welfare, * * *."

I call attention to the fact that this section, which embodies the enabling clause of what has come to be known familiarly as the "Taylor Law", empowers the council of a municipal corporation to levy special assessments for three distinct purposes or objects, viz:

(1) Street improvements, in which is contemplated work of a structural nature, or at the most that which is capable of exact estimation and constitutes a specific "job."

(2) (Departing from the order in which they are found in the statutes). River improvements, with respect to which the same remarks are applicable.

(3) A group of objects to which the above remarks are not applicable at all, such as sprinkling, sweeping and cleaning streets. These are rather in the nature of continual services than specific jobs; and in this clause is found the word "lighting", the application of which is involved in your inquiry.

Consistently with this enumeration of objects in Section 3812 G. C. is found the machinery for making "a public improvement to be paid for in whole or in part by special assessments" (Sec. 3814), consisting of the passage of a resolution of necessity, the preliminary preparation of plans, specifications, estimates and profiles, service of notice of the resolution, the passage of an ordinance determining to proceed with the improvement, etc., culminating in the letting of the contract for the

improvement. These sections run from Section 3814 to Section 3837 General Code, both inclusive, and have to do solely with the first two classes which I have above distinguished. In other words, they deal with making a public improvement to be paid for in whole or in part by special assessments as the introductory section indicates. There are some special provisions, of course, for sewers found in Sections 3871 et seq. of the General Code which it is not necessary to notice here.

All this machinery, as I have hinted, is appropriate only in case of the making of an improvement, i. e., the doing of the work on a specific job, and can have no application to the rendition of a municipal service, like sweeping or cleaning streets or lighting them. This is made very clear by comparison of the sections to which I have just referred with Sections 3839 to 3845, inclusive, relating to sweeping, sprinkling and cleaning of streets, and in particular by observing the parallel provisions of Sections 3846 and 3837. Both of these sections deal with what shall happen when municipal or other public property is specially benefited by the improvement or service for which assessments are levied. If the schemes were not entirely separate and distinct there would have been no necessity for Section 3846.

Coming now to Sections 3839 et seq. of the General Code, it is to be observed that the procedure therein outlined is as follows:

Unless street commissioners are provided for (Sections 3840-3841), the council passes an ordinance providing for the sprinkling, sweeping or cleaning which is contemplated (Section 3842); notice of the passage of this ordinance is to be given by newspaper publication (Section 3843); the entire cost and expense connected with the work in any year may by ordinance be assessed (Section 3844); bonds may be issued and sold in anticipation of the assessments (Section 3845).

I have now dealt with all the statutes found in the chapter of the present Municipal Code which relate to assessments, excepting those dealing with the method of making assessments according to benefits (Sections 3847 to 3852, inclusive) and those dealing with the construction of sidewalks and curbing, etc. (Sections 3853 to 3870-2 inclusive).

It will be seen that the procedure for assessing the annual cost of a service is much simpler than that for assessing the cost of a specific improvement, and that the two procedures are entirely separate and distinct.

This examination of the related provisions, however, has disclosed the striking fact that no machinery for assessing the cost of lighting a street is specifically provided for in the existing laws in spite of the grant of power in Section 3812 to assess such cost. Lighting a street is not an "improvement" and therefore the provisions of Sections 3814 et seq. do not apply, and authority to proceed thereunder for this purpose is lacking. On the other hand, the simpler procedure for assessing the annual cost of a municipal service found in Sections 3839 et seq. is limited to sprinkling, sweeping and cleaning, which are the very matters that, together with "planting shade trees thereupon," are mentioned in the same context in Section 3812 with "lighting." It is very clear to my mind that the procedure outlined in Sections 3839 et seq. of the General Code can not directly be applied to lighting the streets. Yet we still have the express provision of Section 3812, which must mean that the General Assembly at least attempted to grant authority to a municipal council to assess the annual cost of lighting streets upon the specially benefited property.

The statutes are thus ambiguous and an investigation into their legislative history with a view to resolving the ambiguity is suggested. Such investigation discloses a curious state of affairs. Section 3812, which I have referred to as the enabling provision of the so-called "Taylor Law", is in point of fact a codification of Section 9 of the Municipal Code of 1902 (96 O. L. 26). To explain the presence of the word "lighting" in it we go back to Section 2292 Revised Statutes, which was

repealed at the time the Municipal Code of 1902 was enacted. That section provided as follows:

> "For the payment of the cost of lighting the corporation the council may, by ordinance, levy and assess a tax in proportion to the feet front on the lots and lands bounding or abutting on the streets and avenues lighted; but in cities of the second grade of the second class, council shall, by ordinance, levy and assess a tax of five-tenths of one mill on all property assessed upon the general duplicate * * for such purpose, and in addition thereto, a tax according to the valuation of the property, as assessed upon the tax duplicate, on the lots and lands bounding and abutting on the streets and avenues so lighted; and all the provisions of this chapter concerning special assessments and the collection thereof, which, in their nature, are applicable, shall apply to assessments for this purpose."

This section dates from the revision of 1880. The codifiers in the official edition of the Code for that year assigned Section 584 of the Municipal Code of 1869 (66 O. L. 248) and the act found in 76 O. L., 13, as the source of the law then codified. There is absolutely nothing about lighting streets in Section 584 of the Municipal Code of 1869. The act found in 76 O. L. 13 applied only to cities of the second grade of the second class, viz: the City of Toledo. It is evident, therefore, that the codifiers of 1880 so changed the form of the pre-existing law as to make a special act general in part, and it remained general in form and unambiguous in purport, except in so far as the careless legislative method of adopting other statutes by reference "which in their nature are applicable" might have made it difficult to interpret, down to the revision of 1902. What happened then was the repeal of the pre-existing statutes and the enactment of a new set of provisions in which the naked power to assess for the purpose of lighting was reaffirmed, but from which the provision found in original Section 2292 R. S., to the effect that all provisions for making assessments which in their nature might be applicable should apply to this particular section, was omitted; and in which again the procedure or machinery for making assessments of various kinds was so outlined as to exclude from the operation of any of the methods of making assessments the exercise of the power to assess for lighting.

Two choices only are open to me:

> (1) To regard the present statutes as incomplete and defective and to hold accordingly that, despite the mention of the power in Section 3812, it does not effectually exist at the present time.
>
> (2) To interpret the Municipal Code of 1902 as a codification of the pre-existing law, and where ambiguity or incompleteness exists to resolve or supply such ambiguity or incompleteness by referring to the pre-existing law.

I find myself unable to interpret the Municipal Code of 1902 in the way last suggested. It was not a mere codification of the pre-existing law. It was in form and in substance an entirely new act, except in so far as previously existing statutes were adopted by reference. This conclusion is borne out by the legislative and judicial history of this state. It is well known that prior to 1902 the General Assembly, acting under the seeming authority of a long line of decisions by the Supreme Court, had passed laws for the government of municipal corporations which, though general in form and theoretically operating with uniformity throughout the state, were in fact and in substance special and local.

In *Platt* vs. *Craig et al.*, 66 O. S., 75, and *State ex. rel. Knisely et al.* vs. *Jones et al.*, 66 O. S., 453, the Supreme Court upset this whole legislative scheme and made it necessary to enact an entirely new system of legislation. In fact in *State ex rel.* vs. *Beacom et al.*, 66 O. S., 491, decided with State ex rel. Knisely vs. Jones, the execution of the judgment of the Supreme Court was suspended from June 26, 1902, when such case was decided, until October 2, 1902, in order to give the legislature an opportunity to pass a constitutional set of statutes. This was done in extraordinary session of the General Assembly, the work of which is found in Volume 96 of the Ohio Laws.

In view of these facts I feel myself unable to apply to the interpretation of the legislation of 1902 the principles which the Supreme Court has recently applied to the codification of 1910 in the case of *Elmwood Place* vs. *Schanzle*, 91 O. S. 354. In that case an omitted provision of a former statute was read back into the codified statute to supply the deficiencies of the latter. But the legislation of 1910 was an avowed codification—a mere revision, and the opinion in the case last cited makes it very clear that this was the sole ground upon which the court felt able to arrive at the conclusion there expressed. The Municipal Code of 1902 did not partake of this character, and if it is found to have imperfections it must stand or fall as a unit and can not be aided by provisions found in the pre-existing law but omitted from it.

Taking the statutes as we find them, then, the reasons already stated compel the first of the two answers above suggested. The naked grant of power to assess the cost of lighting streets is in the statutes, but this is not enough; the machinery must be supplied in order to make that grant effectual; the machinery of improving a street is not appropriate, and the machinery of sweeping or cleaning a street, though appropriate, is not made applicable to lighting streets.

Thus far in this opinion I have assumed that the word "lighting" means the furnishing of a service. It is at least susceptible to another meaning, viz: the installation of equipment for lighting, such as cluster light posts and the like. I do not decide the question as to what the word "lighting" means, though I am inclined to think that it was intended to mean that which the municipality about which you inquire construed it as meaning; for if it does not mean that, then your question must be generally answered in the negative, while, as I have shown, if it does mean that, your question must still be answered in the negative for lack of machinery to make the grant of power effectual.

The conclusion at which I have arrived makes it unnecessary for me to consider the subsidiary question relative to the application of the assessments.

Yours very truly,

JOSEPH MCGHEE,

Attorney-General.

1590.

MUNICIPAL CORPORATION—PAYMENT OF SPECIAL ASSESSMENTS AFTER THIRTY DAY PERIOD WITHOUT INTEREST, WHEN.

Deferred installments of special assessments for street improvements made by municipal corporations do not bear interest. The interest on the bonds issued in anticipation of their collection constitutes a part of the body of the assessments themselves and is inseparable from such assessments.

Council is authorized, however, to provide by legislation in alternative form for two assessments; one exclusive of the interest and payable in cash within a certain time to be fixed by the ordinance (there being no statute fixing such time), and the other inclusive of the interest on the bonds and payable in annual installments.

Where the interest has been assessed and the assessment has been certified to the county auditor for collection, the city council may not by resolution authorize the county treasurer and county auditor to accept payment of all or any part of the assessment less such interest; nor can the county officers, acting under such resolution or on their own initiative, lawfully accept such lesser amount.

A resolution of council authorizing the acceptance of payment of an assessment without the interest after the period within which, under the assessing ordinance, such payment was originally authorized is effectual to authorize the city treasurer to accept such payment prior to the certification of such assessment to the county auditor, if the same does not amount to a discrimination against those who may have already paid in cash in accordance with the terms of the original assessing ordinance.

The city treasurer is authorized to accept full payment of an assessment or of any installment thereof falling due prior to the certification thereof to the county officers, notwithstanding that the assessing ordinance may have provided for payment in cash, less interest on the bonds, to the city treasurer within a limited period of time expiring before such certification; but without authority from council the city treasurer can not remit such part of the assessment as represents the interest on the bonds after such period has expired, even as to a property owner who desires to pay the assessment in full.

The city treasurer's authority to accept payment of an assessment terminates when the assessment has been certified for collection to the county officers.

As to whether the county treasurer can lawfully accept full payment (including interest on bonds) of an assessment certified to the county auditor for collection in installments, QUERY.

COLUMBUS, OHIO, December 4, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your letter of recent date requesting my opinion as follows:

"Statement of Facts.

In a municipality of the State of Ohio, the assessing ordinances provide that a property owner shall have the privilege of making full cash payment in thirty days. The solicitor advised the auditor and treasurer that cash payment can be received and accepted by the city treasurer after the expiration of such thirty days and for a protracted period. Under advice of an examiner of this department, the treasurer and auditor have refused to accept payment after the thirty day period specified in the ordinance; and after the assessment bonds have been issued and the unpaid assessments have been certified to the county auditor for collection, the council of such municipality passed a resolution authorizing the county auditor and the county treasurer to accept cash payment when tendered and to remit the interest, thus throwing the interest on the assessment in such instance upon the municipality. We are referring you to the provisions of Sections 3815, 3881, 3892 and 3905 G. C.

Question 1: Has council power to pass a resolution of such nature?

Question 2: Can the city treasurer accept cash payment upon an assessment after the period provided for cash payment in the assessing ordinance has expired?

Question 3: Can the county auditor and county treasurer legally accept cash payments on assessments after assessments have been certified to the county auditor for collection?

Question 4: Can the county auditor and treasurer legally remit the interest charges on such assessments?

Question 5: Section 3881 G. C. fixes the period which shall be allowed a person to pay the cash assessments at thirty days. Is there any statutory provision for the fixing of the time of allowing cash payments on street improvements?"

The sections to which you refer me are as follows:

"Section 3815. * * * In such resolution (of necessity) council shall * * determine the method of assessment, the mode of payment, and whether or not bonds shall be issued in anticipation of the collection thereof. Assessments for any improvement may be payable in one to twenty installments at such time as council prescribes." (107 O. L. 151)

"Section 3881. * * * Any person so assessed shall have the option of paying his proportion of the assessment in cash within the period of thirty days from the date of the levy thereof upon due notice being given."

"Section 3892. When any special assessment is made, has been confirmed by council, and bonds, notes or certificates of indebtedness of the corporation are issued in anticipation of the collection thereof, the clerk of the council, on or before the second Monday in September, each year, shall certify such assessment to the county auditor, stating the amounts and the time of payment. The county auditor shall place the assessment upon the tax list in accordance therewith and the county treasurer shall collect it in the same manner as other taxes are collected, and when collected pay such assessment to the treasurer of the corporation, to be by him applied to the payment of such bonds, notes or certificates of indebtedness and interest thereon, and for no other purpose. For the purpose of enforcing such collection, the county treasurer shall have the same power and authority as allowed by law for the collection of state and county taxes."

"Section 3905. The council may order the clerk or other proper officer of the corporation to certify any unpaid assessment or tax to the auditor of the county in which the corporation is situated, and the amount of such assessment or tax so certified, shall be placed upon the tax list by the county auditor, and shall, with ten per cent penalty to cover interest and cost of collection, be collected with and in the same manner as state and county taxes, and credited to the corporation. Such ten per cent penalty shall in no case be added unless at least thirty days intervene between the date of the publication of the ordinance making the levy and the time of certifying it to the county auditor for collection."

Some of these provisions I do not believe to be applicable to the questions submitted by you. On the other hand, there are other provisions which you have not mentioned which are applicable.

"Section 3893. In all other cases, such assessments shall be paid to and collected by the treasurer of the municipality, and in any event the clerk of the council, when the receipt is presented to him by the owner, showing the payment of an assessment on his property, shall enter such receipt on the margin of the record of the assessment."

"Section 3817. *When bonds are issued in anticipation of the collection of the assessment, the interest thereon shall be treated as part of the*

cost of the improvement for which assessment may be made. If such assessment or any installment thereof is not paid when due, it shall bear interest until the payment thereof at the same rate as the bonds issued in anticipation of the collection thereof, and the county auditor shall annually place upon the tax duplicate the penalty and interest as therein provided."

Your statement of facts makes it plain that all the questions which you have asked relate to the collection of assessments in anticipation of which bonds have been issued.

A few general comments on the theory of assessments under the present Municipal Code will, I think, clear the way of several seeming difficulties. Assessments do not bear interest until due. On the contrary, the interest which the municipality has to pay on the bonds is a part of the total cost which is to be apportioned; it enters into and becomes a part of the assessment itself, and is not a thing separate from it. This statement is not affected, in my judgment, by the last sentence of Section 3881 G. C. above quoted. So far as this provision is concerned it does not purport to authorize the payment of any different amount when payment is made in cash than would be paid if all the installments should be allowed to run their course before payment. In other words, payment in cash as referred to in Section 3881 G. C. does not, in my opinion, contemplate the payment of a lesser amount than the aggregate of all the installments. In the original Municipal Code of 1902 the phrase was "in full." The word "full" was stricken out and the word "cash" inserted by the amendment in 97 Ohio Laws, page 51, in which other changes not material in the present case were made. I do not see that this amendment effected any material change in the section in this respect. The phrase "his proportion of the assessment" must be read in connection with Section 3817 G. C., which shows that such proportion of the assessment includes the interest on the bonds.

Of course, Section 3881 G. C., however interpreted, does not have general application but only applies to assessments for sewer purposes.

Indeed the statutes will be searched in vain for any authority to permit a person assessed for a municipal improvement to pay anything less than his proportion of the entire cost of the improvement, including interest on the bonds.

But I can not shut my eyes to the fact that the practice has been otherwise. I feel that the best that can be done under the circumstances is to find some basis for power on the part of the council to authorize the collection of less than the proper proportion of the entire assessment from an individual who pays the same before the installments thereof are due, and to point out, if possible, the proper procedure by which such a result can be achieved and the limitations on the power to achieve it.

If the assessment is made before any bonds are issued, then, of course, Section 3817 G. C. does not apply and the interest on the bonds is not to be treated as a part of the cost of the improvement. See in this connection Section 3896 G. C., which states what the cost of the improvement shall include and in which the phraseology is as follows:

"Interest on bonds, where bonds *have been* issued in anticipation of the collection of assessments."

But when the assessment is made in this manner I know of no authority in any administrative officer subsequently to include the interest on the bonds as a part of the assessment.

Section 3812 of the General Code authorizes the council to assess "any part of the entire cost" of a municipal improvement. Section 3817, which has been quoted, merely provides that the interest on the bonds when bonds have been issued in anticipation of the collection of the assessment "shall be treated as a part of the cost of the improvement for which assessment *may* be made." Section 3820 provides that—

> "The corporation shall pay such *part* of the cost and expense of improvements for which special assessments are levied as council deems just, which part shall be not less than one-fiftieth of all such cost and expense, and in addition thereto, the corporation shall pay the cost of intersections."

I think it is clear from these sections that the city may decide to assume the entire burden of the interest; and that if the assessment is made before the bonds are issued and nothing else is done by council the legal result would be that the interest on the bonds is not a part of the assessed cost of the improvement, and that there will be no administrative authority to include it therein. In such a case, therefore, if the owner of the property which is assessed exercises his privilege of paying in cash he will not pay any part of the interest which would be a burden on the general tax duplicate; and even if this privilege is not exercised and the assessment is certified for collection to the county auditor, the interest on the bonds will not, without more, constitute a part of the deferred installments.

I now call attention to Section 3909 of the General Code, which provides as follows:

> "If an assessment proves insufficient to pay for the improvement and expenses incident thereto, the council may, under the limitation prescribed for such assessment, make an additional pro rata assessment to supply the deficiency. In case a larger amount is collected than is necessary, it shall be returned to the persons from whom it was collected, in proportion to the amounts collected from such persons respectively. This section shall be subject to the limitations contained in other sections of this chapter."

It is apparent from this section that the powers of council are not *functus officio* when it has made a single assessment if it turns out that the total cost of the improvement as elsewhere defined, excepting that part which the council has determined that the city shall pay, is not covered by the assessments which have already been made. So that, returning to the first case which I have supposed, if the council should have levied assessments before any bonds were issued and without determining formally that the city should bear the interest on any bonds that might thereafter be issued, it should simply apportion in the first assessment the total cost of the improvement other than the interest on bonds; and if it should later become necessary to issue bonds in anticipation of the collection of assessments that were not paid in cash, an additional assessment might be made under favor of section 3909 to provide for the payment of interest.

We have it, then, that council may by passing two separate assessing ordinances apportion, first, the cost of the improvement without the interest on the bonds; and second, the cost of the interest on the bonds. If this can be done, I do not see why it is not perfectly lawful for council to achieve the same object by passing a single assessing ordinance with alternative provisions; first assessing the total cost, exclusive of the interest on the bonds, and making that assessment payable in cash only, and not in installments at all; then making another apportionment of the

total cost, inclusive of the interest on the bonds, and providing that that may be paid in installments. This, in my judgment, is the legal way to put into effect the practice which obtains so largely in the municipalities of this state.

The foregoing comments are intended to show just what authority there is in law for the separation of the interest on the bonds from the remainder of the total cost and expense of the improvement for the purpose of apportionment.

I am aware that this is not the practice which obtains, and that the form given, for example, in Ellis' Municipal Code, page 290, was evidently drafted upon another theory. I quote the form to illustrate the difference in ideas:

> "That the total assessment against each lot shall be payable in cash within ____ days of the date of the final passage of this ordinance, or in ____ annual installments with interest at the rate of __ per cent per annum upon deferred payments, at the option of the owner."

As I see it, this form is entirely erroneous, in that it assumes that the interest is no part of the assessment but that the deferred installments bear interest. Both assumptions are wrong, as I have shown. I suppose that most of the assessing ordinances that have been passed in municipalities have followed the form which I have quoted. I am not disposed to say that these ordinances are invalid but am suggesting that they be treated as if they had been phrased in accordance with the theory which I have laid down, viz: that of alternative assessments.

Your questions, however, go to the power of the council to remit what in legal effect is a part of an assessment after the same has been made and certified to the county auditor for collection. The power of the council to do this by legislation appropriate to that end would afford an interesting study. The effect of the assessment is to impose a liability in favor of the corporation secured by lien on the property assessed. The general question would be as to the power of the council to release obligations existing in favor of the municipality; for if the council can release in part it can release the whole, and I see no distinction in principle between remitting interest which has entered into the assessment and canceling the entire assessment as to particular property owners. Council has the general control of the finances of the corporation. In the case of an over-assessment it has authority to remit the excess, and it is even its duty to return that which has been collected in excess of the amount necessary. (Sec. 3909, supra).

However, when the assessment has been certified to the county officers for collection another principle operates. It has been decided that when this is done the cause of action on the assessment passes from the city and vests in the county officers. Not even the statutory requirement that actions shall be brought in the name of the real party in interest can operate so as to authorize the city to sue. (Railroad Co. vs. Bellaire, 67 O. S., 297). The decision cited was rendered under statutes other than those immediately under consideration, but it is believed that its principle applies to the latter. It is difficult to see how council could have any authority to release a claim which does not constitute an actual or potential cause of action in favor of the city. I would be content, therefore, to rest my conclusion upon this ground upon the exact facts submitted by you.

If council, instead of attempting by resolution to authorize the county auditor and the county treasurer to accept the payment of a lesser sum than that which really constituted the assessment certified to them for collection, had amended the ordinance by the passage of another ordinance changing the assessment itself, a different question would arise. Though the cause of action which exists when an assessment has been made and certified to the county auditor vests in the county treasurer, yet it rests upon an ordinance of council which is of continuing force

and not fully executed. It would seem (though I do not so decide) that council might by repealing or amending the ordinance remove the entire foundation of the assessment and that such action would be binding upon the county officers. Of course, this could not be done in any event where some of the property owners had paid their assessments in cash; for this would result in discrimination among property owners of the same class. This, however, was not done in the case described by you; but council has attempted to treat the assessment as a claim in favor of the city subject to release in part. Such action by resolution can not be effective as a repeal or amendment of the assessing ordinance, and for reasons already stated it is nugatory as an attempt to release a claim existing in favor of the city.

For all the foregoing reasons I answer your first question in the negative; that is, council may be said, of course, to have the power to pass such resolutions as it pleases but the resolution which it has passed in the case stated by you is neither binding upon the county officers nor does it authorize them to act in accordance with its terms.

The reasoning in which I have indulged also answers your fourth question. The county auditor and the county treasurer are without authority on any ground whatsoever to remit what you have designated as the "interest charges on such assessment" but which in contemplation of law amount to a part of the body of the assessments themselves. The least action that can authorize them to accept less than the amount certified to them for collection is an ordinance of council amending the assessing ordinance; but I do not wish to be understood as passing upon the question that would be raised if such an ordinance had been passed.

Your second question was in a way passed upon in the opinion of this department directed to the bureau under date of December 7, 1917, (Opinions of the Attorney-General for that year, Volume 3, page 2380). Therein, in referring to Section 3893 of the General Code, which, following Section 3892 above quoted, provides:

> "In all other cases, such assessment shall be paid to and collected by the treasurer of the municipality, * * *."

I said:

> "I am able to apprehend no sufficient reason for holding that these sections can not be applied to assessments when bonds, notes or certificates of indebtedness have been issued in anticipation of the collection thereof, but the date of certification has not yet arrived. The phrase 'in all other cases' in Section 3893 should not in my opinion receive such an interpretation as to mean cases other than those in which bonds, notes or certificates of indebtedness have been issued in anticipation of assessments; rather it means in my opinion cases other than those in which, under the preceding section, the unpaid assessments have been certified for collection to the county auditor. An assessment is, under Section 3897, a lien from the date thereof. It would be most unjust to create such a lien and prevent its discharge by the owner of the property at any time after it is created. The statutes should not receive such an interpretation but in my judgment should be so construed as to permit the payment of the assessment at any time after it is levied."

In other words, at least up to the time when the certification to the county auditor was made the property owner has the right to pay his whole assessment in cash.

But, as I have already pointed out, this does not mean that the city treasurer can accept payment of the amount assessed less interest during this entire period. The assessing ordinance will have fixed the date within which such payment without interest can be made. After that date the city treasurer is, in my opinion, not authorized to accept anything except a cash settlement of the entire assessment including all interest which would run if the assessments should remain unpaid until due.

But, again, we encounter the question as to the right of council to release the assessment in part at this stage of the proceedings. It will be observed that at this time the county authorities have nothing whatever to do with the collection of the assessment. It is in the hands of the city authorities and they are subject to the control of the council by proper action. We now face, therefore, the question as to whether council, without amending the assessing ordinance, can by resolution release that part of the assessment which represents the interest on the bonds in favor of all property owners who after the cash payment period has expired, but before the certification to the county officers, are willing to pay cash. In my opinion this may lawfully be done, if no one has paid his assessment within the cash payment period. To extend the time as to some after exacting payment of others would involve discrimination against those who had paid under the original rule, which could not be sustained against their objections at least. The only material difference between a resolution and an ordinance is that respecting the necessity of publication. Both resolutions and ordinances are subject to the same rules as to the formalities of adoption, excepting that an ordinance requires the concurrence of a majority of all members elected to council (Sec. 4224 G. C.); both are subject to the referendum (Sec. 4227-2 G. C.); both must be presented to the mayor for approval (Sec. 4234 G. C.). Instances are recorded wherein the compromise of litigation and the confession of judgment have been authorized by resolution (Walcutt vs. Columbus, 6 C. C. n. s., 271).

When, therefore, prior to the certification to the county auditor the council, by resolution, takes action which in effect amounts to an extension of the time of making payments in cash, less the interest (which in legal effect constitutes a part of the assessment) such action is sufficient to authorize the city treasurer while the assessment remains in his hands to accept such lesser sum, subject to what I have said about discrimination against those who may have already paid.

If Section 3881 G. C. above quoted really meant (as you seem to infer that it means) that the thirty day period should be allowed to the property owner to pay his assessment in cash without the inclusion of interest therein, there would be strong ground for asserting that this statute would be controlling and would prevent council from fixing a longer period as to sewer assessments, either in its assessing ordinance or by the indirect means just discussed, within which such payment might be accepted. I have already stated that I do not hold this to be the meaning of Section 3881 G. C., and in repeating that statement I have, of course, incidentally answered your fifth question.

One element of your second question remains to be considered: Can the city treasurer lawfully accept payment of an assessment at any time after it has been certified for collection to the county officers? The answer to this question would seem to be obvious but for another provision of Section 3893 G. C. above referred to, viz:

> "In any event the clerk of the council, when the receipt is presented to him by the owner, showing the payment of an assessment on his property, shall enter such receipt on the margin of the record of the assessment."

This statute, however, does not purport to authorize the city treasurer to accept payment of an assessment after it has been certified to the county officers. I am of the opinion, therefore, that this part of your second question should be answered by the statement that the city treasurer has no authority to accept payment of any kind of an assessment after it has been certified to the county officers for collection.

The statutory provision just quoted becomes applicable when your third question is considered. I shall, however, first have to interpret your question. I assume that you mean by the phrase "cash payments" payments of less than the total amount assessed, which, of course, includes, as I have stated, the interest. So interpreted the question must, of course, be answered in the negative, with the reservation that I am not passing upon the effect of an amendment of the ordinance by the passage of another ordinance after the assessment has been certified to the county officers for collection.

If this is what your question means, then I have sufficiently answered it by the negative statement just made. If, however, you mean to inquire whether the county auditor and county treasurer can lawfully accept payment of an entire assessment in cash, including, however, the interest at the rate carried by the bonds, at any time after such assessment is certified to the county for collection, then Section 3893 becomes material. This section at least assumes that full payment of an assessment can be made at any time. Such an idea is consonant with principles of justice which ought to permit the owner of property charged with a lien to discharge the lien, while safeguarding the interests of the party in whose favor the lien exists. Though some essential machinery would seem to be lacking, I incline to the view that cash payment of the proper amount may be accepted by the county officers at any time. I imagine, however, that this question is not the one which you have in mind, and do not therefore intend to express a final opinion upon it.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1591.

MUNICIPAL CORPORATION—IF IT SECURES PERMANENT INTEREST IN A HOSPITAL UNDER SECTION 4022, HOSPITAL MUST BE MANAGED ACCORDING TO AGREEMENT.

1. *Where a municipal corporation secures a permanent interest in a hospital, as provided in Section 4022 G. C., the hospital thereafter must be managed in accordance with the agreement under which the municipality secured the interest in said hospital.*

2. *The director of public safety of a municipal corporation would have nothing to do with reference to the management of such a hospital unless the provision or agreement under which the municipality secured an interest in the hospital so provides, and this for the reason that the hospital is not purely a municipal institution.*

3. *The management of said hospital would be authorized in law in paying the traveling expenses of its pupil nurses while attending another hospital in order to comply with the state regulations, and keep said pupil nurses on the pay roll, pro-*

vided such a course would not be contrary to the agreement between the corporation and the city under which the city secured an interest in the hospital.

COLUMBUS, OHIO, December 4, 1918.

The Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I have your communication of August 29, 1918, which reads as follows:

> "We respectfully request your written opinion upon the following matters:
>
> We are enclosing you herewith copies of two communications received from F. D. Green, state examiner, giving all the information we are able to obtain on the question of the hospital of the city of Findlay, Ohio.
>
> Question 1. Is not this hospital purely a municipal institution?
>
> Question 2. Have the board of managers or any other officers a legal right to incur obligations?
>
> Question 3. Should not such obligations be made through the director of public safety?
>
> Question 4. Is not any compensation paid any employes of such hospital, when such compensation is not properly fixed by ordinance or resolution of council, illegal?
>
> Question 5. Was the payment of expenses of pupil nurses in attending Cincinnati legal?
>
> Question 6. Can municipalities legally pay traveling expenses and compensation of pupil nurses while they are taking such training?"

To your communication are attached two letters received by you from F. D. Green, state examiner. These letters are too lengthy to quote in full, but the facts therein set forth are briefly as follows:

> (1) Prior to 1899 there was a corporation under the name of the Home and Hospital, of Findlay, Ohio, which owned and operated a hospital therein.
>
> (2) In 1899 this corporation transferred to the city of Findlay all its grounds, buildings and equipment in consideration of the payment of $1.00 to it and the assumption of a mortgage of $5,100.00. As a part of the consideration also of the transfer, an agreement was entered into by and between the said corporation and the city of Findlay, to the effect that the corporation was to continue to manage and operate the hospital in accordance with its constitution and by-laws. This agreement was for a period of ten years.
>
> (3) Some time after this the hospital building was destroyed by fire. Under an agreement made between the parties, the city deeded the property back to the Home and Hospital company, the company agreeing to rebuild the hospital building and when the building should be completed and equipped, to deed the property back to the city of Findlay.
>
> (4) Under date of February 18, 1901, the said corporation did transfer by warranty deed the property to the city of Findlay, the consideration being $1.00, and, "the contractual relations now existing between the Home and Hospital, of Findlay, Ohio, and the city of Findlay."
>
> (5) While the contract in reference to the management of said institution was not possibly expressly renewed, yet it has at least tacitly been

considered to be renewed and still in force and effect. In fact, the council of the city passed a resolution in 1910 which practically renewed the contract, and the corporation still continues to operate the hospital, fixing the salaries, employing and dismissing employes, etc.

(6) The corporation admits to the hospital free of charge patients who are not able to pay and makes a charge for admission to those who are able to pay. The city helps to support the hospital by levying a tax from year to year, about three-fourths of the expense of the hospital being taken care of from fees charged and about one-fourth of the expense being secured through taxation.

(7) The hospital maintains a nurses' training school and pays the pupil nurses six, eight and ten dollars per month. In order that they may comply with the requirements of the state medical board, the pupil nurses must take about a year's training in some other hospital and they have been attending the Cincinnati city hospital. Last year the board paid the traveling expenses of these pupil nurses. This next year they propose to keep them on the pay roll as well as pay their traveling expenses in their attendance upon the Cincinnati city hospital.

From these facts the questions set out in your communication arise. Before taking up your questions in the order in which they are set out in your communication, it will be well for us to note the provisions of the law in reference to hospitals. The provisions of our statutes are such that it will require a pretty careful analysis of the statutory provisions before we can arrive at a very safe answer to your questions.

At first sight, the provisions of our statutes, in reference to the management and control of hospitals, seem to be conflicting. For example, Section 4370 G. C. places the management of hospitals under the supervision of the director of public safety. Section 4035 G. C. reads as follows:

> "The director of public safety shall have the entire management and control of such hospitals, when completed and ready for use, and subject to the ordinances of council, shall establish such rules for its government, and the admission of persons to its privileges, as he deems expedient. Such director may also employ a superintendent, steward, physician, nurses and such other employes as he deems necesary, and fix the compensation of all persons so employed, which compensation shall be subject to the approval of the council."

This section places the entire management and control of certain hospitals under the supervision of the director of public safety. Sections 4043 and 4051 G. C. reads as follows:

> *Section* 4043.—"Such board shall have the entire management and control of the erection, rebuilding and repair of all buildings, and the entire management and control of all grounds so acquired, and shall adopt rules and regulations for the protection, care and government thereof, and such rules, when approved by the council of the municipality, shall have the same effect and may be enforced by the same penalties as ordinances thereof."
>
> *Section* 4051.—"The board of hospital trustees may employ such superintendents, physicians, nurses and other employes as it deems necessary for the execution of its duties and fix their salaries or compensation. Any of such persons may be removed by the board at any time."

Here we find the management of certain hospitals placed under the supervision of a board of hospital trustees. Section 4036 G. C. reads as follows:

> "In any municipal corporation which has become or may hereafter become the owner or trustee of property for hospital purposes, or of funds to be used in connection therewith, by deed of gift, devise or bequest, such property or funds shall be managed and administered in accordance with the provisions or conditions of such deed or gift, devise or bequest."

Here we find another provision in reference to the management of hospitals in that certain hospitals are to be managed and administered in accordance with the provisions or conditions under which they were deeded or devised to the city. From all these provisions it is quite evident that we must distinguish carefully between different kinds of hospitals in order to be able to answer your questions intelligently.

In 1898 an act was passed by the General Assembly entitled "An act to provide for the creation of a board of hospital trustees, and to prescribe the powers and duties of such board in cities of the second class, third grade "A." This act applied at the outset to the city of Springfield only and is found in 93 O. L., page 708. Section 5 of this act provided that the entire management and control of any hospital or hospitals belonging to such city should be under a board of hospital trustees, and Section 14 of the act read as follows:

> "Such board of hospital trustees may employ such superintendents, physicians, nurses and other employes as it may deem necessary for the execution of its duties, and fix their salaries or compensation; and any of such persons may be removed by such board at any time."

With these provisions in mind let us pass to another act of the General Assembly which was passed in 1902 and formed a part of what is known as the municipal code. Section 220 of this act contains the following provisions:

> "In any municipal corporation which has become or may hereafter become the owner or trustee of property for any part or hospital purposes, or of funds to be used in connection therewith, by deed of gift, devise or bequest, said property or funds shall be managed and administered in accordance with the provisions or conditions of said deed of gift, devise or bequest."

This section then proceeds:

> "Provided that in all cases where such deed of gift, devise or bequest requires the investment, or change of investment, of the principal of said property or funds, or any part thereof, to be made upon the approval of any advisory committee."

The section then makes provision that a board of trustees consisting of four resident electors shall be appointed to have charge of the said matters. The act found in 93 O. L., 708, above noted, became Sections 1536-425 to 1536-437 of Bates Statutes, omitting Sections 1 and 2 of the act, while the act found in 96 O. L., 92, became Section 1536-943 of Bates Statutes. In adopting the General Code the General Assembly brought these two acts together and they practically became one

act, entire and complete in its scheme. Section 1536-943 became 4036 to 4039 G. C., while Sections 1536-425 to 1536-437 became Sections 4040 to 4052 G. C.

Let us now again call attention to the proviso that was originally found in Section 220 of the Municipal Code, which afterwards became Section 1536-943 of Bates Statutes. This proviso is not specifically mentioned in the General Code, but Section 4036 G. C. includes all the matter that came before the proviso, as found in the original act and in Bates Statutes, and Section 4037 G. C., et seq. contains all the matter that was found after the proviso.

It is important to keep this in mind for the reason that there are contained in the original section two distinct matters not in any way connected. That is, the part before the proviso formed one plan or scheme while the part that followed the proviso formed the other, hence Section 4036 is entire and complete in its provisions while Sections 4037 to 4052 form another plan or scheme for a different purpose entirely.

In noting the different sections of our statutes having to do with hospitals, it will be necessary for us to consider the provisions of one other section, viz., Section 4022 G. C., which reads as follows:

> "Such council may agree with a corporation or association organized in the municipality for charitable purposes, for the erection and management of a hospital for the sick and disabled, and a permanent interest therein to such extent and upon such terms and conditions as may be agreed upon between them. The council shall provide for the payment of the amount agreed upon for such interest, either in one payment or installments or so much each year as the parties may stipulate."

In this section we find provisions similar to those found in Section 4036 G. C.

Let us now turn to the facts with a view to ascertaining, if possible, under what provisions of the General Code they may be logically brought. In deciding this question it might be considered that there were two separate and distinct transactions between the Home and Hospital company and the city of Findlay, viz., the one in which the Home and Hospital company deeded the hospital property to the city in consideration of one dollar, and the assumption by the city of a certain mortgage on said property. The second transaction would be that in which the city of Findlay deeded the property, after the fire, to the Home and Hospital company and it in turn, after the hospital building was erected, deeded it back to the city of Findlay upon the consideration therein set out, viz., $1.00, and the agreement which had formerly been entered into by and between the city of Findlay and the Home and Hospital company. If this view could be taken, then in that event it is my opinion that the hospital would be one coming under the provisions of Section 4036 G. C., inasmuch as the second deed to the city by the Home and Hospital company was practically a deed of gift. But, when we come to look at the whole transaction, we note that the former transaction was carried forward into the second transaction because of the fact that the agreement which had been entered into in the first instance was carried into the second transaction. Further, the second transaction was not so much a deed of gift as it was an agreement between the said parties, to the effect that the city would deed the lot to the Home and Hospital company on consideration that said company would erect a hospital thereon and then re-transfer the same to the city of Findlay. It can hardly be said with propriety that this latter transaction was in the nature of a deed of gift, but rather the deed was made to the city on consideration of the agreement which had been made between the two parties, to the effect that the Home and Hospital company should erect a hospital building and then transfer the entire property to the city.

It is my opinion that these facts come more nearly, and possibly within, the provisions of Section 4022 G. C. That is, the city agreed with the corporation for the erection and management of a hospital, securing thereby a permanent interest therein, the terms and conditions of said transfer having been agreed upon between the parties interested. This being true, we can readily eliminate the provisions of Sections 4043 and 4051, to which we made reference in the beginning, and which are to the effect that the board of trustees shall have the management and control of the institution. We can also eliminate the provisions of Section 4035 G. C., above referred to, which is to the effect that the director of public safety shall have the entire management and control of certain hospitals. In passing I might say that this section undoubtedly refers to the hospitals erected under provision of Section 4023 G. C. We can also eliminate the provisions of Section 4370 G. C., to which reference was made. This section undoubtedly applies to strictly municipal hospitals. If we consider it as one transaction, as I have done, we can eliminate the provisions of Section 4036 as well.

Having settled upon the proposition that the facts in the case bring this hospital within the provisions of Section 4022 G. C., let us again note the provisions of this section. It is to be noted that the municipality, under this section, secures a permanent interest in the hospital to the extent and upon such terms and conditions as may be agreed upon between it and the association with which it deals. This, then, brings us to the question as to what was the agreement between the city and the Home and Hospital association. The agreement was that the hospital was to continue under the management of said company under its constitution and by-laws.

Now from all the above, what is the answer to your question? Your first question is, is not this hospital purely a municipal institution? In my opinion it is not. It is an institution such as is provided for in Section 4022 G. C. Your second question is, have the board of managers, or any other officers, a legal right to incur obligations? They have. That is, this hospital must be managed in accordance with the agreement that was entered into originally by and between the city of Findlay and the corporation known as the Home and Hospital of Findlay. Your third question is: "Should not such obligations be made through the director of public safety?" They should not, and this for the reasons above stated. Your fourth question is, "Is not any compensation paid any employes of such hospital, when such compensation is not properly fixed by ordinance or resolution of council, illegal?" It is not. The question of compensation is to be decided by the agreement hereinbefore mentioned.

We come now to your fifth and sixth questions, which are somewhat more difficult to answer satisfactorily. The questions are as to whether the hospital managers are justified in law in paying the traveling expenses of pupil nurses while attending the Cincinnati city hospital and whether they would be justified in law in keeping said pupil nurses on the payroll. In answering these questions it must be remembered that the management of the hospital in question is under the control of the Home and Hospital company. The proper officials of this company fix the salary and compensation of the different employes therein, as said before, under the constitution and by-laws of this company. Hence, if the managers of the hospital desire, in addition to paying the student nurses a certain stipulated sum each month, to pay also their traveling expenses to the Cincinnati city hospital, and at the same time keep them upon the payroll of the company, I can see no legal objections to their so doing. This payment of expenses and keeping them upon the payroll virtually becomes a part of the agreement and consideration, by virtue of which student nurses enter the said hospital. The management could, if it so

desired, pay these student nurses, instead of six, eight and ten dollars per month, twelve, fifteen and eighteen dollars per month, or, for that matter, any other reasonable sum. Hence, if the management of the hospital desires, as an inducement to cause student nurses to enter said hospital, it may agree to pay their traveling expenses to the Cincinnati city hospital and at the same time keep them upon its payroll during the time they are in attendance at said hospital.

I think this answers all your questions. I desire to suggest that the answer to your sixth question is limited and restricted to the particular hospital in question. You ask whether municipalities can legally pay traveling expenses and compensation of pupil nurses while they are taking such training. I am not answering this question as I do not think you intended same, in the form in which it is put, to be answered, but what you desired to know, as I understand it, is as to whether the management of this particular hospital can so pay expenses as set out in your communication.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1592.

APPROVAL OF BOND ISSUE OF MONTGOMERY COUNTY IN THE SUM OF $18,000.00.

COLUMBUS, OHIO, December 4, 1918.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In Re: Bonds of Montgomery county, Ohio, in the sum of $18,000.00, for the purpose of providing a fund for the repair of certain bridges in said county.

I have carefully examined the transcript of the proceedings of the board of county commissioners of Montgomery county, Ohio, relating to the above issue of bonds, and find said proceedings to be in conformity to the provisions of the General Code relating to bond issues of this kind. I am therefore of the opinion that properly prepared bonds covering said issue will, when the same are properly executed and delivered, constitute valid and binding obligations of said county.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1593.

APPROVAL OF ARTICLES OF INCORPORATION OF THE PERSHING REPUBLICAN LEAGUE—CORPORATIONS MAY BE FORMED TO ACCOMPLISH A SINGLE OBJECT—MAY BE FORMED FOR FURTHERING POLITICAL CANDIDACY.

A corporation not for profit may lawfully be formed for the purpose of doing a thing which is capable of accomplishment once and for all.

Such corporation may lawfully be formed for the purpose of furthering the political candidacy of an individual.

COLUMBUS, OHIO, December 6, 1918.

HON. WILLIAM D. FULTON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of November 25, requesting my opinion as to the legality of the proposed articles of incorporation of The Pershing Republican League.

The incorporators of this proposed corporation not for profit state that it is formed for the purpose of:

> "First. Nominating and electing General John J. Pershing president of the United States.
>
> Second. Organizing like associations and leagues in all the States, Districts and possessions of the United States, for the purpose aforesaid.
>
> Third. Doing all things necessary and proper for the accomplishment . . of the purposes aforesaid."

In spite of the division of the purpose clause as I have quoted it into three parts it is manifest to me that but a single purpose is stated by it, so that it is not open to objection on the ground of multiplicity of objects.

I have given some consideration to the question as to whether or not a corporation can be formed for the purpose of accomplishing a single specific thing, so that when that thing is accomplished it will no longer have any lawful existence. This question is presented by the articles as I have quoted them, for it is apparent that if and when General John J. Pershing is elected president of the United States this proposed company will no longer have any legal existence.

I have found no case—indeed no authority whatsoever—on this point. While it is usual, of course, to incorporate companies and associations for purposes which imply the carrying on of continuous activities, I do not believe that it is unlawful in the absence of statute to incorporate a company for a purpose which is capable of accomplishment once and for all. Thus, a corporation might be organized for the purpose of acquiring, subdividing into lots and selling a particular tract of real estate. I do not believe it would be necessary to authorize such a corporation to deal generally in real estate without limitation. In fact the security of the investment would rather be enhanced than otherwise by the restriction thus imposed.

Surely there is nothing in our statute, Section 8623 G. C., from which an implication of the kind which has just been imagined can be drawn. That section authorizes the formation of corporations

> "for any purpose for which natural persons lawfully may associate themselves."

It will be noticed that the word in our statute is not "business" or any like term importing continuity of activity. Therefore I reach the conclusion that the fact that the incorporators of this association have in mind an object that is logically capable of complete attainment does not afford a ground for characterizing the articles of incorporation which they have filed as illegal.

So far as Section 8623 is concerned indeed there is nothing in the proposed articles of incorporation which could give rise to any doubt. If the test of the legality of the purpose of a corporation is furnished by considering whether or not natural persons lawfully might associate themselves for such purpose, it is clear

that we have in the articles of incorporation under consideration nothing that is open to criticism. Natural persons may, of course, lawfully associate themselves to procure the nomination and election of the person of their common choice for any office. So far as Section 8623 is concerned it seems to give authority to individuals to do under corporate form anything they might do as an unincorporated association.

It would not be safe, however, to lay down this principle as one of universal application. Section 8623 is in this respect subject to implied exceptions, as in the case of insurance companies (State vs. Livestock Co., 38 O. S. 347); as well as to the express exceptions against the carrying on of professional business which is found in Section 8623 itself. The implied exceptions just referred to result from the fact that the legislature has chosen to provide for the organization of certain companies by special laws, thus taking them out of the general statutes on the subject of the formation of corporations, of which Section 8623 is a part. No implied exception of this character operates against the formation of a corporation for the purpose under consideration.

There may be, however, an implied exception arising from certain provisions of the penal code, which I now quote:

> "*Section* 13,320.—Whoever, being a corporation engaged in business in this state, directly or indirectly, pays, uses, offers, or consents or agrees to pay or use money or property for, or in aid of a political party, committee or organization, or for or in aid of a candidate for political office, or for a nomination thereto, or uses money or property for any political purpose whatever, or for the reimbursement or indemnification of any person or persons for money or property so used, shall be fined not less than five hundred dollars nor more than five thousand dollars."
>
> "*Section* 13,321.—Whoever, being an officer, stockholder, attorney or agent of a corporation violating the next preceding section, participates in, aids or advises such violation or solicits or knowingly receives money or property in violation of such section, shall be fined not more than one thousand dollars or imprisoned not more than one year, or both."
>
> "*Section* 13,322.—Whoever, being a corporation for profit, violates any provision of the law requiring it to make out, have sworn to by an officer thereof who has knowledge of the facts, and file with the secretary of state, auditor of state or state superintendent of insurance, an affidavit respecting the use of its funds or property for political purposes, or its consent thereto, shall be fined not less than fifty dollars nor more than five hundred dollars."

These sections constituted Sections 1 and 3 of an act found in 99 Ohio Laws, 23. Section 2 of that act required every corporation for profit doing business in Ohio to file certain reports with certain officers setting forth that such corporation had not, directly or indirectly, paid or contributed to the funds of any political organization, committee or candidate. These are the reports to which Section 13,322 as I have quoted it refers.

I think it is obvious that if these sections apply to a corporation of the kind now proposed to be organized they would effectively prohibit the organization of a company for such purpose, and would give rise to another implied exception to the general terms of Section 8623, supra.

The question then is as to whether or not a corporation formed for political purposes, and no other, is within the scope of Sections 13,320 et seq.; or, more accurately, whether in enacting Sections 13,320 et seq. the General Assembly intended

to prohibit the formation of corporations for political purposes. For example, are Sections 13,320 et seq. to be regarded as a prohibition against the incorporation of political clubs affiliated with political parties?

In my opinion, these sections are not open to so wide an interpretation. In the first place, Section 13,320 applies to corporations "engaged in business in this state"; Section 13,321 uses language indicative of business companies or corporations for profit; Section 13,322 refers expressly to corporations for profit. While I would not say that only those corporations which are formed technically for profit are amenable to Sections 13,320 et seq., I get from these sections and from the act of which they were originally parts as a whole the impression that they were intended to apply to corporations formed for other than political purposes, and to prevent them from intermeddling in politics and misapplying their corporate funds for such political purposes. The use of the word "business" and the other words and phrases to which I have referred at least makes these statutes ambiguous so far as their application to a case like that under consideration is concerned. Being ambiguous they are open to interpretation or construction. One of the recognized rules of construction of statutes is that the evil to be remedied may be looked to, to determine the probable legislative intent. In this case it seems clear that the evil to be remedied was not the formation of corporations for political purposes but the participation in politics of corporations formed for other purposes.

For these reasons I advise that the formation of a corporation for political purposes is not prohibited by Sections 13,320 et seq. of the General Code.

Knowing of no other reason for which it might be alleged that the articles of incorporation in question are not lawful, I advise that they should be accepted and filed by you as secretary of state.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1594.

DISAPPROVAL OF BOND ISSUE OF VILLAGE OF CORTLAND, OHIO. $3,500.00.

COLUMBUS, OHIO, December 7, 1918.

The Industrial Commission of Ohio, Columbus, Ohio.

In Re: Bonds of the village of Cortland, Ohio, in the sum of $3,500.00, for the purpose of providing a fund for the purchase of certain fire apparatus, consisting of an engine and hose, said engine to be mounted on a truck.

I have carefully examined the transcript submitted of the proceedings of the council of the village of Cortland and of other officers relating to the above issue of bonds, and regret to say that I find myself unable to approve said issue. This issue is one for the above stated purpose provided for by ordinance of the council of the village of Cortland, Ohio, without the authority of a vote of the electors, under the assumed authority of Section 3939 of the General Code.

As a limitation on the amount of bonds that may be issued by a municipal corporation during any fiscal year, under authority of said section, without a vote

of the electors, Section 3940 G. C., as amended in the Terrell act (107 O. L., 575-578) provides as follows:

> "Such bonds may be issued for any or all of such purposes, but the total indebtedness created in any one fiscal year, by the council of a municipal corporation under the authority conferred in the preceding section, shall not exceed one-half of one per cent. of the total value of the property in such municipal corporation as listed and assessed for taxation."

The financial statement appended to and made a part of the transcript of the proceedings relating to this issue of bonds shows that the tax duplicate valuation of the taxable real and personal property in said village is the sum of $674,560.00. One-half of one per cent. of this amount is $3,372.80, which is the maximum amount of bonds that may be issued by this village under authority of Section 3939 G. C. during the current fiscal year, without a vote of the electors. It is thus seen that the amount of the proposed issue of bonds exceeds the amount of bonds that the council of the village was authorized to provide for in the ordinance above referred to. The bonds authorized by said ordinance are probably invalid only to the extent of the excess of said proposed issue over the amount of bonds for which the council might have legally provided, but inasmuch as you have not, in your resolution providing for the purchase of this proposed issue of bonds, indicated any intention on your part to purchase any part of said issue less than the whole thereof, I feel that I have no discretion to do otherwise than to advise you to reject said issue and to rescind your former resolution providing for the purchase of the same.

The transcript submitted is herewith enclosed.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

1595.

COLLATERAL INHERITANCE TAX—MUNICIPAL COUNCIL MAY PROVIDE BY ORDINANCE DISPOSITION OF SHARE THEREOF TO OTHER THAN GENERAL FUND.

The fifty per cent of the collateral inheritance tax which is to go into the treasury of a city or village under the provisions of Section 5331 G. C. should be credited, in the absence of legislation by the council thereof, to the general revenue fund of such city or village.

Such council may, however, provide by ordinance that such inheritance tax revenue shall go into some fund other than the general revenue fund.

COLUMBUS, OHIO, December 7, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your letter of November 11 requesting my opinion as follows:

> "Section 5331 G. C., in covering the collateral inheritance tax designates that 50 per cent shall go to the city or village but does not designate

into what fund or funds such taxes shall be credited. It has been the custom of this office to direct that in the absence of specific statutory authority such inheritance tax should be placed into the general fund of the city.

Question 1. Is it within the powers of the city council to designate into what fund or funds this tax shall be placed?

Question 2. Are such taxes properly to be credited to the general fund?"

It will not be necessary to quote Section 5331 General Code, referred to by you. As you say, it does not specify into what fund of a municipal corporation the half of the inheritance tax to which such municipality is entitled shall go.

I am clearly of the opinion that in the absence at least of authorized action by the council of a municipal corporation revenues arising from inheritance taxes should be credited to the general fund of the municipality. The other funds, such as the sinking fund, the safety fund, the service fund and the health fund, are proceeds of levies made for these specific purposes and of revenues by statute directed to be placed to the credit of such funds—as premiums and accrued interest derived from the sale of bonds, special assessments in anticipation of the collection of which bonds have been issued, interest on deposit of sinking fund moneys, etc. The general fund, on the other hand, is primarily the recipient of miscellaneous revenues not otherwise provided for. I can not say that there is any statute now in force which contains an express declaration to this effect. However, the very term "general fund" must mean a fund available for expenditure for any lawful purpose of the corporation, as opposed to the special funds which can be expended only for such specified purposes. Therefore, miscellaneous revenue which is not dedicated by law to any particular purpose must necessarily belong in the general fund.

The following sections of the General Code, now or formerly in force, do show that the general fund is available for expenditure for any lawful purpose:

Section 3800.—"* * * Any balance remaining in such contingent fund at the end of the fiscal year shall thereupon become a part of the general fund, to be again appropriated as other moneys belonging to the corporation. * * *."

Section 3801: (Repealed 103 O. L. 522)—"When a municipal corporation has been authorized, * * * to create a fund for a public improvement, and the authority so conferred has been exercised * * *, and there remains a cash balance in such fund unexpended, the auditor or other accounting officer shall immediately transfer such balance to the credit of the general fund of the corporation."

Section 3802: (Repealed 103 O. L. 522)—"When a cash balance exists at the end of such fiscal year, in a fund, other than a fund created for a public improvement, and for any reason such cash balance can no longer be lawfully used for the purpose for which it was created, the auditor * * shall transfer such balance to the general fund of the corporation."

Section 3803: (Repealed 103 O. L. 522)—"When money so authorized to be transferred to the general fund of a municipal corporation has been so transferred, it shall be available for the general purposes of the corporation, *as other moneys in the general fund.*"

Although the three sections last above quoted have been repealed, they may properly be looked to to determine the meaning of the term "general fund" as it

occurs in other statutes originally in force at the same time. It is true that these three sections constituted a separate act by themselves (95 O. L. 96) but they were allowed to remain in force by the Municipal Code of 1902 (96 O. L.) and may severally be looked to for evidence of the meaning of the phrase "general fund" as occurring in that act, for example, and in Section 3800 G. C. above quoted.

I do not find it necessary to pass upon the question as to whether moneys in the general fund may be expended without transfer for purposes within the purview of some of the special funds, such as the health fund. It is perfectly obvious, however, that the proceeds of an inheritance tax could not belong in any of these special funds because not dedicated to such special purposes and therefore they do belong, as I have said, in the first instance to the general fund and may be expended for any purpose to which that fund may be applied.

These observations answer your second question in the affirmative.

Your first question requires me to consider whether or not the council can pass an ordinance which shall, so to speak, have the effect of a permanent and automatic transfer of inheritance tax moneys to some fund or funds of the city or village other than the general fund.

As to revenues created by council itself through the enactment of ordinances imposing licenses and the like, I am clearly of the opinion that council may direct the revenue into a fund other than the general fund. In fact, this would be the appropriate thing to do in such cases. Here, however, we have the case of a revenue arising from a state law, and the question is as to whether or not council in the absence of a provision of that law or elsewhere in the statutes of the state may control the course of such revenue and divert it from the general fund into which it would otherwise go by a standing ordinance.

In my opinion, council has power to do this. As may be inferred from statements already made, there is no statute of the state setting up by express mention specific funds in the treasury of a city other than the sinking fund and the general fund. There is nothing, for example, requiring the city council to make any levy for a service fund, as such. The levies of council are to be made "for the several purposes allowed by law" (Section 3793; see also Section 5649-3a). "Purposes allowed by law" referred to in other sections are as follows:

> *Section* 3784.—"Each municipal corporation shall have special powers * * * to levy and collect taxes * * * for the purposes of paying the expenses of the corporation, constructing improvements authorized, and exercising the general and special powers conferred by law."
>
> *Section* 3785.—"The aggregate of all taxes levied by a municipal corporation, exclusive of the levy for * * * free public libraries and library buildings, for university and observatory purposes, for hospitals, and for sinking fund and interest, on each dollar of valuation of taxable property in the corporation on the tax list, shall not exceed in any one year ten mills."
>
> (This section was, of course, repealed by implication by the so-called Smith One Per Cent Law. I cite it to show that there is no mention in it of any such fund as a safety fund or a service fund, for example.)
>
> *Section* 3787.—"On or before the first Monday in March of each year the several officers, boards and departments in each municipal corporation, shall report an estimate, in itemized form, to the mayor and auditor, or clerk, of the corporation, stating the amount of money needed for their wants for the incoming year and for each month thereof."
>
> *Section* 3788.—"On or before the first Monday in April of each year the auditor of such city and clerk of such village shall furnish to the mayor

and council and to each member thereof, the following statements, which council may require to be printed:

1. A statement showing the balance standing to the credit or debit of the several funds on the balance sheet of the corporation, at the end of the last fiscal year.

2. A statement showing the monthly expenditures from each fund in the twelve months, and the monthly expenditures from all the funds in the twelve months of the last fiscal year.

3. A statement showing the annual expenditures from each fund for each year of the last five fiscal years.

4. A statement showing the monthly average of such expenditure from each of the several funds for the last fiscal year, and also the total monthly average from all of them for the last five fiscal years."

There are other statutes in this same context which might be quoted. Suffice it to say, however, that there is nothing to prevent the municipal corporation from treating as a single "fund", i. e., the proceeds of a single levy of taxes, all revenues derived by taxation for the purpose of paying all expenses of the corporation other than the construction of special improvements, the maintenance of free public libraries, universities and observatories, hospitals, and for sinking fund and interest. In short, so far as the statutes are concerned there need be no "funds" of a municipal corporation other than the sinking fund, the hospital fund, the library fund, the university and observatory fund, the special improvement fund and the general fund.

The custom prevails, however, of making a further sub-division of the general expense fund into the funds which I have previously mentioned in this opinion. I suspect that this custom may have the sanction of the Bureau of Inspection and Supervision of Public Offices, if indeed it did not result from suggestions emanating from your Bureau. However that may be, there is nothing illegal about designating the purposes of the service department as a "purpose" for which taxes may be levied separate from the other purposes pertaining to the general expenses of the municipality. So also with respect to the safety and health funds. In point of fact, when a levy is made for the health fund under favor of Section 4451 General Code, its proceeds must constitute a separate fund in contemplation of the law. Of course, I do not take account of funds arising from other sources than general taxation, such as the water works fund (Section 3960 General Code).

In the face of this generality of expression I think we must concede something to the power of council under Section 4240 of the General Code, which provides that

> "The council shall have the management and control of the finances * * of the corporation, except as may be otherwise provided, and have such other powers and perform such other duties as may be conferred by law."

Inasmuch as it is not "otherwise provided" with respect to the proceeds of inheritance taxes which are to be paid into the treasury, I am of the opinion that council may exercise its control over the finances of the corporation by passing an ordinance to the effect that the proceeds of such taxes shall be paid into some fund set up on the books of the city auditor or village clerk other than the so-called "general fund." In other words, Section 4240 evinces a legislative intent to the effect that the council shall have legislative power over finances except in so far as such power may be denied by general law. Were it not for this section it might be argued that the silence of the general law would have the effect of a negation as to the power of council. The statute, however, reverses the presumption and

produces, I think, an opposite result. Now there is nothing in the general law so far considered which is inconsistent with such an exercise of power on the part of council. The only other statutory provisions which occur to me as affording ground for a contrary argument are those dealing with the subject of transfers. It might be argued because the power to transfer funds has been expressly given, with certain limitations, the council has no other authority to control the course of moneys coming into the treasury. I do not think that such an argument would be well taken. "Transfer" means that money which is actually in a fund is removed from that fund as the result of the process and placed in another fund. It has nothing whatever to do with the rules by which general receipts shall be credited to particular funds.

For all the foregoing reasons, then, I answer your two questions, as follows:

(1) It is within the power of a city council by permanent ordinance to designate into what fund or funds the proceeds of the inheritance tax accruing to the municipality may be placed.

(2) In the absence of such action on the part of council such receipts are to be credited to the general fund.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1596.

APPROVAL OF BOND ISSUE OF VILLAGE OF WESTERVILLE, OHIO. $4,540.00.

COLUMBUS, OHIO, December 9, 1918.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In Re: Bonds of the village of Westerville, Ohio, in the sum of $4,540.00 in anticipation of the collection of assessments for the improvement of Glenwood Drive by grading and draining.

I have carefully examined the corrected transcript of the proceedings of the commission of the charter village of Westerville, and of other officers relating to the above issue of bonds. I find said proceedings to be in conformity to the provisions of the General Code of Ohio relating to bond issues of this kind, and to the provisions of the charter of the village of Westerville.

I am therefore of the opinion that properly prepared bonds covering the above issue will, when the same are properly executed and delivered, constitute valid and binding obligations of said village to be paid in accordance with the terms thereof.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1597.

BONDS—DELIVERY OF, TO INDUSTRIAL COMMISSION AT COST OF TAXING DISTRICT.

Bonds sold to the Industrial Commission of Ohio by a taxing district must be delivered to the treasurer of state at the expense of the taxing district. Such

delivery may be made in person or by express, or otherwise, at the discretion of the district officials, unless limited by ordinance.

COLUMBUS, OHIO, December 9, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio

GENTLEMEN:—I acknowledge receipt of your letter of November 23 requesting my opinion as follows:

> "We are referring you to your opinion No. 758, under date of November 3, 1917, Annual Report of Attorney-General for 1917, page 2028.
>
> *Question*: In bonds sold to the Industrial Commission of Ohio by a taxing district of this state, can such taxing district bear the expense of the delivery of the bonds to the Industrial Commission either when taken there by an officer or sent by express?"

The opinion to which you refer holds, in effect, that a municipal corporation is without authority to pay the expense of delivery of bonds to a private purchaser. In the course of that opinion, however, and by way of contrast attention was called to the provisions of Section 1465-58 of the General Code, which deals with the power of the State Liability Board of Awards (The Industrial Commission) to invest the state insurance fund in municipal bonds, and creates the duty in the officers of the several taxing districts before offering bonds issued by them for sale at competitive bidding to offer them in writing to such State Liability Board of Awards. That section expressly provides that

> "all such bonds so purchased forthwith shall be placed in the hands of the treasurer of state."

The section does not in words say who shall place the bonds in the hands of the treasurer of state. In the former opinion, however, I assumed that this sentence imposed the duty upon the municipal authorities to make the delivery. Upon reflection I am satisfied that I was then right. The bonds upon acceptance would be in the possession of the municipal officers. The command to place them in the hands of the treasurer of state is therefore naturally directed to them.

It is true that I did not find it necessary specifically to pass upon the question now submitted in preparing the former opinion, but having the opportunity to do so by virtue of your present request I advise you that it is the duty of the municipal officers charged with the sale of bonds to deliver such as have been accepted by the Industrial Commission of Ohio to the Treasurer of State. The statutes are entirely silent as to the manner in which such delivery shall be made. In the absence of specific provisions of ordinances governing such matters the choice of the means by which the delivery shall be made would seem to rest in the sound discretion of the municipal officers. I would not think that it would be an abuse of such discretion to deliver such bonds in person or by express, especially in view of the fact that payment therefor is to be made upon delivery of the bonds.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1598.

MUNICIPAL CORPORATION—COUNCIL IN FIXING COMPENSATION OF EMPLOYES MAY FIX SAME AT SO MUCH FOR ONE MONTH AND LESSER AMOUNT THEREAFTER.

The council of a city may, without exceeding its powers, fix compensation of certain municipal employes for service during good behavior at so much for one month of the year and at a lesser amount for each month thereafter, even though it is apparent that the motive of council in so acting was to give each employe affected thereby the monthly salary fixed for the later months substantially for one month prior to the time when such ordinance could under the initiative and referendum provisions of the statutes go into effect.

COLUMBUS, OHIO, December 9, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your letter of November 11 requesting my opinion as follows:

"Enclosed find copy of ordinance passed by the council of the city of Mt. Vernon, together with the lead pencil notation, showing the compensation in effect in June, July and August. In short, it is openly manifest that such legislation was drafted in a manner to intentionally circumvent Section 4227-2 of the General Code.

Question 1: Is such ordinance legal?

Question 2: Was the amount drawn in July legally paid?

Question 3: Will the continuance of the payments of the amounts shown in the August list be legally payable?"

The ordinance to which you refer provides as follows:

"AN ORDINANCE

Fixing the salary and the bonds of the superintendent of water works, clerk of the water works, engineers and assistants at the power house, pipe fitters and laborers.

Be it ordained by the council of the city of Mt. Vernon, Ohio:

Section 1. That the superintendent of water works, clerk of the water works, engineers and assistants, pipe fitters and laborers shall receive the salary hereinafter provided, payable out of the water works fund of the city, and each shall give respective bond as required:

1—A superintendent of water works who shall receive for the month of July, 1918, the sum of $115.00 and $95.00 per month for each and every month thereafter, and shall give bond in the sum of $1,000.00.

2—A clerk of water works who shall receive $100.00 for the month of July, 1918, and $85.00 for each and every month thereafter, and shall give bond in the amount of $1,000.00.

3—An engineer at the power house who shall receive $95.00 per month for the month of July, 1918, and $85.00 for each and every month thereafter. Two assistants of the engineer at the power house who shall receive $90.00 for the month of July, 1918, and $80.00 per month for each and every month thereafter.

4—Pipe fitters who shall receive 37½ cents per hour and laborers 34⅜ cents per hour.

Section 2. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

J. D. WEAVER, President of Council,
B. H. BAIR, Mayor.

Passed May 28, 1918. Approved May 28, 1918.
Attest: Howard C. Gates, City Auditor."

It is manifest that the effect of this ordinance is such as to allow to the incumbent of each of the positions enumerated therein such amount of salary for the month of July as would represent the difference between the salary which he was thereafter to receive and the salary which he had received during the preceding month of June. That is to say, it being apparent that the ordinance could not take effect for thirty days because of the operation of the initiative and referendum statute to which you refer, council has, as you put it, undertaken to circumvent that statute by paying for July an amount great enough to make up the deficiency for June, so that the same person occupying one of these positions during both of these months of June and July would receive an amount in the aggregate for the two months equal to the salary for any period of two months thereafter. In short, in such a case the result would be the same as if council had fixed the salary in the amount per month that was ultimately fixed for each position and had made the change effective on the first day of June. Putting it in still another way: council sought to raise the salaries of the positions affected by this ordinance and to make its action effective as of the first of June; and not being able to do this directly it sought to do it indirectly in the manner described.

Of course, in legal contemplation what council did was not exactly that which has just been described; for if, for example, the clerk of the waterworks had died on the first day of July and his successor had been immediately appointed it would have been the latter and not the former who would have received the increased salary for that month. It is only by assuming what undoubtedly was the fact, viz: that the incumbents of all these positions remained the same during the three months beginning with June 1 of the year in which the ordinance was passed, that the action may be characterized as a retroactive increase of salary.

Nevertheless, it will not do to dismiss the question upon this narrow and technical ground. Council has, as you say, undertaken, broadly speaking at least, to accomplish indirectly a thing which it could not do directly. The general principle of law is that an attempt to accomplish by indirection something that is prohibited or illegal when done directly is ineffectual and void. This principle must be taken into account.

But this principle is not to be laid hold of to afford an easy solution to the question any more than the other view which has been previously expressed, for it remains to be demonstrated that the thing which council could not do directly was illegal or *ultra vires* the council. Such a conclusion can not be predicated upon the provisions of the initiative and referendum act. The thirty days' stay of the effectiveness of municipal legislation provided for by that statute is merely for the purpose of affording to citizens the right to circulate and file referendum petitions against the legislation. It is not created for any other purpose. It was not interposed for the purpose of preventing any public evil but merely as a part of the necessary machinery of the referendum. It would be too much therefore to say that council violated either the letter or the spirit of the referendum by acting as it did.

If the ordinance is to be regarded as void it must be, then, because of some

other principle than that embodied in the initiative and referendum law. I have sought for such a principle and have considered in this connection the question as to whether or not in fixing the salary or compensation of municipal employes the council may establish a rate which shall be other than a uniform rate. The statute under which the council acted was Section 4214 of the General Code, which reads, in part, as follows:

> "Council, by ordinance or resolution, shall determine the number of officers, clerks and employes in each department of the city government, and shall fix by ordinance or resolution their respective salaries and compensation."

This section gives to the council the right to fix pecuniary reward of municipal employes, either by way of salary or by way of compensation. The ordinance in this case shows that council has chosen in the instances mentioned by you to fix salaries. The question now arising is as to whether or not council acted within the scope of this power in passing the ordinance which has been quoted.

The definition of the term "salary" as given in the Century Dictionary is:

> "the recompense or consideration stipulated to be paid to a person periodically for services, usually a fixed sum to be paid for the year, half year or quarter."

The Standard Dictionary defines the term as follows:

> "a periodical allowance made as compensation to a person for his official or professional services or for his regular work."

Perhaps a better legal definition is that given in *Benedict* vs. *United States,* 176 U. S. 357-360, as follows:

> "A fixed annual or periodical payment for services, depending upon the time and not upon the amount of services rendered."

Thompson vs. Phillips, 12 O. S. 617.

Our own statutes use the term frequently to apply to special emoluments, such as the additional compensation of a judge. (See General Code, Sections 2252 et. seq.).

On the contrary, our statutes frequently stipulate of salaries that they shall be paid in equal periodical installments (See Sections 3001 and 3003), from which it might be inferred that the division of an annual salary into equal installments would not necessarily be the case if such a provision were not in the statute.

In the case before us the council did not fix an annual salary, nor did it say that each of the officers or employes named in the ordinance should receive a salary of so much per month. On the contrary, it assumed, or attempted to fix, a salary for the month of July and then a salary for each of the months thereafter, the amounts or rates being different.

I have been unable to find any principle upon which I feel justified in holding that this action on the part of council is illegal; especially do I feel constrained against the adoption of such a view because of the fact that the authority of council is not limited to the fixing of salaries. It may if it chooses provide for the com-

pensation of municipal officers and employes on some basis other than that of a salary. Though council has given to the compensation provided for the officers named in the ordinance in the case at hand the name of "salary", yet it must be remembered that that name does not control its specific intent manifested by the express provision that the compensation for the month of July shall be different from that for other months. Not being obliged to fix the compensation by way of determining annual salaries, and not being obliged to apportion the annual salary equally among the several months of the year, council is, I believe, vested with complete discretion as to how the compensation which it fixes shall be allowed and paid.

In view of all these considerations, I feel unable, as I have said, to say that the action of council in the case at hand is illegal because of the inequality between the amounts fixed for the month of July and those fixed for the other months. Having already held that the action of council can not be condemned as an attempt to do indirectly a thing which is prohibited when done directly, I come to the conclusion that the ordinance is legal, that the amount drawn in July was legally paid, and that the continuance of the payments of the amounts shown in the August list will be legally payable.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1599.

MUNICIPAL CORPORATION—WITNESSES AT HEARING BEFORE COUNCIL PAID FIFTY CENTS A DAY.

Where a hearing is held before council for charges against an officer by virtue of Sections 4263 *and* 4264 *of the General Code, the witnesses called in such hearing are to be paid at the rate of fifty cents per day for each day's attendance, as provided under Section* 3011 *G. C.*

COLUMBUS, OHIO, December 9, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I have your letter of October 31, 1918, as follows:

"The charter of the city of Columbus provides that on matters wherein the charter is silent the statutes shall obtain. The charter is silent relative to witness fees, and there is no legislation covering. An investigation was held before council relative to charges of delinquency against officers, under authority of Sections 4264 et seq. G. C.

Question: In view of the provisions of Sections 3011 and 3012 G. C., to what compensation would witnesses called before the council investigation be entitled?"

Sections 4263 and 4264 G. C. read:

Section 4263.—"The mayor shall have general supervision over each department and the officers provided for in this title. When the mayor has reason to believe that the head of a department or such officer has been guilty

in the performance of his official duty of bribery, misfeasance, malfeasance, nonfeasance, misconduct in office, gross neglect of duty, gross immorality or habitual drunkenness, he shall immediately file with the council, except when the removal of such head of department or officer is otherwise provided for, written charges against such person, setting forth in detail a statement of such alleged guilt, and, at the same time, or as soon thereafter as possible, serve or cause to be served a true copy of such charges with the person against whom the charges are made. Such service may be in person or by leaving a copy of the charges at the office of such person, and due return thereof made to council, as is provided for the return of the service of summons in a civil action."

Section 4264.—"When so filed with council, such charges shall be for hearing at the next regular meeting thereof, unless council extends the time for such hearing, which shall be done only on the application of the accused. The accused may appear in person and by counsel, examine all witnesses, and answer all charges against him. The judgment or action of the council shall be final, but to remove such officer the votes of two-thirds of all members elected to the council shall be required."

Section 4266 G. C. empowers council to compel the attendance of witnesses at the hearing. Section 4267 G. C. reads:

Section 4267.—"In all cases in which the attendance of witnesses may be compelled for such investigation, any member of the council may administer the requisite oaths, and the council shall have the same power to compel the giving of testimony by the attending witnesses as is conferred upon courts of justice. In all such cases, witnesses shall be entitled to the same privileges, immunities and compensation as are allowed witnesses in civil cases, and the costs of all such proceedings shall be payable from the general fund of the municipal corporation."

It will be noted from a reading of Section 4267 that the witnesses attending the hearing are to be allowed the same compensation as "witnesses in civil cases."

Sections 3011 and 3012 G. C. read:

Section 3011.—"In all cases not specified in this chapter, each person summoned as a witness shall be allowed fifty cents for each day's attendance, and the mileage herein specified. When not summoned, each person called upon to testify in a cause shall receive twenty-five cents."

Section 3012.—"Each witness in civil causes shall receive the following fees: For each day's attendance at a court of record, to be paid on demand by the party at whose instance he is summoned, and taxed in the bill of costs, one dollar, and five cents for each mile from his place of residence to the place of holding such court, and return; for testifying before an officer authorized to take depositions, under a subpoena, seventy-five cents, and five cents for each mile from his place of residence to the place of taking depositions, to be paid on demand by the party at whose instance he is summoned; for attending a coroner's inquest, one dollar for each day and the same mileage allowed a witness in the taking of depositions, to be paid from the county treasury; for attending a trial before a justice of the peace, or mayor of a municipal corporation, fifty cents for each day and such mileage. No mileage shall be allowed if the

distance from the place of residence of the witness to the place where called to testify is less than one mile."

Section 3014 G. C. provides for fees of witnesses in criminal cases, and Sections 3011 and 3012, above quoted, have reference to civil cases. Section 3012 enumerates certain classes of civil cases, providing different witness fees for the different classes of cases. A hearing before council is not included in the classes enumerated in that section, so reference must be had to Section 3011, which takes care of all civil cases not specified in Section 3012. Section 3012 was originally Section 26 of an act "to regulate the fees of probate judges, clerks of courts, sheriffs, witnesses, jurors' fees in partitions and to repeal certain acts therein named," found in 73 O. L., p. 127, and Section 3011 was originally Section 28 of the same act. It is quite clear from a reading of the act that Section 3011 G. C. is authority for the payment of fees in civil cases, not included in Section 3012.

Answering your question, therefore, I am of the opinion that the witnesses called before council in the hearing to which you refer should be paid the fees provided in Section 3011 G. C., which is 50 cents for each day's attendance.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1600.

APPROVAL OF FINAL RESOLUTION FOR ROAD IMPROVEMENT IN JEFFERSON COUNTY.

COLUMBUS, OHIO, December 9, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of December 5, in which you enclose for my approval the following final resolution:

Steubenville-Cambridge Road—I. C. H. No. 26, Section K, Jefferson county, petition No. 2538.

I have carefully examined said final resolution, find it correct in form and legal and am therefore returning the same with my approval endorsed thereon in accordance with Section 1218 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1601.

APPROVAL OF FINAL RESOLUTION FOR ROAD IMPROVEMENT IN AUGLAIZE COUNTY.

COLUMBUS, OHIO, December 10, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of December 6, in which you enclose, for my approval, final resolution for the following named improvement:

Wapakoneta-St. Mary's Road—I. C. H. No. 165, Section A-1, Auglaize county.

I have carefully examined said resolution, find it correct in form and legal and am therefore returning same to you with my approval endorsed thereon in accordance with the provisions of Section 1218 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1602.

DISAPPROVAL OF BOND ISSUE OF THE VILLAGE OF BEACH CITY, STARK COUNTY, OHIO.—$4,500.00.

COLUMBUS, OHIO, December 10, 1918.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In Re: Bonds of the village of Beach City, Stark county, Ohio, in the sum of $4,500 for the purpose of purchasing electric light equipment for suppplying and transmitting electricity to the corporation of the village of Beach City and the inhabitants thereof.

I have carefully examined the transcript submitted of the proceedings of the council of the village of Beach City and of other officers, relating to the above issue of bonds which was purchased by you by resolution under date of November 13, 1918, subject to the approval of this department.

This issue of bonds is one for the above stated purpose, and is provided for by ordinance of the council of the village of Beach City without a vote of the electors. I know of no statutory provisions authorizing a municipal corporation to issue bonds for the purpose above stated other than those of Section 3939 General Code. This section of the General Code is a part of the Longworth law, so-called, and the amount of bonds that may be issued for any of the purposes provided for therein is subject to limitations provided by other sections of the General Code which form an integral part of said Longworth law. One of these sections is 3940 General Code, which as amended in the Terrell act (107 O. L. 575, 578), provides as follows:

"Such bonds may be issued for any or all of such purposes, but the total indebtedness created in any one fiscal year, by the council of a municipal corporation under the authority conferred in the preceding section, shall not exceed one-half of one per cent. of the total value of the property in such municipal corporation as listed and assessed for taxation."

The financial statement appended to and made a part of the transcript of the proceedings relating to the above issue of bonds shows that the tax duplicate valuation of the taxable real and personal property in said village is the sum of $696,530; one-half of one per cent. of this amount is $3,482.65, which is the maximum amount of bonds that may be issued by this village for any particular purpose under the authority of Section 3939 General Code, during the current fiscal year without a vote of the electors of the municipality.

It is thus seen that the amount of the proposed issue of bonds exceeds the amount of bonds that the council of the village was authorized to provide for in the ordinance above referred to. As pointed out in my recent opinion to you disapproving the bonds of Cortland village, I am inclined to the view that the bonds authorized by said ordinance are invalid only to the extent of the excess of said proposed issue over the amount of bonds for which council might have legally provided under the limitation of Section 3940 General Code.

However, inasmuch as you have not in your resolution providing for the purchase of this issue of bonds, indicated any intention to purchase any part of said issue less than the whole thereof, I am not in position to advise you to do otherwise than to reject said issue and to rescind your former resolution providing for the purchase of the same.

I note a couple of other defects in the transcript, one at least of which would prevent my approval of the proceedings independent of the fundamental defect above considered in the absence of further information.

The transcript does not show that the ordinance providing for this issue of bonds was published in the manner required by law, and further, does not contain enough facts to show affirmatively that the meeting of council under date of September 4, 1918, at which the ordinance providing for this issue of bonds was enacted, was a legal meeting. This last defect is cured by the fact that apparently all of the members of council attended and participated in said meeting, and both of said defects are of such a nature that they probably could be obviated by further information. However, the first defect in the proceedings above pointed out is of such a nature as requires my disapproval of the issue.

The transcript submitted is herewith enclosed for return to the village authorities.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1603.

COUNTY COMMISSIONERS—OFFICES—MEMBER OF BOARD AND MEMBER OF COUNTY AGRICULTURAL SOCIETY INCOMPATIBLE.

The offices of member of a board of county commissioners and member of a county agricultural society are incompatible.

COLUMBUS, OHIO, December 12, 1918.

HON. D .H. PEOPLES, *Prosecuting Attorney, Pomeroy, Ohio.*

DEAR SIR:—I have your communication in which you request my opinion as follows:

> "Are the office of commissioner of Meigs county, Ohio, and member of the Meigs County Agricultural society compatible?"

The court in State ex rel. vs. Shaffer, 6 O. N. P. (N. S.) 219, in the opinion on p. 221 lays down the following principle as applying to incompatible offices:

> "It was early settled at common law that it was not unlawful *per se* for a man to hold two offices; if the offices were incompatible with each other, that is, if the attempt to fill one disqualified the officer from performing the duties of the other, so that, for instance, in one position the officer was superior in functions to himself filling the other, as in the case of a man attempting to fill at one time the office of councilman and village clerk, then he could hold but one, but if the duties of one were not in conflict with the duties of the other, then both could be held. And it was early held that the test of incompatibility was not that it was physically impossible for the officer to perform the duties of one office because he was at that time elsewhere performing the duties of the other, but the distinction was in an inconsistency in the functions of the offices, as in the example above given."

In State of Ohio ex rel. vs. Gebert, 12 C. C. (N. S.) 274, the court in the opinion at p. 275 lays down the following principle:

> "Offices are considered incompatible when one is subordinate to, or in any way a check upon, the other; or when it is physically impossible for one person to discharge the duties of both."

It is readily seen that the court in this case has extended the principles of incompatibility far beyond that set out in State ex rel. vs. Shaffer, supra.

The question arises as to whether these offices might be considered incompatible due to the fact that the duties of the one are subordinate to those of the other, or in some way are a check upon the other.

The provisions of the law having to do with a county agricultural society are found in Sections 9880 to 9910 G. C., inc. Without quoting any of these sections in full, it is evident, from a study of the same, that the matters pertaining to a county fair and the property connected therewith are to be performed not alone by the county agricultural society, but also to a considerable extent by the county commissioners of the county. Sometimes these two bodies perform the duties together. At times the county commissioners act upon the request of the county agricultural society. And I would say at the outset that the duties of the county agricultural society in regard to county fairs are so interwoven with the duties of the board of county commissioners, that it can readily, and should be, held that these two offices are incompatible.

For instance, in Section 9894 G. C. we find a provision that—

> "* * * the county commissioners shall on the request of the agricultural society annually levy taxes of not exceeding a tenth of one mill upon all taxable property of the county, * * *."

In Section 9895 G. C. we find this provision:

> "If a county society and the county commissioners decide that the interests of the society and county demand an appropriation from the county treasury for the purchase and improvement of county fair grounds * *"

the county commissioners may levy a tax upon all the taxable property of the county.

In Section 9900 G. C. there is a provision made in reference to the selling of its site by a county society, to the effect that if the county paid all or any portion of the purchase money for the site to be sold or leased, written consent must be given by the county commissioners to the sale or lease of the premises.

Section 9908 G. C. provides that under certain conditions consent of the county commissioners must be given to an agricultural society before it can encumber the real estate owned by it in order to pay the costs of necessary repairs and improvements. Other sections might be cited along the same line.

On account of all of these provisions it is my opinion that the offices of county commissioner and member of a county agricultural society are incompatible.

It does not appear in the request how or under what conditions the agricultural society of Meigs county holds its real estate, but I do not feel that it is essential for me to know this particular fact. I am of the opinion that in no case should a member of the board of county commissioners of a county be at the same time a member of the county agricultural society.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1604.

APPROVAL OF LEASES TO DAYTON POWER AND LIGHT COMPANY, JENNIE FRAHM, CELINA, OHIO, AND JAMES BENADUM, BALTIMORE, OHIO.

COLUMBUS, OHIO, December 12, 1918.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your letter of December 10, 1918, in which you enclose three leases, in triplicate, for my approval, as follows:

	Valuation
To The Dayton Power & Light Co., a small tract of land and water main crossing under the Miami and Erie canal at Piqua, O	$400 00
To Jennie Frahm of Celina, Ohio, a small tract of land on the south shore of Lake St. Marys, for agricultural purposes	259 50
To James Benadum, Baltimore, Ohio, a small portion of the abandoned Ohio canal property in the village of Baltimore, Fairfield county, Ohio, for agricultural purposes	100 00

I have carefully examined these leases, find them correct in form and legal and am therefore returning the same to you with my approval endorsed thereon.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1605.

FEES AND COSTS—REQUISITION—PAYMENT OF COSTS FOR RETURNING PRISONER NOT PAID BY STATE WITHOUT.

Section 13,722 G. C. authorizes the payment of costs covering the arrest and return of a prisoner from outside of Ohio only when such arrest and return have been made upon the requisition of the Governor.

If the prisoner has been returned to Ohio prior to either the time of the application for the extradition papers or the issuing of the same, the state is not authorized to pay the cost of the arrest and return.

COLUMBUS, OHIO, December 12, 1918.

HON. SAMUEL DOERFLER, *Prosecuting Attorney, Cleveland, Ohio.*

DEAR SIR:—I have your letter of November 23, 1918, as follows:

"The following situation has presented itself in the matter of the extradition of prisoners from other states and the payment of bills for expenses incurred in returning them. Under the law, of course, the state reimburses the county for all expenses incurred.

It sometimes happens that prisoners will return without the formality of extradition papers. In such cases we have presented the bills to the auditor of state, but he has refused payment thereon for the reason that no extradition proceedings were brought.

I was therefore compelled in all cases, whether extradition was waived or not, to secure extradition papers from the Governor of Ohio so as to present them, or a certificate that they were granted, to the auditor with the county's bill.

In some cases the authorities outside of the state notified us that they would only hold the prisoner for a limited period of time and that inasmuch as extradition was waived, we must immediately secure our prisoner. In those cases we did not have time to send to Columbus for extradition papers, but would send the officer first to secure his prisoner and then would secure the extradition papers later, solely for the purpose of permitting the county to be reimbursed by the state.

I realize that securing extradition papers after a prisoner has been returned is an absurdity, yet as an official of this county I must protect it by such proceedings as will reimburse it for necessary expenses incurred.

It seems to me that the state auditor's contention that he will not reimburse the county unless the county has gone to the expense of securing extradition papers, whether necessary or not, is unsound.

I am submitting this whole proposition to you for solution, feeling that both the state and county will be dealt justly with."

Section 110 G. C. reads:

"The demand or application must be accompanied by sworn evidence that the party charged is a fugitive from justice, and that the demand is made in good faith for the punishment of crime and not for the purpose of the collection of debt or pecuniary mulct or of removing the alleged fugitive to a foreign jurisdiction to serve him with civil process, and by a duly attested copy of an indictment or an information, or a duly attested

copy of a complaint made before a court or magistrate authorized to take it and accompanied with an affidavit or affidavits to the facts constituting the offense charged by persons having actual knowledge thereof."

It will be noted from this section that in making an application to the Governor for extradition papers, an affidavit must be made to the effect that the party sought to be extradited is a "fugitive from justice." This being so, it is clear that extradition papers cannot be issued if the prisoner has already been returned to Ohio, since he would not be a fugitive from justice at the time the application to the Governor was made.

Of course there might be cases where the person accused of a crime is a fugitive from justice at the time the application is made, but is returned to Ohio before the extradition was finally issued. It might be argued that in such cases the issuing of extradition papers, even after the return of the fugitive, would justify the payment of the expense of the prisoners returned by the state. However, the sections of the statute governing payment of costs in these cases force us to the opposite conclusion.

Section 2491 G. C. provides:

"When any person charged with a felony has fled to any other state, territory or country, and the governor has issued a requisition for such person, or has requested the president of the United States to issue extradition papers, the commissioners may pay from the county treasury to the agent designated in such requisition or request to execute them, all necessary expenses of pursuing and returning such person so charged, or so much thereof as to them seems just."

Section 13722 G. C. reads:

"Upon sentence of a person for a felony, the officers, claiming costs made in the prosecution, shall deliver to the clerk itemized bills thereof, who shall make and certify, under his hand and the seal of the court, a complete bill of the costs made in such prosecution, including the sum paid by the county commissioners for the arrest and return of the convict on the requisition of the governor, or on the request of the governor to the president of the United States. Such bill of costs shall be presented by such clerk to the prosecuting attorney, who shall examine each item therein charged, and certify to it if correct and legal."

It will be noted that Section 2491 makes provision for the payment of expenses in extradition cases in the first instance by the county commissioners, and that Section 13722 provides for the reimbursement of the county by the state. It will be noted, however, that Section 13722 only authorizes the reimbursement of the county by the state for the "sum paid by the county commissioners for the arrest and return of the convict on the requisition of the governor." It will be seen from this provision that the state pays the costs only when the convicted person has been arrested and returned on the requisition of the governor. If the prisoner has been returned to Ohio prior to either the application for the extradition or the issuing of the same, it is clear that he has not been returned "on the requisition of the governor," and in such cases it is my opinion that the state should not pay the costs of such prisoner's return.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1606.

COLLATERAL INHERITANCE TAX—LAW IN FORCE AT TIME OF DISTRIBUTION GOVERNS DISTRIBUTION.

Inheritance taxes accruing under the law as it existed prior to the amendment of Section 5331 G. C. in the year 1913 but paid thereafter must be distributed in accordance with the provisions of the amended section.

COLUMBUS, OHIO, December 12, 1918.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of November 21, in which you invite my opinion upon a question submitted by the auditor of Auglaize county, as follows:

> "In our settlement of collateral inheritance tax in February we will be confronted with the following situation:
>
> L. N. Blume, of Wapakoneta, died on July 4, 1912, and the probate court, in reviewing the subject of inheritance tax pertaining to the estate, ordered that certain amounts be paid into the county treasury which was done on October 29, 1918.
>
> In making settlement, shall we make distribution based on the provisions of the law in force at the time of death of Mr. Blume or does the law in force at the time of payment into the treasury apply?"

In my judgment, the answer to this question depends upon the intention of the legislature as manifested in its amendment to Section 5331 of the General Code and that of the people in adopting Article XII, Sections 7 and 9 of the Constitution.

The history here involved is brought out by a quotation of the constitutional amendments and a statement as to the date as of which the legislature acted. The amendments are as follows:

> "Section 7.—Laws may be passed providing for the taxation of the right to receive, or to succeed to, estates, and such taxation may be uniform or it may be so graduated as to tax at a higher rate the right to receive, or to succeed to, estates of larger value than to estates of smaller value. Such tax may also be levied at different rates upon collateral and direct inheritance, and a portion of each estate not exceeding twenty thousand dollars may be exempt from such taxation."
>
> "Section 9.—Not less than fifty per centum of the income and inheritance taxes that may be collected by the state shall be returned to the city, village, or township in which said income and inheritance tax originates."

These sections went into effect January 1, 1913. At that time there was in force a collateral inheritance tax law which did not, however, distribute its revenue in the manner provided in Section 9 as above quoted. At the succeeding session of the legislature Section 5331 of the General Code was so amended as to provide for the even division of inheritance tax revenues in the manner which I have indicated. The evident intention of the legislature was to conform the statute to the amended constitution.

Other amendments were made in the collateral inheritance tax law at the same

time: the exemption of two hundred dollars was raised to five hundred dollars and the exclusion of brothers and sisters, etc., from the list of direct relatives whose inheritances were not taxable was made. The amending act contained no express saving clause; neither did the framers of the constitutional amendments offer for the approval of the people at the election at which they were adopted any clause saving pending proceedings from the effect of the amendment.

Section 26 of the General Code is a saving clause which can be read into every ordinary amending or repealing act. Without quoting it, however, I may remark that it evidently does not apply here, first, for the reason that we are dealing rather with a change in the constitution than with a change in the statute, and second, for the reason that it has been held that the collection of taxes is not a "proceeding" wihin the meaning of the section.

Alexander vs. Spencer, 13 C .C., n. s., 475.
Lee vs. Dawson, 8 C. C., 365.

In the absence of such a statute, however, it is a general principle applicable to inheritance taxes as well as to other forms of taxation that a change in the law does not affect substantive rights which have already vested; so that, for example, if the decedent in the case about which you inquire had left property to a brother, and before the tax had been assessed the law had been changed as it was in 1913 by making such inheritance theretofore exempt subject to taxation, such change would not in my opinion have affected the rights of the brother.

On the other hand, it is also stated as a general principle that changes in procedure may, in the absence of the expression of a contrary intention, result from a change in the statute. (See Gleason and Otis' Inheritance Taxation, pp. 25, 27.) In my opinion the change respecting the distribution of the tax is rather to be regarded as a change in procedure than as a change affecting substantive rights; especially is this true when we take into account the fact that this particular change was made in deference to an amendment to the constitution. In short, after January 1, 1913, it was no longer possible under the constitution to divide the proceeds of an inheritance tax otherwise than equally between the state and the municipality or township, unless the constitution be interpreted as applicable only to inheritance tax laws passed after the amendment went into effect. The general assembly of 1913, however, upon which devolved the duty of making the contemporaneous interpretation of the amendment, evidently proceeded upon the opposite basis and determined that it was incumbent upon it as a legislative body to conform the existing inheritance tax law to the provisions of the new constitution. The legislature must therefore have intended that all inheritance taxes distributed after Section 5331 was amended at least should be divided equally between the state and the local subdivision. I know of no constitutional impediment in the way of arriving at such a result.

For all the foregoing reasons I am of the opinion that although the right to collect the tax in question accrued prior to the amendment of Section 5331 G. C., the tax must be distributed in accordance with the section as it now is.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1607.

MUNICIPAL CORPORATIONS—POWER TO ISSUE BONDS UNDER SECTION 3939 NOT AUTHORITY TO ENGAGE IN BUSINESS OF OPERATING ICE PLANT—IF MUNICIPAL ICE PLANT PUBLIC UTILITY, UNDER CONSTITUTION, BONDS MAY BE ISSUED THEREFOR.

The mere grant of power by the legislature to a municipal corporation to issue bonds for the purpose of constructing a municipal ice plant is not of itself sufficient authority to it to engage in the business of operating an ice plant.

If a mnuicipal ice plant is a "public utility" within the meaning of Article XVIII, Section 4 et seq. of the Constitution, which apply to all municipalities, such grant of power to issue bonds would, however, be fully efficacious.

COLUMBUS, OHIO, December 13, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of November 2, requesting my opinion as follows:

> "Under paragraph 27 of Section 3939 of the General Code, as amended, 107 O. L., 553, a municipality may issue bonds for installing and operating a municipal ice plant. We know of no other authority of law for the construction and operation of a municipal ice plant.
>
> *Question*: Is the authority to issue bonds sufficient authority in non-charter municipalities for the erection and operation of municipal ice plants?"

As you say, there is nothing in the General Code relating to the powers of municipal corporations generally which authorizes such a municipal corporation to own and operate a municipal ice plant.

If the Municipal Code were the sole source of the authority of a municipal corporation in this regard, I should feel grave doubt as to whether the mere grant of power to issue bonds for the purpose of constructing an ice plant would be sufficient to authorize a municipality to embark in such an enterprise.

However, under the present constitution of this state the authority of a municipal corporation to own and operate a public utility is not limited to that granted by the legislature, but is found in Article XVIII, Sections 4, 5 and 6, as follows:

> "Section 4.—Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility, the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility."
>
> "Section 5.—Any municipality proceeding to acquire, construct, own, lease or operate a public utility, or to contract with any person or company therefor, shall act by ordinance and no such ordinance shall take effect until after thirty days from its passage. If within said thirty days a petition signed by ten per centum of the electors of the municipality

shall be filed with the executive authority thereof demanding a referendum on such ordinance it shall not take effect until submitted to the electors and approved by a majority of those voting thereon. The submission of any such question shall be governed by all the provisions of Section 8 of this article as to the submission of the question of choosing a charter commission."

"Section 6.—Any municipality, owning or operating a public utility for the purpose of supplying the service or product thereof to the municipality or its inhabitants, may also sell and deliver to others any transportation service of such utility and the surplus product of any other utility in an amount not exceeding in either case fifty per centum of the total service or product supplied by such utility within the municipality."

In this connection Section 12 of the same article provides as follows:

"Any municipality which acquires, constructs or extends any public utility and desires to raise money for such purposes may issue mortgage bonds therefor beyond the general limit of bonded indebtedness prescribed by law; provided that such mortgage bonds issued beyond the general limit of bonded indebtedness prescribed by law shall not impose any liability upon such municipality but shall be secured only upon the property and revenues of such public utility, including a franchise stating the terms upon which, in case of foreclosure, the purchaser may operate the same, which franchise shall in no case extend for a longer period than twenty years from the date of the sale of such utility and franchise on foreclosure."

The reference in Section 12 to the authority of any municipality to issue mortgage bonds is clearly not intended to exclude the issuance of general tax bonds as a means of acquiring, constructing or extending a public utility. On the contrary, it is clearly intimated in Section 12 that the mortgage bonds may be in addition to bonds which are subject to the "general limit of bonded indebtedness prescribed by law."

The above quoted provisions of the Home Rule amendment are, in my opinion, self-executing and apply to all municipalities. As much was clearly intimated in the leading case on the subject of the Home Rule amendment, which is *State ex rel.* vs. *Lynch,* 88 O. S. 71. In the leading opinion of Shauck, C. J., in that case I find the following language: (p. 97)

"Among those who had attentively studied the functions of written constitutions it was accepted as a sound proposition that a municipality might own and operate only such utilities as it used in its municipal operations. Those who are responsible for this amendment were aware that no enlargement of that capacity was denoted by the provisions of the third section that 'municipalities shall have authority to exercise all powers of local self-government,' and, therefore, they employed the express language of the later section of the article to confer that capacity with respect to other utilities. * * *."

In other words, Judge Shauck intimated, if he did not expressly hold, in this passage from his opinion that the capacity to own and operate public utilities was conferred upon all municipal corporations by "the later section of the article," by which he meant of course Section 4.

I think it is clear, therefore, that all municipal corporations, non-charter as well as charter, have power to own and operate any public utility "the product or service of which is to be supplied to the municipality or its inhabitants."

Of course, this conclusion still leaves open the question as to whether or not a municipal ice plant is a "public utility." This question is by no means easy of solution in the present confused state of the law on this vexed subject. If we go back to the time honored test of natural monopoly, that is, the existence of natural restrictions respecting production or distribution of a product or service, we would still be left in doubt, for there would seem to be no natural restriction upon the distribution of ice at least, such distribution being made by wagons, nor would there seem to be any natural limitation upon the production of artificial ice as any one who has the necessary capital may construct and operate an ice plant. The furnishing of artificial ice would therefore be brought with difficulty within the same category as the furnishing of electric current, gas, street car service, water, and the like, with respect to all of which there are natural limitations tending to a monopoly either upon the process of production as in the case of natural gas or in the process of distribution or direct rendition of the service as in the case of all of those enumerated. However, I am not prepared to say that a court would necessarily adhere strictly to the strict test of what constitutes a public utility which I have just suggested.

On the other hand we find that the legislature has actually conferred upon municipalities the power to issue bonds for this purpose. This must be taken as a legislative determination to the effect that a municipal ice plant does constitute a public utility; for it must be presumed that the legislature in granting the power to issue bonds either determined or took it for granted that a municipal corporation having the power to own and operate a public utility would be thereby authorized to own and operate a municipal ice plant.

In this state of legislation I would advise that it would be improper for the Bureau of Inspection and Supervision of Public Offices or any other state authority to question the power of a municipal corporation to own and operate an ice plant. To do so would be to question the constitutionality of the act. This should be done, in my judgment, at the instance of some taxpayer or other pecuniarily interested party. As for myself, I would prefer not to express an opinion upon the question, feeling that in doubtful cases it is the duty of the attorney-general to strive to uphold the constitutionality of a law rather than, as a general rule at least, to seek to strike it down.

I answer your question therefore by saying that although the authority to issue bonds conferred by amended Section 3939 of the General Code for the purpose of installing and operating a municipal ice plant may not be in and of itself sufficient authority in non-charter municipalities for the erection and operation of a municipal ice plant, this authority may be coupled up with the grant of authority in the above quoted sections of the Home Rule amendment to the constitution in such manner as to give color of authority to a municipal corporation, not only to issue bonds for the purpose, but also to undertake the enterprise of operating a municipal ice plant as a public utility; and that the ultimate question as to whether or not a municipal ice plant is a public utility should at this time, in view of the legislative action in the amendment of Section 3939, be regarded as a doubtful constitutional question which should be resolved by the administrative officers of the state in favor of the constitutionality of the statute and the existence of the power.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1608.

APPROVAL OF LEASES TO THE MIAMI VALLEY RAILWAY CO. AND ROBERT F. WOLFE, COLUMBUS, O.

COLUMBUS, OHIO, December 13, 1918.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of December 12, in which you enclose for my approval two leases, in triplicate, as follows:

	Valuation.
To The Miami Valley Railway Co., for railway right-of-way along the M. & E. canal, in Miami county, Ohio	$8,766 66
To Robert F. Wolfe, Columbus, Ohio, for Journal Island in Buckeye Lake, Fairfield county, Ohio	3,333 33

I have carefully examined these leases, find them correct in form and legal and am therefore returning the same to you with my approval endorsed thereon.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1609.

MUNICIPAL CORPORATIONS—VILLAGE LIABLE FOR EXPENSES INCURRED BY BOARD OF HEALTH IN ESTABLISHING QUARANTINE HOSPITAL.

Where a municipality established a quarantine hospital within its limits, accepts patients residing in the township outside the municipality and cares for them in said hospital, the village is liable for the expenses incurred by the board of health in reference thereto, under the provisions of Section 4451 *G. C.*

COLUMBUS, OHIO, December 13, 1918.

HON. JARED P. HUXLEY, *Prosecuting Attorney, Youngstown, Ohio.*

DEAR SIR:—I am in receipt of your communication which reads as follows:

"This office has been requested to secure your opinion upon the following facts:

The village of Struthers in the past has made no levy for relief and support of the poor, these activities being exclusively discharged by the township trustees.

The village of Struthers has established a temporary hospital for the purpose of taking care of people suffering from Spanish Influenza which at the present time is an epideimc in said village. Patients suffering from this malady are also accepted from the township of Poland, within whose territorial limits the village of Struthers lies.

It is now suggested by the authorities of the village of Struthers that

in view of the fact that the township has been bearing the expense of relief of the poor in the past, the village should assume the indebtedness incident to the establishment and maintenance of said hospital during the continuance of said Spanish Influenza epidemic.

Should the village of Struthers or the trustees of Poland township bear such indebtedness for the establishment of said hospital and its maintenance?"

The answer to your question is mainly based upon three sections of the General Code. That the village of Struthers, through the board of health, has full power and authority in law to erect a temporary hospital, is clearly evident from Sections 4456 and 4457 G. C. These sections read as follows:

"Section 4456.—A municipality may establish a quarantine hospital within or without its limits. If without its limits, the consent of the municipality or township shall be first obtained, but such consent shall not be necessary if the hospital is more than eight hundred feet from any occupied house or public highway. When great emergency exists, the board of health may seize, occupy and temporarily use for a quarantine hospital, a suitable vacant house or building within its jurisdiction. The board of health of a municipality, having a quarantine hospital, shall have exclusive control thereof."

"Section 4457.—The board of health may erect temporary wooden buildings or field hospitals deemed necessary for the isolation or protection of persons or freight supposed to be infected, and may employ nurses, physicians and laborers sufficient to operate them and sufficient police to guard them. Such board may cause the disinfection, renovation or destruction of bedding, clothing or other property belonging to corporations or individuals when such action is deemed necessary by the board or a reasonable precaution against the spread of contagious or infectious diseases."

If the municipality has authority to erect said quarantine hospitals and employ nurses, physicians and laborers sufficient to operate them, the next question to be considered is, who is responsible for the expenses incurred in the establishment and maintenance of the hospital?

In my opinion the provisions of Section 4451 G. C. apply. This section reads as follows:

"Section 4451.—When expenses are incurred by the board of health under the provisions of this chapter, upon application and certificate from such board, the council shall pass the necessary appropriation ordinances to pay the expenses so incurred and certified. The council may levy and set apart the necessary sum to pay such expenses and to carry into effect the provisions of this chapter. Such levy shall, however, be subject to the restrictions contained in this title."

I think it is clear from this section that the village of Struthers is liable for the indebtedness about which you make inquiry, and not the township of Poland, in which said village is located.

I am aware that the question might arise as to whether said township should pay at least a part of the cost and expense of the establishment and maintenance of said hospital, because patients suffering from Spanish Influenza were accepted from

the township as well as from the territorial limits of said village. However, it is my opinion this would not alter the principle above laid down. While the authorities of the village of Struthers might have refused to accept patients residing in the township of Poland, yet if said authorities did so accept patients from said township, I know of no principle of law by which a part of the cost and expense of establishing and maintaining the hospital could be charged back to the township.

In an opinion rendered by me to Hon. C. M. Caldwell, prosecuting attorney, on April 16, 1917, found in Volume I, Opinions of the Attorney-General for 1917, page 508, I practically so held. The facts in that case differ somewhat from those in the one now before me, but it seems to me the same principle applies to both. In the case Mr. Caldwell presented, a certain village had quarantined a person who was a resident of the township outside the village, said person having been taken sick with a contagious disease while in the village, and the question arose as to who should pay the cost and expense of the quarantine when such quarantined person was unable to pay the same. I held that said cost must be borne by the village, and used the following language in said opinion: (p. 510)

> "There is no provision for charging such payment back to the township or municipality in which the quarantined person might reside. The only time there can be such a charge back is when a person with a contagious disease is quarantined and is a legal resident of another county of the state and is unable to pay such expense."

Hence it is my view that if the village of Struthers accepted patients from the township of Poland, admitted them to the hospital and took care of them while so located therein, it is the duty of said village to provide payment therefor under the provisions of Section 4451 G. C.

I might say in passing, I am rendering this opinion upon the theory that the hospital established was a quarantine hospital and established for the purpose of isolating persons suffering with said disease and protecting other persons from the contagion of the same. A different question would arise if this hospital was a measure adopted merely to take care of what might be termed the indigent poor of the township and village. I take it that this was a regular quarantine hospital, from the fact that you speak of the disease as an epidemic and that the hospital was erected not so much with a view to taking care of the indigent poor, but to prevent the spread of the epidemic.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1610.

MUNICIPAL CORPORATION—BOARD OF HEALTH—PERSON QUARANTINED BY, SECTION 4436 APPLIES.

Section 4436 G. C., and not Section 3480, should be made to apply in a case where a resident of a village is quarantined by the board of health of said village and said person so quarantined is in need of medical attention and is unable to pay for the same.

COLUMBUS, OHIO, December 14, 1918.

HON. SUMNER E. WALTERS, *Prosecuting Attorney, Van Wert, Ohio.*

DEAR SIR:—I am in receipt of your communication reading as follows:

"Some months ago Mr. A, a resident of the village of E, was quarantined by the board of health of said village of E. Mr. D, the attending physician, notified, in writing, the township trustees of the township in which said village of E is located, that he was attending Mr. A. Mr. D is now asking the township trustees to pay him for his services.

Please advise me whether, in your judgment, Section 4436 of the General Code, or the chapter embracing the Poor laws (3476-3496) govern and should be followed in the payment of this bill."

The provisions of the General Code which lie primarily at the foundation of your question are Sections 3480 and 4436, which read as follows:

"Section 3480.—When a person in a township or municipal corporation requires public relief, or the services of a physician or surgeon, complaint thereof shall be forthwith made by a person having knowledge of the fact to the township trustees, or proper municipal officer. If medical services are required, and no physician or surgeon is regularly employed by contract to furnish medical attendance to such poor, the physician called or attending shall immediately notify such trustees or officer, in writing, that he is attending such person, and thereupon the township or municipal corporation shall be liable for relief and services thereafter rendered such person, in such amount as such trustees or proper officers determine to be just and reasonable. If such notice be not given within three days after such relief is afforded or services begin, the township or municipal corporation shall be liable only for relief or services rendered after notice has been given. Such trustees or officer, at any time, may order the discontinuance of such services, and shall not be liable for services or relief thereafter rendered."

"Section 4436.—When a house or other place is quarantined on account of contagious diseases, the board of health having jurisdiction shall provide for all persons confined in such house or place, food, fuel, and all other necessaries of life, including medical attendance, medicine and nurses, when necessary. The expenses so incurred, except those for disinfection, quarantine, or other measures strictly for the protection of the public, when properly certified by the president and clerk of the board of health, or health officer where there is no board of health, shall be paid by the person or persons quarantined, when able to make such payment, and when not by the municipality in which quarantined."

Section 3480 G. C. is part of the act which has to do with the indigent poor of a township or municipal corporation, while Section 4436 is a part of the act relating to health conditions of municipalities, and especially with the board of health. Section 3480 is rather broad and general in its scope, while Section 4436 is specific and limited in its provisions, in that it applies to persons who are quarantined on account of contagious diseases.

For this reason, inasmuch as your question relates to a person who was quarantined by the board of health of a certain village, it is my opinion that Section 4436 should be made to apply, rather than the provisions of the act of which Section 3480 is a part.

While the above may be a sufficient answer to your question, it might be well, in order to have a somewhat broader foundation for the answer, to note the nature of the acts of which Sections 3480 and 4436 are a part.

Sections 3476 to 3496 inc. G. C. relate to the indigent poor of a township or

municipality and are embodied in Ch. 1, Div. IV, Tit. XI of Part First. This act was originally passed as found in 73 O. L. 233 and was an act entitled "For the relief of the poor." It dealt with county infirmaries and the duties of township trustees. Section 11 of said act, which afterwards became Section 3476 G. C., provided that the township should afford public support or relief to all persons therein who were in condition requiring the same. Section 14 thereof, which afterwards became Section 3480 G. C., provided for medical attention to those who might be in need of it. The whole act pertained to indigents or paupers as they are usually called.

In 93 O. L. 261, an act is found entitled "To revise and improve the statutes of Ohio relating to the care of the poor." This act was passed in 1898. The section of this act which afterwards became Section 3476 G. C. was amended so that it included not only the township trustees, but also "the proper officers of each corporation therein." The section of the act which afterwards became Section 3480 G. C. was also made to include the same provision.

So that Sections 3476 to 3496 inc. G. C. furnish a complete scheme for the support of or relief to all persons within a township or a municipal corporation who are in such a condition as to require it, whether it be medical or other relief. That is, this chapter makes provision for the support and relief of the poor, in the various townships and municipal corporations, who are in need of relief because of general and ordinary conditions.

We will now consider the general provisions in connection with the board of health of cities and villages. This act is found in Ch. II, Div. 5, Subd. 2, Tit. XII, Part First, being Sections 4404 to 4476 inc. G. C. The general headings of this chapter are:

> Organization and Powers. Nuisances. Dangerous Communicable Diseases. Quarantine Hospitals. Food and Supplies. Sanitary Plant.

These headings indicate clearly the underlying principle of the chapter, viz., the preservation of the health of the people of the municipality. The name, board of health, also clearly indicates this. When we consider the chapter in detail, we find that every provision thereof has to do with but one thing, and that is, that the board of health is to take such steps and adopt such measures as to prevent the inception of infectious and contagious diseases and the spreading of the same. It deals with water-closets, privies, cess-pools, sinks and drains; with yards, pens and stables, and the use, cleaning and emptying of the same; with the quarantining of persons exposed to infectious or contagious diseases and all kinds of buildings needed for said quarantine; with the disposition of bodies of persons dying with infectious or contagious diseases; with the erection and maintenance of quarantine hospitals; with the inspection of all kinds of foods and supplies with reference to whether they are pure or not; and with the erection and maintenance of plants for the removal from the municipality of liquid or solid wastes dangerous to the public health.

In all this there is not one word said relative to the indigent poor of the municipality, nor provision made in reference to them. This was not the object or purpose which the legislature had in mind in enacting the statute in regard to the board of health. The object and purpose of this chapter is specific and definite and relates entirely to the prevention of the inception of infectious and contagious diseases and the spreading of the same; while, as said before, the object and purpose of the chapter heretofore considered is just as definite and specific, to the effect that it deals entirely and absolutely with measures for relief of the poor, whether this relief be medical or otherwise.

Hence when we consider the two fundamental or basic sections of these two acts as applied to your question, and the general scope and nature of the acts themselves, I think we are safe in concluding that a state of facts, such as you submit, should be controlled by Section 4436, rather than by Section 3480 G. C.

I might call your attention to a decision of the circuit court found in 18 C. C. (N. S.) 196 in village of Barberton vs. Lohmers. In this case the court was not directly considering whether a state of facts, as set out by you, should come under Section 4436 or Section 3480 G. C., but it held, under facts very similar to those set out by you, that a physician would have a right of action against the municipality under the provisions of Section 4436. It was an action to recover compensation for medical services rendered to quarantined smallpox patients alleged to have been unable to pay therefor themselves. Of course the procedure of the physician in said circuit court case differed from the course pursued by the physician in your case, but to my mind the decision of the court at least tends to the point that Section 4436 is the proper section to control in those cases in which persons quarantined are in need of medical attention and are unable to pay for the same.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1611.

COLLATERAL INHERITANCE TAX—BASED ON RIGHT TO RECEIVE AND NOT ON RIGHT TO TRANSMIT.

Where a residuary estate is divided by will among four collateral relatives, the shares of two of whom are less than five hundred dollars in amount, the collateral inheritance tax is to be computed by subtracting these shares together with the sum of one thousand dollars from the total amount of such estate and is to be paid out of the share received by the two remaining collateral relatives in the proportion that they are entitled to share in what is left after these deductions are made.

COLUMBUS, OHIO, December 14, 1918.

HON. H. T. PHILLIPS, *Probate Judge, Athens, Ohio.*

DEAR SIR:—In your letter of recent date you request my opinion as follows:

> "A dies testate leaving a net estate amounting to $5,000.00. By the terms of the will of A, $300.00 was given to a niece, B, $350.00 to a nephew, C, and the residue to two nephews, D and E. How much of the estate is subject to the collateral inheritance tax? Should the total inheritance tax be paid from the residue willed to D and E, or should it be apportioned among the legatees according to the amount received by each?"

You are advised, in accordance with principles laid down in numerous opinions of this department and the courts, that the tax in the case about which you inquire should be computed upon the sum of $3,350.00, and that the total tax should be paid by D and E in the proportions in which they are entitled to share in so much of the residue as exceeds the sum of $1,000.00.

The tax is based upon the right to receive by inheritance and not upon the right to transmit. Each distributive share constitutes a separate subject of taxation. The

shares of A and B fall below the statutory exemption of $500.00 and are not taxable; those of D and E are taxable to the extent of the excess of the value of each above $500.00. I assume that the shares which they will respectively get are both above the sum of $500.00 in value.

For these reasons the conclusions which I have previously expressed have been arrived at.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1612.

DOG LICENSE LAW—SHERIFF—DEPUTIES OF SHERIFF UNDER SAID LAW ORDINARY DEPUTY—DUTY OF SHERIFF TO SEIZE AT SIGHT.

1. *The deputy sheriffs who perform the duties devolving upon the sheriff under the law found in* 107 *O. L.* 534, *are the ordinary deputies selected by the sheriff under the law.*

2. *The county commissioners must make an allowance for deputy hire, in view of the added duties placed upon the sheriff in said act. If the amount allowed should not be sufficient, the only remedy is for the sheriff to apply to the common pleas court for an additional allowance.*

3. *Under the provisions of section* 5652-7 *G. C.* (107 *O. L.* 535), *the sheriff is required to seize at sight and impound a dog under the conditions therein set out, and is not required to file an affidavit before a justice of the peace, before he can make such seizure.*

COLUMBUS, OHIO, December 14, 1918.

HON. FRANK B. GROVE, *Prosecuting Attorney, Cadiz, Ohio.*

DEAR SIR:—I have your communication requesting my opinion on the following matter:

> "Under Section 2980-1 G. C., the commissioners of Harrison county, Ohio, fixed the deputy hire for the sheriff at about $400.00, said sum fixed being the greatest amount they could allow under said statute, i. e., they allowed the full 30 per cent of the fees, etc., collected by the sheriff, which fees amounted to less than $2,000.00.
>
> The amount of deputy hire as so fixed by the commissioners is insufficient for the sheriff to employ deputy or deputies to enforce the provisions of the dog law, as found in 107 O. L. 534-540.
>
> Section 5652-8 G. C. (107 O. L. 535) provides that "county commissioners shall provide for the employment of deputy sheriffs necessary to enforce the provisions of this act."
>
> My question is this: May the county commissioners make an allowance for the sheriff to provide pay for deputies mentioned in preceding paragraph, and have said amount of said allowance drawn from the county fund and placed to credit of the sheriff's fee fund to be used for such deputies?
>
> Or must the sheriff first expend the amount allowed by the commissioners under Section 2980-1 G. C., and then apply to the common pleas court for a further allowance as provided in said Section 2980-1?

I should further like to inquire whether you construe Section 5652-7 (107 O. L. 535) as requiring the sheriff to seize untagged dogs on sight or information? Or before he can legally be required to take said untagged dogs must an affidavit be filed as mentioned in said section?"

Your communication divides itself into three questions as follows:

1. The nature of deputy sheriffs who are to be provided to perform the duties under the dog law as found in 107 O. L. 534.
2. The payment of these deputies.
3. Seizure of untagged dogs.

In an opinion (No. 861) to Hon. Perry Smith on December 15, 1917, I held that the duty of seizing untagged dogs primarily rests with the sheriff of the county, and that if he performs this duty through a deputy, it must be done through his ordinary force of deputies, selected under the provisions of law relating to this matter; that is, the same force which performs the general duties devolving upon the sheriff must perform the duties set out in the above act, providing the sheriff desires to perform those duties through deputies. This opinion, I think, answers your first query and I am enclosing a copy of the same for your consideration.

In an opinion (No. 973) rendererd to Hon. John V. Campbell, prosecuting attorney, on January 29, 1918, I held that the deputy sheriffs who performed the duties under the law designated above are to be paid in the same manner as are the ordinary deputies in the sheriff's office. In other words, the sheriff must make his report to the county commissioners, and said commissioners make an allowance, in accordance with the provisions of law, which will take care of the full deputy force needed by the sheriff. To be sure the county commissioners would take into consideration the added duties placed upon the sheriff under the above law and would make their allowance in view of said added duties. Of course if your commissioners have allowed the maximum for deputy hire, the sheriff of your county can not do otherwise than to apply to the common pleas court of your county for an additional allowance for deputy hire. I am enclosing a copy of said opinion No. 973, which I think fully answers your second question.

Your third question asks for a construction of Section 5652-7 G. C. (107 O. L. 535), which reads as follows:

"County sheriffs shall seize and impound all dogs more than three months of age, except dogs kept constantly confined in a registered dog kennel found not wearing valid registration tags. Upon affidavit made before a justice of the peace, that a dog more than three months of age and not kept constantly confined in a registered dog kennel is not wearing a valid registration tag and is at large, or is kept or harboured in his township, such justice of the peace shall forthwith order the sheriff of the county to seize and impound such animal. Thereupon such sheriff shall immediately seize and impound such dog so complained of. Such sheriff shall forthwith give notice to the owner of such dog, if such owner be known to the sheriff, that such dog has been impounded, and that the same will be sold or destroyed if not redeemed within four days. If the owner of such dog be not known to the sheriff, he shall post a notice in the county court house describing the dog and place where seized, and advising the unknown owner that such dog will be sold or destroyed if not redeemed within four days."

In order to understand this section, it will be well for us to consider Section 5652-6 G. C., which reads as follows (107 O. L. 535):

> "Every registered dog, except dogs constantly confined to registered kennels, shall at all times wear a valid tag issued in connection with the certificate evidencing such registration. Failure at any time to wear such valid tag shall be prima facie evidence of lack of registration and shall subject any dog found not wearing such valid tag to impounding, sale or destruction, as hereinafter provided."

Section 5652-7, supra, specifically provides that county sheriffs shall seize and impound all dogs more than three months of age, unless they are dogs kept constantly confined in a registered dog kennel, or unless they are wearing a valid registration tag. In my opinion this requires the sheriff to seize untagged dogs outside of a registered dog kennel, without the necessity of filing an affidavit before a justice of the peace. The latter part of this section gives the right to any individual to appear before a justice of the peace and file an affidavit stating that a dog more than three months of age, and not kept constantly confined in a registered dog kennel, is not wearing a valid registration tag and is at large. When such an affidavit is filed, the justice notifies the sheriff, at which time it immediately becomes his duty to seize and impound the dog so complained of. But this provision does not have any effect upon the duty of the sheriff to seize upon sight and impound a dog, as hereinbefore set out.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

1613.

COMMON PLEAS COURT—POWER TO COMMIT CHILD TO CHILDREN'S HOME.

A common pleas court exercising the divorce jurisdiction is without power to commit a child to the children's home of a county in the sense that it may order the officials of such home to receive the child; but it may order any person who may be a party in the case to place such child in such children's home by complying with the statutory procedure for the voluntary placing of children in such home.

COLUMBUS, OHIO, December 14, 1918.

Board of State Charities, Columbus, Ohio.

GENTLEMEN:—Some time ago I received from you a request for opinion in the following language:

> "We find that occasionally a judge of the common pleas court is committing dependent children to a county children's home. This has been occurring where there seems to be a designation of the judge of the probate court to act in the capacity of judge of the juvenile court.
>
> We wish to inquire whether a commitment by the judge of the common pleas court, under such circumstances, is legal, and if the superintendent of the county children's home is required to accept such commitment. See Section 1639 of the General Code."

Section 1639 General Code, referred to in your letter, relates to the exercise of the juvenile jurisdiction.

Suspecting the possibility of misunderstanding, I later requested specific information from you relative to the facts upon which your question was based, and am just in receipt of such information in the form of abstracts of records and journal entries in five cases, as follows:

"Dreyfuse Case No. 1.

Three children. Admitted to ———— County Children's Home, 3-3-16, by one trustee upon application of the Associated Charities and juvenile probation officer. Parents separated, mother living in adultery.

Later, action for non-support brought by trustees of children's home, in common pleas court against father, resident of Seneca county. Man indicted by grand jury of ———— county 4-9-17. April 11, 1917, defendant pleaded guilty for non-support of children and court fixed bond of $500 and placed order of $4 per week for the support of children, appointing a guardian as trustee, these payments to be continued until each child attains the age of sixteen years. The said trustee was further ordered to pay this money to the children's home.

Halliwell Case No. 2.

Two children, admitted to ———— County Children's Home, 4-20-17, by one trustee upon application of an aunt. Divorce proceedings in court December, 1916, were dismissed, male children being given to an aunt and the female child to the mother of the defendant who was ordered to pay for the support of the children. Order fails to state how much. This aunt secured the admission of the boys to the county home. Father later voluntarily agreed to contribute through the clerk of the court $4 a week toward the support of his boys.

Drake Case No. 3.

Two boys, placed in ———— County Children's Home, 10-13-17, by order of common pleas judge, with order on father to pay $2 a week for support, with a further order that if he was not able to pay, he should present himself to the home and the matron would furnish him with work to do to the extent of his indebtedness. Matron complained that she could not tolerate about the place a man of Mr. Drake's character and reputation and to give him work would be impossible. The judge therefore secured the placing of the boys in family homes.

Commitment on October 1, 1917, of common pleas court of the boys, Andrew and John, to ———— County Children's Home. On October 25, 1917, custody and control of common pleas court released in this case in favor of juvenile court.

Neusbaum Case, No. 4.

——— Neusbaum admitted to ———— County Children's Home, 12-10-12, by trustee on application of mother; parents separated. Kidnapped from county home on 12-18-12 by father. Later divorce trial, court ordered child to live with mother, and father to pay support. Mother

later remarried, later separated; claims she could not keep child on what court sent to her; child admitted to county home 6-12-18 as a boarder. Common pleas judge sent for father and requested him to make provision for the care of the child who by order of court was on July 6, 1918, placed out in family home.

Graham Case, No. 5.

Children admitted to ———— County Children's Home 3-29-18 on order common pleas judge. After divorce proceedings which were denied and dismissed, children were placed in children's home on court order with charge of $8 per week toward the support of the children."

I observe at once that cases Nos. 1, 2 and 4 do not answer the description set forth in your original letter, inasmuch as they are not commitments at all but in each of them the children were admitted on application to the trustees of the home under favor of Section 3089 or Section 3090 of the General Code. No such question as that originally submitted by you is therefore even remotely raised in these cases.

Turning now to cases Nos. 3 and 5 I find that the following journal entries were made:

Case No. 3.—Drake vs. Drake.

"On this first day of October, 1917, it appearing to the court that the defendant, ——— Drake, has not a fit place to keep the two boys, minor children of the parties, that they have not had proper care or schooling in the last year, at least, and that there is no dependence to be placed upon the defendant that he will be able to take proper care of them or send them regularly to school, it is ordered that the said children, ———— and ———, be committed to the ———— County Orphans' Home until further order herein, and that the defendant contribute to their maintenance there at least the sum of two ($2.00) dollars per week in advance.

On this, 25th day of October, 1917, it appearing to the court that the children of the parties herein, ————, are in need of juvenile jurisdiction as now exercised by the juvenile court of this county, in order that they may be properly reared and educated as contemplated by the statute of this state, and that this court is not provided with the proper agencies to that end.

It is ordered that the custody and control of this court be released in favor of said juvenile court, and that said court be requested to take charge of said children and make such order in the premises as may seem to be to the best interest of the children."

Case No. 5.—Graham vs. Graham.

"* * * it is ordered that a divorce be denied them and each of them and that both the petition and the cross petition therefor be dismissed.

And the court further finding that neither the plaintiff nor the defendant is a proper person to have the care and custody of said children, it is ordered by the court that the care and custody of said children be confided to the ———— County Orphans' Home and the defendant is ordered to pay the sum of $8.00 per week for their support, said payments to be made through the clerk of this court."

Neither of these cases really raises the question which you submit in your general letter. For in that letter you state as a conclusion that the judge of the common pleas court has assumed to exercise juvenile jurisdiction without being designated to exercise that jurisdiction, whereas the journal entries which I have quoted show that in both cases now under consideration the common pleas court was exercising the divorce jurisdiction and not the juvenile jurisdiction. Among the powers of the common pleas court in the exercise of the divorce jurisdiction is that set forth in Section 11987 of the General Code, as follows:

> "* * * The court shall make such order for the disposition, care and maintenance of the children, if any, as is just."

This jurisdiction is a continuing one in the sense that the order for disposition, care and maintenance may be modified from time to time whether there is any reservation in the original order to that effect or not.

Hoffman vs. Hoffman, 15 O. S. 427. Rogers vs. Rogers, 51 O. S. 1.

Jurisdiction in divorce cases, in so far as the power to award alimony and regulate the custody, etc., of the children is concerned, is exercised upon equitable principles, one of which is that the court acts *in personam*. In this respect the jurisdiction and powers of the court differ both from its jurisdiction and powers respecting the decree of divorce itself and from the jurisdiction and powers of the court exercising juvenile jurisdiction in adjudicating upon the status of a child. In cases of the last two described classes the court acts quasi *in rem*.

It is indispensable to the valid exercise of jurisdiction *in personam* that the decrees and orders of the court shall be directed to persons who are parties in the case and upon whom the process of the court has been personally served. For this reason alone a divorce court is without power to order any person or institution which is not a party to the case to assume the custody of minor children. Moreover, consideration of the statutes relative to the admission of children into a county or district children's home discloses the fact that there are two methods by which children may be admitted: These may be described as application and commitment. In the one case, exemplified by statutes already referred to, the efficient official act which constitutes a child a legal inmate of a children's home is the order of admission on the part of the trustees of the home; in the other case, that act is an order of a court having jurisdiction directed to the proper officers of the home and binding on them whether agreed to by them or not. Without quoting statutes it is sufficient to say that the juvenile court is expressly authorized to commit children to children's homes as well as to other institutions, whereas the common pleas court in the exercise of divorce jurisdiction is not given such express authority. For reasons which I have previously stated, I do not think that such authority could be claimed by implication arising from Section 11987.

I therefore arrive at the conclusion that a common pleas court exercising divorce jurisdiction is without power to commit a child to a children's home.

But, though technically such commitment can not be made by a divorce court in a direct way, a child may be placed in a children's home as a result of a decree of such a court in the following manner:

The court acting *in personam* may order the parties, husband and wife presumably, and more particularly the one party having the actual custody of the child at the time, to take such steps as may be necessary to place such child in a children's home or in any other public or private institution. It then becomes incumbent upon such parties to comply with the order of the court at peril of proceedings in contempt. Such compliance can be effected only by making application to the

trustees of the home in the case of a children's home; if the trustees refuse admission to the child for any proper reason, the court would have to take other action, being without power, as has been stated, to compel the trustees to receive the child; but should the trustees admit the child under such circumstances it would be legally admitted.

Now in case No. 3 the court exercising divorce jurisdiction appears to have assumed power to commit children to the "———— County Orphans' Home." Technically this order was void for reasons already stated. It nevertheless appears that the children referred to in the order were admitted to the home and that subsequently the common pleas court, perhaps feeling unable to deal with the situation, had released the custody of the children to the juvenile court. Such release, I may say, was necessary for the divorce court having previously acquired jurisdiction the juvenile court could not properly have interfered and assumed control of the custody of the children without such action on the part of the common pleas court.

In Re: Angeline E. Crist, 89 O. S. 33. Children's Home vs. Fetter, 90 O. S. 110. Orphan Asylum vs. Soule, 24 C. C. n. s. 151.

If the juvenile court has assumed jurisdiction in this case, which does not appear, and if in the exercise of such jurisdiction it has ordered the children to remain in the children's home in question, it would appear that no question could now be raised as to the legality of their status as inmates of such home. It must be admitted, however, that there was an irregularity in this case, though not the kind of irregularity suspected by you as indicated in your general inquiry. That is to say, the defect in proceedings did not arise from an attempt on the part of the common pleas court to exercise juvenile jurisdiction but rather from an attempt on the part of the common pleas court, having properly acquired divorce jurisdiction, to exercise that jurisdiction in an improper manner.

In case No. 5 the entry shows that the court did not frame its decree in the objectionable manner in which the decree in case No. 3 was framed. The order was that the custody and control of the children "be confided to the ———— County Children's Home." This order was proper and amounted to a direction to the parties in the case to take the proper steps to place the children in the home. The detailed statement of facts upon which your abstract is based seems to show that the authorities of the children's home regarded this order as in the nature of a commitment and accepted the children into the home without formal application. This was erroneous, and for that reason the children are not properly inmates of the home; they may be made so, if desired, however by complying with the statutes relative to the voluntary admission of children to the home.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1614.

ADJUTANT GENERAL—DUTY OF, RE MAINTENANCE LEGISLATIVE HALLS—RE APPOINTMENT OF EMPLOYES.

1. *The duty of the adjutant general respecting the maintenance and repair of the legislative halls is limited by Section* 150 *of the General Code to their preparation for the reception of the general assembly at the commencement of each ses-*

sion. Such work required to be done during the session may, without conflict with this section, be done under the supervision of the respective houses and paid for out of appropriations for their purposes, as may be the cleaning and renovation necessary at the conclusion of a session and after the adjournment thereof.

Under Section 150 *G. C. and appropriations to the House and Senate, respectively, for purposes of cleaning, repairs, etc., the renovation of the legislative halls immediately preceding the regular session of the general assembly devolves upon the adjutant general and such appropriations can not be lawfully extended for such purpose.*

2. *The adjutant general is without power to appoint more than the three officers with police powers mentioned in Section* 151 *G. C. Such power can not be derived from an appropriation for the salaries of six policemen.*

Such appropriation bill constitutes authority to employ and pay the extra policemen as general employes, though they might not lawfully exercise the police powers provided by statute.

COLUMBUS, OHIO, December 16, 1918.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I have your request for an early opinion upon the following questions:

> "Under the language of Section 150 G. C., is the adjutant general required to renovate the furniture, carpets, curtains, clocks and other equipment of the legislative halls, and make all necessary repairs therein which may become necessary during the session of the legislature; or may that body, by resolutions, authorize its own employees to renovate carpets, curtains, clocks and other fixtures and supplies and to make such repairs either during the session of the legislature, or after its adjournment?
>
> Section 151 G. C. specifically designates the number of certain employees that may be appointed by the adjutant general, and Section 154 G. C. specifically designates the pay of such appointees.
>
> May the adjutant general, in the face of the provisions of Section 151 G. C., appoint more of such employees than are therein designated, and may the legislature legally provide compensation for a greater number of such employes in the appropriation bill than are so specified by Sections 151 and 154 G. C.?
>
> In other words, where the law specifically fixes the number of employees, and fixes their compensation, may the legislature, in its appropriation bills, legally provide funds for a greater number, or at a higher compensation?"

Sections 150, 151 and 154 G. C., referred to in your inquiry, provide as follows:

> "Section 150.—The superintendent shall annually make a report of his transactions to the governor, keep the state house, grounds and appurtenances constantly protected and in order, and prepare the legislative halls for the reception of the general assembly at the commencement of each session."
>
> "Section 151.—The adjutant general shall appoint for the term of two years one day policeman, one night policeman and one visitors' attendant."
>
> "Section 154.—The day policeman and visitors' attendant shall receive an annual salary of seven hundred and twenty dollars, and the night policeman shall receive an annual salary of eight hundred dollars.

Section 150, the interpretation whereof is involved in your first question, clearly limits the duty of the adjutant general as superintendent of the state house to preparing the legislative halls for the reception of the general assembly at the commencement of each session. This particular duty is separately enjoined upon him by the section, so that I would find it impossible to reach the conclusion that the continuing care of the legislative halls devolves upon the adjutant general in his capacity as superintendent under the provision that he shall "keep the state house, grounds and appurtenances constantly protected and in order." Nor could I say that the adjutant general acquires general authority to care for the legislative halls as a part of the state house, etc., under Section 146 of the General Code, which gives to him "supervision and control of the state house and heating plant therein, the fixing and placing of all offices, commissions, departments and bureaus of the state therein, * * * materials and persons employed in and about the state house, the grounds and appurtenances thereof and all work or materials required in or about them."

That is to say, if the general assembly had intended in enacting these statutes to give to the adjutant general the power and the duty to attend to the care and maintenance of the legislative halls generally, it would not have dealt specifically with his duty as regards the legislative halls in the way in which it actually deals with that duty in Section 150.

I am therefore of the opinion that the adjutant general has nothing to do with the care, renovation and repair of the equipment in the legislative halls *during the session of the legislature.* His duty is fully discharged when he has prepared such halls for the reception of the general assembly *"at the commencement of each session."*

A somewhat closer question is presented by that part of your question which deals with the cleaning, etc., which has to be done after the conclusion of a legislative session. The General Code sections which have been referred to and quoted leave this question very much in doubt. Certainly the sections are not explicit enough to control a given session of the general assembly in the proper expenditure of the moneys appropriated for the use of the separate houses. So that in practice if in making up the budget for the House of Representatives and the Senate, respectively, appropriations are made upon the assumption that at the conclusion of the session the hall devoted to each branch of the assembly is to be cleaned and renovated, so that it is left in good condition for other proper uses during the recess or adjournment of the assembly, and then by proper House or Senate resolutions provision is made for expending these appropriations in the doing of such work, such expenditures are, in my opinion, legal.

From conversations with you I have gathered the impression that your first question relates to a state of facts more specific than that described in your formal inquiry. I shall attempt to cover these facts as I understand them:

The time for the commencement of the regular session of the general assembly is at hand; the legislative halls presumably stand in need of renovation and cleaning in preparation for that session; the sergeants-at-arms of the respective houses or other representatives of such houses of the general assembly are preparing to make, or are making, these repairs and doing this cleaning.

This, in my opinion, is improper. As I have pointed out, the plain duty of preparing the legislative halls for the reception of the general assembly rests upon the adjutant general. The appropriations made for the House and Senate, respectively, at the last session of the general assembly do not in any wise conflict with the provisions of Section 150 of the General Code, as it must be presumed that those appropriations are intended to provide for maintenance and repair, etc., in and about the legislative halls during the sessions and immediately after the conclusion thereof.

Answering your second question, I beg to advise that without more authority than what is set forth in Section 151 G. C. the adjutant general may not, of course, appoint or employ in his capacity as superintendent of the state house any policemen or attendants other than those therein mentioned. I take it, however, that your question is asked in the light of appropriations which have been made, such as that which I find in 107 Ohio Laws, 265, setting aside under the head of "Personal Service—State House and Grounds" a sum so itemized as to care for the compensation of the following employes:

> "Superintendent of laborers, 11 laborers, 2 night policemen, 2 visitors' attendants, 2 day policemen, carpenter, chief engineer, 2 engineers, 2 firemen, 2 elevator attendants."

Here are appropriations to pay twenty-six employes instead of the three specifically mentioned in Section 151. I take it, however, that your question does not relate to all of these employes. For example, the superintendent of laborers. the chief engineer, the carpenter, the under-engineers, the firemen and the elevator attendants are not employes of the character mentioned in Section 151. While the adjutant general is not specifically by statute authorized to employ other persons, yet the inference is plain that, subject to such appropriations as the general assembly may make, he is to have authority to do so. When he is given by Section 146 supervision of the heating plant of the state house he is not, of course, expected to operate that plant in his own proper person. The same principle holds good for and justifies all the appropriations made save those for the six policemen mentioned in the appropriation. The statute gives him three, who are respectively designated as a day policeman, a night policeman and a visitors' attendant. It is very clear, however, that the visitors' attendant is just as much a "policeman" as either of the other two who are mentioned (See Sections 152 and 153 G. C., not quoted).

In short, the appropriation multiplies by two the number of persons to be appointed by the adjutant general for each of these positions; he is to have two day policemen instead of one, two night policemen instead of one and two visitors' attendants instead of one.

I am very clearly of the opinion that the extra policemen and attendants thus provided for can not exercise the police powers mentioned in Sections 152 and 153 of the General Code; that is to say, they can not take an oath of office, they are not entitled to wear a uniform and badge of office and they have not the same authority to make arrests as policemen of cities, etc. These police powers are conferred by law upon three persons only and not six.

I think it follows from this that, strictly speaking, the appropriations for additional policemen, etc., are ineffectual to create additional officers of this class; so that, still dealing with the question from the standpoint of strict logic, the adjutant general is not authorized by the appropriations alone to have more than the one day policeman, the one night policeman and the one visitors' attendant which the statute authorizes him to appoint. Not being empowered to appoint such additional officers, the provision as to their compensation might be said necessarily to be equally ineffectual. However, I have already stated that, in my opinion, the law does not limit the number of employes which may be authorized by appropriation in the department of the adjutant general as superintendent of the state house, etc. Therefore, while it is probably true that the additional policemen referred to in the appropriation could not, strictly speaking, have or exercise police powers, I would be further of the opinion that their employment in a general capacity as assistants to the adjutant general would not be illegal. You are not interested

in the powers of these officers or employes but merely in the question as to whether compensation may be lawfully paid to them. This question, I think, must be answered in the affirmative. I take it that the employes in question have already rendered services and that your question relates to the legality of payments previously made. I am of the opinion that such payments were legal.

Your second question also raises the issue as to whether the salaries mentioned in Section 154 can be exceeded under favor of the appropriation. It does not appear that such has been the case, however, as the amounts appropriated for the salaries of night policemen, day policemen and visitors' attendants are in each instance exactly twice the amount mentioned in Section 154 of the General Code. Unless, therefore, I am informed that what you hint at in this part of your question has actually been done or attempted I would prefer not to pass upon that feature of your question.

For all the foregoing reasons, then, I answer your questions as follows:

(1) The duty of the adjutant general respecting the maintenance and repair of the legislative halls is limited by Section 150 of the General Code to their preparation for the reception of the general assembly at the commencement of each session. Such work required to be done during the session may, without conflict with this section, be done under the supervision of the respective houses and paid for out of appropriations for their purposes, as may be the cleaning and renovation necessary at the conclusion of a session and after the adjournment thereof.

Under Section 150 G. C. and appropriations to the House and Senate, respectively, for purposes of cleaning, repairs, etc., the renovation of the legislative halls immediately preceding the regular session of the general assembly devolves upon the adjutant general and such appropriations can not be lawfully extended for such purpose.

(2) The adjutant general is without power to appoint more than the three officers with police powers mentioned in Section 151 G. C. Such power can not be derived from an appropriation for the salaries of six policemen.

Such appropriation bill constitutes authority to employ and pay the extra policemen as general employes, though they might not lawfully exercise the police powers provided by statute.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1615.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN CLERMONT, JACKSON, JEFFERSON, MADISON, MORGAN AND SUMMIT COUNTIES.

COLUMBUS, OHIO, December 16, 1918

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your letter of December 13, in which you enclose for my approval, final resolutions for the following improvements:

Milford-Hillsboro Road.—I. C. H. No. 9, Section N-1, Clermont county.

Jackson-McArthur Road—I. C. H. No. 396, Section I. Jackson county, (Cont. No. 2).

Jackson-Pomeroy Road—I. C. H. No. 395, Section F, Jackson county, (Cont. No. 1).

Skelly-Empire Road—I. C. H. No. 378, Section A, Jefferson county.

Marysville-London Road—I. C. H. No. 239, Section C-2, Madison county.

McConnelsville-Marietta Road—I. C. H. No. 393, Section P, Morgan county.

Akron-Canton Road—I. C. H. No. 66, Section R, Summit county.

I have carefully examined said resolutions, find them correct in form and legal and am therefore returning the same to you with my approval endorsed thereon in accordance with the provisions of Section 1218 G. C.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

1616.

MUNICIPAL CORPORATION—CITY SOLICITOR AS POLICE COURT PROSECUTOR NOT ENTITLED TO COMPENSATION UNDER SECTION 13440.

A city solicitor or assistant designated as prosecutor of the mayor's or police court is not entitled to compensation under Section 13440 *G. C. for services rendered in the prosecution of the cases enumerated in said section in such courts.*

COLUMBUS, OHIO, December 16, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I have your letter of September 11, 1918, as follows:

"We respectfully request your written opinion upon the following matter:

Is a city solicitor or assistant, designated as prosecutor of the mayor's or police court, entitled to the compensation fixed by Section 13440 G. C., for prosecutions in such cases before the mayor or police court of a municipality? See also Section 4306 and 4307 G. C."

Sections 4306 and 4307 of the General Code read:

Section 4306—"The solicitor shall also be prosecuting attorney of the police or mayor's court. When council allows an assistant or assistants to the solicitor, he may designate an assistant or assistants to act as prosecuting attorney or attorneys of the police or mayor's court. The person thus designated shall be subject to the approval of the city council."

Section 4307.—"The prosecuting attorney of the police or mayor's court shall prosecute all cases brought before such court, and perform the same duties, as far as they are applicable thereto, as required of the prosecuting attorney of the county. The city solicitor or the assistant or assistants whom he may designate to act as prosecuting attorney or attorneys of the

police or mayor's court, shall receive for this service such compensation as council may prescribe, and such additional compensation as the county commissioners shall allow."

You will note that Sections 4306 and 4307 make it the duty of the solicitor to prosecute all cases brought before the police or mayor's court. Section 13440 G. C. provides that the humane society "may employ an attorney to prosecute" certain cases therein enumerated. If the humane society does not see fit to employ an attorney, it is the duty of the city solicitor to act in these cases. For this reason it is my opinion that the city solicitor may not be allowed any additional compensation for his services with respect to the cases enumerated in Section 13440 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1617.

DISAPPROVAL OF BOND ISSUE OF UNION TOWNSHIP RURAL SCHOOL DISTRICT, LICKING COUNTY—$2,500.00.

COLUMBUS, OHIO, December 18, 1918.

The Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

In Re: Bonds of Union Township Rural School district, Licking county, Ohio, in the sum of $2,500.00 for the purpose of completing a school building in the course of erection in said school district.

I have examined the transcript of the proceedings of the board of education of Union Township Rural School district, Licking county, Ohio, relating to the above issue of bonds.

This proposed issue of bonds is one by the board of education of said Rural School district without a vote of the electors under authority of Section 7629 G. C.

As a result of my examination of this transcript I am compelled to disapprove said issue specifically for the reason that the board of education in the resolutior providing for this issue of bonds did not make any provision for an annual levy of taxes for interest and sinking fund purposes on said bonds, as required by Section 11 of Article XII of the State Constitution, which reads as follows:

"No bonded indebtedness of the state or any political sub-divisions thereof, shall be incurred or renewed, unless, in the legislation under which such indebtedness is incurred or renewed, provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds, and to provide a sinking fund for their final redemption at maturity."

The above quoted provision of the State Constitution is obviously mandatory and the failure of the board of education in the adoption of this resolution to comply therewith leaves me no discretion to do otherwise than to disapprove the issue.

An examination of the transcript discloses two other defects, which may be briefly noted:

(1) The transcript shows that this school district has an outstanding bonded indebtedness. This being so the board of education of the school district is required under Section 7614 G. C. to provide a sinking fund with respect to said bonded indebtedness to be managed by a board of commissioners of the sinking fund of said school district to be appointed in the manner provided in said section. Under the provisions of Section 7619 G. C., the board of education is required to offer this proposed issue of bonds to said board of commissioners of the sinking fund of the school district before otherwise disposing of the same, and under Section 1465-58 G. C., the Industrial Commission of Ohio is authorized to purchase only such school bonds as shall first have been offered to the board of commissioners of the sinking fund of the school district and by such board rejected.

(2) The transcript shows that the tax duplicate valuation of taxable real and personal property in such school district is $2,131,930.00. Presumably these figures represent the tax duplicate valuation of the school district for the year 1918. The issue of bonds here under consideration, as one provided for during the current school year, is limited with respect to the authorized amount thereof under Section 7629 by the tax duplicate valuation of the year 1917. It is altogether probable that the tax duplicate valuation of the taxable real and personal property in said school district for the year 1917 was sufficient under the limitation provided in Section 7629 G. C. to authorize this issue of bonds in the amount above stated. However, the transcript should properly have stated said tax duplicate valuation of the school district for the year 1917.

By reason of the objections first above noted herein said issue of bonds is hereby disapproved and you are advised not to purchase same upon the present legislation of the board of education providing for said issue.

Said transcript is herewith enclosed for return to the clerk of the board of education of said school district.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1618.

BOARD OF EDUCATION—SCHOOLS—UNLESS BONDS ISSUED UNDER SECTION 7625 PROVIDE FOR EMERGENCY UNDER SECTION 7630-1 RESOLUTION MUST DETERMINE FUNDS RAISABLE UNDER SECTION 7629 NOT SUFFICIENT—DISAPPROVAL OF BOND ISSUE OF DEFIANCE CITY SCHOOL DISTRICT—$30,000.

Unless a proposed issue of bonds by the board of education of a school district for any one or more of the purposes mentioned in 7625 G. C. is to provide for an emergency under the terms of Section 7630-1 G. C. such board of education is not authorized to submit the question of such bond issue to a vote of the electors of the school district, unless in its resolution providing for the submission of such question, or in other appropriate legislation it first determines that the funds at its disposal or that can be raised by a bond issue without a vote of the electors under Section 7629 G. C., are not sufficient for the purpose.

COLUMBUS, OHIO, December 18, 1918.

The Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

In Re: Bonds of Defiance City School district in the sum of $30,000, for the purpose of securing funds to furnish and complete the new school

building to be used for high school and grade purposes and to repair and equip the old high school building for the proper accommodation of the schools in said district.

I have carefully examined the transcript submitted of the proceedings of the board of education of Defiance City School district relating to the above issue of bonds, which appears to be one pursuant to the vote of the electors of the school district under the authority of Section 7625 to Section 7628, inclusive, of the General Code.

As a result of such examination I am compelled to disapprove said issue of bonds specifically for the reason that the resolution of the board of education, providing for the submission to the electors of the school district of the question of said bond issue, does not comply with the requirements of Section 7625 of the General Code. Under the provisions of this section, before a board of education can submit to the electors of the school district the question of a bond issue in any determined amount, for any one or more of the purposes provided for in said section, the board of education is required to determine, among other things, "that the funds at its disposal or that can be raised under the provisions of Sections 7629 and 7630 are not sufficient to accomplish the purpose." In other words, a board of education is not authorized to submit to the electors of the school district the question of a proposed bond issue in any particular or determined amount for any of the purposes mentioned in Section 7625, unless the board otherwise determines that the funds at its disposal, or that can be raised by a bond issue under Section 7629 of the General Code, without a vote of the electors, are not sufficient to accomplish such purpose. The determination of these facts can be made only by some appropriate action of the board of education as a body, to be entered upon its records. In the present instance the resolution of the board of education finds that it is without sufficient funds at its disposal to accomplish the purpose of said proposed bond issue, but does not contain any finding to the effect that the amount of funds that can be raised by the issue of bonds, under Section 7629, General Code, without a vote of the electors, would not be sufficient for the purpose. As before indicated, such a finding or determination was jurisdictional to the power of the board of education to submit the question of this proposed bond issue to a vote of the electors of said school district, and to the authority of said board of education to provide for the issue of said bonds, pursuant to such vote.

I note in the resolution of the board of education, authorizing this issue of bonds, pursuant to a vote of the electors, a recital that said issue of bonds is under the authority, among other sections of the General Code, there stated, of Section 7630-1 G. C. If this issue of bonds were one as a whole, under the authority of Section 7630-1 G. C., it is probable, on considerations that need not be here discussed, that the resolution drawn under said section for the purpose of submitting the proposed bond issue to the vote of the electors, would not be required to determine that the funds that could be raised by an issue of bonds by the board of education, under Section 7629 G. C., would not be sufficient for the purpose of said bond issue. However, as I see it, the recital that said issue of bonds is under the authority of Section 7630-1 G. C. is wholly gratuitous, inasmuch as the transcript not only fails to set out any facts by way of recital or otherwise, showing the application of this section, but on the contrary the stated purpose of said bond issue quite clearly shows that said issue, as a whole, was not an emergency issue within the purview of Section 7630-1 of the General Code.

It follows from what I have just said that this resolution in failing to make this necessary determination or finding of fact is fatally defective and that this proposed bond issue should be and hereby is disapproved.

My examination of this transcript discloses a number of other defects which may be briefly noted:

(1) The transcript does not contain sufficient facts to indicate affirmatively that the meeting of the board of education, under date of September 10, 1918, at which the resolution above referred to was adopted, was a legal meeting. It appears that this meeting was one held by way of adjournment from a meeting of the board of education on September 3, 1918. This being so, it is obvious that the legal character of the meeting of September 10, 1918, depends upon whether or not the meeting of September 3, 1918, was a legal meeting of the board of education, that is, a regular meeting or a special meeting called in exact compliance with the provisions of Section 4751 of the General Code.

However, any defect in the legal character of said meeting of September 10, 1918, is cured by the fact that apparently this meeting was attended and participated in by all of the members of the board of education.

(2) The transcript does not show that any notice of the election on the question of this bond issue was given by the clerk in the manner required by law.

(3) The resolution of the board of education, under date of November 18, 1918, authorizing this issue of bonds, pursuant to a vote of the electors, provides that for the purpose of paying the interest on said bonds and to create a sinking fund sufficient to discharge the interest on said bonds, as the same mature, there shall be levied and ordered collected annually a tax on all the real and personal property in the *City of Defiance,* Ohio, sufficient for the purpose. This provision of the resolution is obviously erroneous and fails as a compliance with Section 11 of Article XII of the state constitution. Clearly this annual tax should be levied upon the taxable real and personal property in Defiance City School district, which is an entirely distinct political subdivision from the city as such. In this connection it may be observed there is nothing in the transcript to indicate that the boundaries of Defiance City School district are coextensive with those of the city itself, and even if such were the case, there can be no assurance that such boundaries will remain coextensive with those of the city during the life of the bonds, provided for by this resolution.

(4) The transcript does not contain the financial statement which is required by this department with respect to bonds of school districts, or other political subdivisions.

The transcript submitted is herewith enclosed for return to the authorities of the school district.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1619.

MUNICIPAL CORPORATION—CERTIFICATE UNDER SECTION 3806 NEED NOT BE EXECUTED UNTIL JUST PRIOR TO AWARDING CONTRACT.

The certificate required by Section 3806 *G. C. (the Burns Law) need not be executed and filed until just prior to the awarding of the contract for a municipal improvement, such certificate not being necessary as a preliminary to the passage of*

an ordinance authorizing or directing such contract to be made or improvement to be executed; as to whether such certificate is necessary prior to the award, or its issuance may be postponed until just prior to the execution of the contract. Query.

COLUMBUS, OHIO, December 18, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—In your letter of October 29, receipt whereof is acknowledged, you request my opinion upon a question presented by the city auditor of a certain city in the state. The auditor advises in his letter, which is attached to your communication, that a contract was let by the city in July 1917, for street improvements and that under that contract work had proceeded to a certain point when the contractors defaulted; that the city was about to proceed to complete the work when it was enjoined by the city solicitor, at the instance of a taxpayer, from so doing on the ground that no certificate of the auditor that the money was in the appropriate fund for the particular purpose had been filed.

The auditor's question is, in his own words, as follows:

> "as to where the proper starting point would be to place the matter upon a legal footing; that is—would it be necessary to have council pass new legislation, or could we start by advertising for bids and putting auditor's certificate on file before entering into new contract?"

For the purposes of this opinion I shall assume that the question relating to the applicability of the so-called "Burns Law," which is now found in Section 3806 et seq. of the General Code, to contracts of the kind mentioned by the city auditor is as between the city and its taxpayers *res judicata.* I therefore eliminate from consideration such decisions as that in *Emmert* vs. *Elyria,* 74 O. S. 185, and *Akron* vs. *Dobson,* 81 O. S. 66. The contract is said to be one for street improvement, but nothing is said in the auditor's letter as to whether or not any part of the cost thereof is to be paid for by special assessments. I am eliminating from consideration therefore any question relating to the application of the requirement as to the auditor's certificate to the entire cost of the work rather than to the city's portion thereof, in accordance with what was held in *Comstock* vs. *Nelsonville,* 61 O. S. 288, and *Carthage* vs. *Diekmeier,* 79 O. S. 323.

In short, the facts as submitted, though not complete, lead me to assume that the statute requiring the filing of the certificate of the auditor applies to the case and that such certificate must be filed covering at least some part of the total cost of the improvement.

Sections 3806 and 3807 of the General Code in their present form provide as follows:

> "Section 3806.—No contract, agreement or other obligation involving the expenditure of money shall be entered into, nor shall any ordinance, resolution or order for the expenditure of money, be passed by the council or by any board or officer of a municipal corporation, unless the auditor or clerk thereof, first certifies to council or to the proper board, as the case may be, that the money required for such contract, agreement or other obligation, or to pay such appropriation or expenditure, is in the treasury to the credit of the fund from which it is to be drawn, and not appropriated for any other purpose, which certificate shall be filed and immediately recorded. The sum so certified shall not thereafter be considered unap-

propriated until the corporation is discharged from the contract, agreement or obligation, or so long as the ordinance, resolution or order is in force."

"Section 3807.—All contracts, agreements or other obligations, and all ordinances, resolutions and orders entered into or passed, contrary to the provisions of the preceding section shall be void, and no person whatever shall have any claim or demand against the corporation thereunder, nor shall the council, or a board, officer, or commissioner of any municipal corporation, waive or qualify the limits fixed by such ordinance, resolution or order, or fasten upon the corporation any liability whatever for any excess of such limits, or release any party from an exact compliance with his contract under such ordinance, resolution or order."

If the street improvement in question is one to be paid for in part by special assessments the following statutes apply:

"Section 3814.—When it is deemed necessary by a municipality to make a public improvement to be paid for in whole or in part by special assessments, council shall declare the necessity thereof by resolution, three-fourths of the members elected thereto concurring, except as otherwise herein provided. Such resolution shall be published as other resolutions, but shall take effect upon its first publication."

"Section 3815.—Such resolution shall determine the general nature of the improvement, what shall be the grade of the street, alley, or other public place to be improved, the grade or elevation of the curbs, and shall approve the plans, specifications, estimates and profiles for the proposed improvement. In such resolution council shall also determine the method of the assessment, the mode of payment, and whether or not bonds shall be issued in anticipation of the collection thereof. Assessments for any improvement may be payable in one to twenty installments at such time as council prescribes."

"Section 3816.—At the time of the passage of such resolution, council shall have on file in the office of the director of public service in cities, and the clerk in villages, plans, specifications, estimates and profiles of the proposed improvement, showing the proposed grade of the street and improvement after completion, with reference to the property abutting thereon, which plans, specifications, estimates and profiles shall be open to the inspection of all persons interested."

"Section 3824.—At the expiration of the time limited for so filing claims for damages, the council shall determine whether it will proceed with the proposed improvement or not, and whether the claims for damages so filed shall be judicially inquired into, as hereinafter provided, before commencing, or after the completion of the proposed improvements."

"Section 3825.—If the council decides to proceed with the improvement, an ordinance for the purpose shall be passed. Such ordinance shall set forth specifically the lots and lands to be assessed for the improvement, shall contain a statement of the general nature of the improvement, the character of the materials which may be bid upon therefor, the mode of payment therefor, a reference to the resolution theretofore passed for such improvement with date of its passage, and a statement of the intention of council to proceed therewith in accordance with such resolution and in accordance with the plans, specifications, estimates and profiles provided for such improvement."

"Section 3833.—The contract for any such improvement shall be let by

the director of public service, in the same manner as other contracts, and in case all bids be rejected such director in cities and the council in villages may order a readvertisement for bids."

If the improvement is not to be paid for in part by special assessments the following section applies:

"Section 4328.—The director of public service may make any contract or purchase supplies or material or provide labor for any work under the supervision of that department not involving more than five hundred dollars. When an expenditure within the department, other than the compensation of persons employed therein, exceeds five hundred dollars, such expenditure shall first be authorized and directed by ordinance of council. When so authorized and directed, the director of public service shall make a written contract with the lowest and best bidder after advertisement for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the city."

In either event the last sentence of Section 4328, just quoted, and Sections 4329 et seq. relating to the opening of bids and entering into the contract govern.

It must be assumed for purposes of discussion that the city council has either passed a resolution of necessity and an ordinance determining to proceed with an improvement to be paid for partly by special assessments, or that if the contract is not to be so paid, for an ordinance has been passed authorizing and directing the director of public service to enter into a contract with the lowest and best bidder, etc., for the doing of a specific piece of work involving the expenditure of more than five hundred dollars. The injunction suit decides at least that the attempt of the director of public service to enter into a contract without the previous filing of an auditor's certificate was ineffectual. The question now is as to whether or not, were an auditor's certificate now placed on file, the underlying legislation of council would be efficacious to authorize him under such certificate to enter into a binding contract for the doing of so much of the work as remains to be done. That is to say, would the underlying legislation of council form the legal predicate of valid procedure on the part of the director of public service, or is the legislation itself invalidated because at the time of its passage the certificate was not on file; and if the improvement be one to be paid for in part by assessment, should the certificate be on file at the time of the passage of the resolution of necessity, or at the time of the passage of the ordinance determining to proceed with the improvement?

I may say at this point that I do not interpret the auditor's question as an inquiry relative to what can be done to legalize expenditures already made by way of the payment of estimates to the contractor under the contract which has been held to have been invalid. As to this I would say, of course, that nothing can be done. That contract can not at this stage of the proceedings be validated at all. Expenditures made under it can not be recovered back. (State vs. Fronizer, 77 O. S. 7); but it can not be made binding upon the contractor nor upon the city by anything that can be done now. This follows from the plain provisions of Sections 3806 and 3807, one of which requires the certificate to be on file *first*, and the other of which makes void anything done in contravention of the policy of the statute. In the face of such provisions it would be impossible to construct any principle by which on the theory of ratification the contract which was entered into might be made binding.

Therefore I repeat that I am interpreting the auditor's question as one relating to the necessary legal steps to be taken in order that a valid contract for the *completion* of the work may be entered into.

Such a question presents considerable difficulty because of the two-fold aspect of Section 3806. It first declares that

> "no contract, agreement or other obligation involving the expenditure of money shall be entered into, * * * unless the auditor or clerk * * * first certifies to the * * * proper board, * * * that the money required for such contract, agreement or other obligation * * * is in the treasury," etc.

If this were all it would be easy to reach the conclusion that the certificate is not required to be on file until just prior to entering into a contract imposing upon the municipality a definite obligation involving the expenditure of money. In other words, if this language of Section 3806 were all there is to be construed one could easily reach the conclusion that a valid contract could now be entered into by the director of public service for the completion of the work if a certificate were first filed.

But this is not all that we find in Section 3806; the section also declares that

> "nor shall any ordinance, resolution or order for the expenditure of money, be passed by the council * * * unless the auditor or clerk * * * first certifies to council * * * that the money required * * * to pay such appropriation or expenditure, is in the treasury," etc.

This language standing by itself might seem broad enough to require the filing of the certificate as a condition precedent to the valid passage of the underlying legislation by the council in cases in which the action of council is necessary.

The whole question is thus thrown into doubt and it must be admitted that a perusal of the decisions which have been made on or affecting the point does not clear away this doubt.

Perhaps the case nearest in point is that of *Braman* vs. *Elyria,* 26 C. C. 731; 5 C. C. n. s. 387; affirmed without report in 73 O. S. 346. That was a case of a street improvement to be paid for in part by special assessment; the council had duly passed a resolution of necessity and later an ordinance determining to proceed; subsequently the board of public service (the court speaks of the "council" but this must be an error as the proceedings were had in 1903 and were governed by the Municipal Code) had advertised for bids and received them and awarded the contract to a certain company. This contract, however, was not signed until a later date. When it was signed, and not before, the city clerk (doubtless the auditor is meant) certified on the contract (which seems to be the usual practice) that the money to pay the amounts coming due thereunder was in the treasury of the city to the credit of the proper fund. In point of fact, the statement of the case shows that until that time he could not have made such a certificate because the money was not actually in the treasury until after the contract was awarded, having been brought there by the issuance of a certificate of indebtedness in the amount of the contract price.

These facts squarely raised the issue as to whether the certificate was properly filed at the time the contract was entered into, or whether it should have been filed at an earlier stage of the proceedings.

Before going on with the discussion of this case let me say that if reasoning like that in *Emmert* vs. *Elyria* and *Akron* vs. *Dobson* had been followed the case would have been decided in favor of the city—as it was—upon the broad ground that the Burns Law did not apply to the contract at all. This makes the decision more or less unsatisfactory as a precedent, especially in view of the fact that the

supreme court in affirming it did not express its views on the law. However, the principles involved in *Emmert* vs. *Elyria* and *Akron* vs. *Dobson* being eliminated from consideration by the decision of the common pleas court in the case now before me, I proceed to a further analysis of the opinion of Winch, J., in *Braman* vs. *Elyria,* as responsive to the question under consideration and for that purpose quote the following portions thereof:

"It is conceded that no such certificate was made before the resolution of necessity was passed, the ordinance for the improvement and assessing its cost was adopted, bids advertised and received, or the contract awarded. The certificate was made, however, before the contract was signed.

Was it made in time?

* * * There are two cases cited to us which contain language indicating that perhaps this certificate should have been made at least before the ordinance for improvement and assessment was adopted."

(The court here comments upon *Ryan* vs. *Hoffman,* 26 O. S. 109, and *Cincinnati* vs. *Holmes,* 56 O. S. 104, which will be hereinafter considered. The court concludes that these decisions, notwithstanding dicta in the respective opinions, are not conclusive).

"It therefore becomes necessary to construe Section 1536-205, former Section 2702 R. S. (repealed 96 O. L. 96) and determine at just what stage in the proceedings culminating in a contract for a municipal improvement, the clerk's certificate becomes necessary, and all subsequent proceedings without it void.

Certainly no 'contract, agreement or other obligation involving the expenditure of money' was 'entered into' by the passage of the resolution of necessity, the ordinance to improve and assess, the advertising or receiving bids.

Nor was such contract, etc., 'entered into' when the contract was awarded. The statute elsewhere provides how municipal authorities shall enter into contracts, and the formalities with reference thereto, without which the contract is void.

The certificate was therefore in time as far as the entering into a contract, agreement or other obligation is concerned.

But the law further provides that no 'ordinance, resolution or order for the expenditure of money shall be passed, until the certificate is made.

We have in this case to consider a resolution—the resolution of necessity; and ordinance—the improvement and assessment ordinance; and an order—the order awarding the contract.

All of these in one sense *concern* both the appropriation and expenditure of money, but certainly the resolution is not *for* them, because the whole proceeding may stop upon the hearing of objections to the improvement, and the expenditure of money will not *necessarily* be made because of the adoption of the resolution.

The same may be said of the ordinance—bids may be advertised for, but none received; * * * the ordinance may be repealed before *any* step is taken under it actually necessitating the expenditure of money. The passage of the ordinance in no wise binds the city to make the improvement, and after its passage, who is to see that the improvement is made? What interested party is there, who can compel the city to go ahead, advertise for bids and accept them? Sometimes when bids for such improvements come in they are so high * * * that the whole matter is

then dropped. Who can interfere with the judgment of the city authorities thus exercised? The mere passage of the ordinance creates no liability against the city, and therefore the ordinance can not be said to be one for the expenditure of money. * * *

The same may be said of the order awarding the contract. That order is simply an expression of opinion * * * that a certain bid is the best and should be accepted; that a contract should *thereafter* be made with such bidder. It authorizes the making of a contract, but it is not a contract, agreement or obligation binding upon the city, until the contract authorized is executed, on behalf of the city, by the proper authorities. Suppose there were no Burns Law, would the contractor claim that he could go ahead with the work immediately, without any further contract with the city, upon the mere awarding of the contract to him? We think not. Such action on the part of the council might be reconsidered and its award revoked before any contract was signed. * * *

If we are right in our construction of the Burns Law, in the case of municipal improvements to be let by contract the clerk's certificate of money in the treasury to the benefit of the proper fund, unappropriated for any other purpose, is not required until just before the contract is signed. While we reach this conclusion with doubt, from a mere interpretation of the words of the law, such doubt is removed when we consider the necessities of the case * * *.

The intention of the law is to prevent the entering into of improvident contracts—improvident, because the payment of obligations is not foreseen when the obligations are incurred. Such intention is strictly complied with if the certificate is made before the final step is taken which makes a contract absolutely binding upon the municipality and absolutely requiring the expenditure of money. Such intention does not contemplate that all preliminary steps leading up to the making of such binding contract shall be void, unless the certificate is made before all such preliminary steps are taken; and at what stage in the proceedings are we to draw the line, except at the entering into the contract?

To take any other view of the case would fill our municipal treasuries with idle money for improvements finally abandoned and never made, would prevent obtaining bids upon which to determine how much money must be so certified; would delay municipal improvements, contrary to the spirit of the law; would involve loss of interest in the case of delayed improvements; would, in fact, * * * extend the scope of the law far beyond its plain and reasonable intent."

I may say very frankly that this reasoning appears to me to be sound and convincing, except possibly as to the legal effect of awarding the contract. The correctness of the court's conclusion on this point would depend upon whether or not a person to whom a contract was awarded could compel the execution of that contract by the city authorities as against action on the part of, say, the council repealing its ordinance determining to proceed with the improvement, or its ordinance authorizing and directing the expenditure to be made, as the case might be. If such person could compel the execution of the contract, or, conversely, if at this stage of the proceedings the city has done its last act and passed the *locus penitentiae,* then upon the general course of reasoning in Judge Winch's opinion his conclusion should have been otherwise with respect to the question as to whether the certificate should be on file at the time the contract is awarded; yet practical considerations support his conclusion here, and it is also true that unless

the awarding of a contract be called an "order" within the terminology of Section 3806 it is not such an act as is referred to in that section because manifestly it is not the "entering into" of a contract.

Without deciding this question at this time, but renewing my expression of approval of the general course of reasoning of the opinion from which quotation has been made, I may briefly refer to other cases in which the same view is taken.

In *Carthage* vs. *Diekmeier,* supra, the facts were as follows:

The original plaintiff had sued the village to recover for work done and material furnished in the improvement of a certain street for which he had been paid in part only. The village set up in its answer the absence of the certificate required by the statute then in force, which was Section 2702 Revised Statutes. The jury returned a special verdict, finding the following facts:

The village began its proceedings by the passage of resolutions of necessity and ordinances determining to proceed with the improvement of several different streets. It then, and before receiving any bids, borrowed money to pay the village's portion (which was all excepting the cost of the curb and gutter) of all of the improvements. It then solicited bids for each improvement separately, received them, and awarded contracts directing the mayor to execute them. These contracts were awarded separately for each improvement. Action in awarding such contracts was by resolution. At the end of the resolution awarding the contract for one of these streets to the original plaintiff the clerk executed a certificate as follows:

> "I hereby certify that there is money in the village treasury in the fund from which the above fund is proposed to be drawn for payment of the village portion of the improvement, and not appropriated for any other purpose, sufficient to pay for the same."

As stated, this certificate was executed on the face of the resolution awarding the contract. The village solicitor, being present at the meeting of council, objected that no specified amount for the improvement of the particular street was set forth in the certificate. The engineer thereupon furnished the necessary figures and the clerk inserted them in his several certificates. The resolutions were then adopted by the council. A contract was thereupon entered into with the plaintiff. A supplementary contract was entered into calling for the performance of additional work, but no certificate was filed by the clerk showing any money in the treasury for the purposes of the supplementary contract.

In the opinion of the supremet court, per Price J., the following language appears:

> "On the approximate estimate of quantities of material to be used, the bid of Diekmeier was made at the figures contained in the seventh finding, and his bid being the lowest, the same was accepted, and the mayor was instructed to execute a contract on behalf of the village. This instruction was in the form of a resolution adopted August 10, 1900. *There was then due,* under the law, a certificate of the village clerk under Section 2702 Revised Statutes. *If not due and essential when the resolution was adopted, it certainly was requisite to a valid contract with the bidder* that the section be complied with *when the contract was executed* on the 13th or 14th of August of that year. The section referred to then provided: (Here follows quotation of Section 2702 R. S., which is in the same words as present Section 3806 G. C.)
>
> The contractor claims that such a certificate was on file and recorded before his contract was entered into * * *.
>
> The * * * finding * * * indicates that there was on hand a

certificate for each of the eighteen streets in similar form and substance, and that the engineer was ready to supply the amount allotted to Linden avenue (the street improved by Diekmeier) without delay. Thus corrected (as above stated) the certificate was left on file, and doubtless recorded. * * *."

(The court then finds that the correction of the certificate by the engineer and clerk before the legislation was adopted made it a valid certificate for the sum of money thus inserted in it).

"But how will the case stand if we discard those figures and deal with the original certificate? * * *

It is contended that the certificate without the figures is according to the language of the statute, and therefore sufficient; * * * that it is a compliance to certify that there is *enough* in the treasury unappropriated to other purposes, to meet the obligation or contract. If there was but a single contract or expenditure in contemplation, the claim might be tenable in such an instance, but this we do not decide. But in the present case it appears there were eighteen resolutions, including the one here involved, adopted at the same council meeting. The bids accepted were separate for the different streets, and separate contracts were executed for such streets. * * *.

Whatever may be the correct view as to the meaning of this statute where a single contract is let, it seems to be a reasonable construction that there be a definite sum certified for each contract where there are several of the same species entered into at the same time to be paid from a theretofore gross fund. * * * it is quite clear to us that when the statute is to be applied to the subject matter where several different streets are to be improved for which purpose separate contracts are let on different separate bids, the certificate should contain a specified sum set apart for each of such contracts. * * * Under the facts of this case * * * the original certificate did not conform to the statute, and the contractor would be without remedy. But with the figures added to the face of the instrument, $2,030 was the sum certified and to that extent the village set apart from the gross fund the amount to cover the Linden avenue improvement. We are told this amount has been paid before suit was brought, and the suit is to recover over $2,260 in excess of that amount.

It is urged for the contractor, that he did not bid a gross sum for improving Linden avenue, but bid for material according to quantity and for certain labor at so much per yard or foot, and so on, and therefore with only the approximate estimate for a basis, it would not be known in advance what should be certified, * * *.

Again, it is said in the brief that finding 10 in the special verdict shows that 'in said specifications the right was reserved to the said village of Carthage to increase or diminish or omit entirely any of the work therein set forth.' * * *.

* * * It was not within the power of the council or the village engineer to increase the liability of the corporation beyond the amount for which the certificate had been filed and thereby nullify Section 2702. * * No mere final estimate of the engineer, no matter if it is correct in its terms, can increase the corporate liability, neither did the acceptance of the work by the public authorities accomplish that result. * * *

We presume the village refused to pay in excess of the $2,030 certified, and having paid that amount, the plaintiff in error is entitled to judgment on the special verdict. * * *."

While perhaps in a sense not necessary to the exact decision in the case, it is clear from the above quotation that the court regarded the certificate, which in this instance had been made just prior to the award by the council of the contract, as made in time. If the court had been of the opinion that the certificate should have been made at the time the resolution of necessity was adopted or at the time the ordinance determining to proceed with the improvement was passed, the reasoning of the opinion would have been entirely different. On the contrary, the court repeatedly refers to the corrected certificate as being a legal certificate determining the pecuniary extent of the village's obligation. We observe that the court expresses doubt as to whether this certificate was required prior to the award of the contract, intimating that it might have been in time if it had been filed afer the award but before the execution. That question was not raised in the case as it was in *Braman* vs. *Elyria* because a certificate had actually been issued at the time of the award.

I shall now consider cases in which intimations or decisions to the contrary have been made.

First I call attention to *Pullen* vs. *Smith,* 26 C. C. 549; 5 C. C. n. s. 1. In this case the council of the village of Lebanon had responded to the proposition of Mr. Andrew Carnegie relative to the erection of a public library building in that village that it would

> "agree for and on behalf of said village to maintain said free public library at a cost of not less than one thousand dollars a year, and to provide a suitable site for the same."

At the time of the passage of this resolution no certificate that the funds necessary to do the things which the council attempted to agree to was on file. The court held that the attempted contract was void and action under it would be enjoined at the suit of a taxpayer. This decision is clearly right and not inconsistent with anything which is held in the two cases from which I have quoted, because it is clear, as held by the court, that the council had undertaken directly to bind the city, so that what it had done amounted to an attempt to enter into a contract, agreement or other obligation involving the expenditure of money without the necessary certificate. The court, however, went on to say that the statute was violated in another respect, in that the action of council was also an ordinance for the expenditure of money. Here the court clearly fell into error, for Jelke, J., in quoting this part of the statute reads it as follows:

> "It provides against 'a resolution *involving* the expenditure of money.'"

As will be observed by a reading of the statute, it contains no such language. The one part prohibits entering into a contract, agreement or other obligation involving the expenditure of money without the filing of the certificate; the other part prohibits the passage of an "ordinance, resolution or order *for* the expenditure of money." The difference in force between the participle and the preposition which I have underscored is obvious and is brought out by the very reasoning of Judge Jelke when he says at page 551:

> "Further, it will not do to say that this action does not *involve* the expenditure of money. If it does not do that, it does nothing else, and is meaningless. That is all that Mr. Carnegie asks. *It is not in itself* the expending of money, like an ordinance to pay, but the statute goes further, it provides against 'a resolution involving the expenditure of money.'"

Of course, Judge Jelke was in error, as I have pointed out, because he misread the statute. On his own reasoning the ordinance in question, while it amounted to an agreement involving the expenditure of money and was therefore void, was not an ordinance for the expenditure of money, i. e., providing for the direct payment of a specific sum of money.

But it is to be admitted that while this verbal slip was committed by Judge Jelke, he sustains his reasoning here by quotation of other cases in which ordinances of like general character had been held to be ordinances *for* the expenditure of money under different statutes. That is, upon the authority of these cases he might have argued, and doubtless intended to argue—though he unfortunately fell into the use of inaccurate words—that the ordinance was one "*for* the expenditure of money."

The cases cited by him were *Rhodes* vs. *Toledo,* 3 Cir. Dec. 325, and *Ryan* vs. *Hoffman,* 26 O. S. 109.

In *Rhodes* vs. *Toledo* it was held that an ordinance providing for the condemnation of private property for street purposes is an ordinance *for* the expenditure of money within the meaning of Section 2702 Revised Statutes, which, as already stated, is identical in phraseology with present Section 3806 G. C. A glance at the opinion shows that this holding was based entirely upon *Ryan* vs. *Hoffman,* supra. I therefore turn to that case. It was one involving the application of a certain statute to the action of council in initiating condemnation proceedings, just as was *Rhodes* vs. *Toledo.* The court held that the statute which it was considering did not apply to the case at hand because the statute was not passed until after the proceedings were initiated. It was the dicta in the case that were relied upon in *Rhodes* vs. *Toledo,* Judge Scribner in that case saying that

> "If the statute in question had no application to a resolution or ordiance providing for the condemnation of lands, it was entirely unnecessary for the court to base its decision, as it did, upon the ground that the law operated prospectively only, and, therefore, did not affect the case pending before it. In the opinion it is declared in express terms that an ordinance providing for the appropriation of lands was within the act, but it was held that the ordinance there objected to was not affected by it for the reason that the law operated prospectively only, * * *."

It might be said, of course, that an ordinance for the condemnation of land, involving as it does the sole action of council and not being a mere order to an administrative authority to enter into a contract, can not be likened to an ordinance of such character with respect to the application of statutes like the Burns Law; so that it would be perfectly possible to distinguish cases like *Rhodes* vs. *Toledo* and *Ryan* vs. *Hoffman* from cases like the one now under consideration on this ground. However, it appears that the statute involved in *Ryan* vs. *Hoffman* was not the Burns Law, though Judge Scribner in his opinion in *Rhodes* vs. *Toledo* erroneously assumed that it was. In *Ryan* vs. *Hoffman* the court was considering the application of Section 3 of the act of April 16, 1874 (71 Ohio Laws, 80). This was what was known as the "Worthington Law" and was applicable only to Cincinnati, whereas the so-called Burns Law was applicable to all cities for the government of which no special laws had been passed. The one was Section 2699 R. S., the other Section 2702 R. S. Their terms, though similar, are essentially of different import. Section 3806 G. C. will, as stated, serve as a quotation of former Section 2702; Section 2699, which was before the court in *Ryan* vs. *Hoffman,* was as follows:

> "In cities of the first grade of the first class, no ordinance or other order for the expenditure of money shall be passed by the city council,

or a board, officer, or commissioner having control over the moneys of the city, without stating specifically in such ordinance or order the items of expense to be made under it, and no such ordinance or order shall take effect until the auditor of the city shall certify to the city council that there is money in the treasury specially set apart to meet such expenditure; and all expenditures greater than the amount specified in such ordinance or order shall be absolutely void, and no party whatever shall have any claim or demand against the city therefor."

To me it is perfectly apparent that this section applied to the initial action of council in any case in which the expenditure of money was involved. True, the language is "for the expenditure of money" and not "involving the expenditure of money"; but the certificate was to be made to the council in all cases and the statute did not apply to any "board, officer or commissioner" other than the council, except in cases in which such board, officer or commissioner might have "control over the moneys of the city," i. e., act independently of council. It will thus be seen that the vital difference between the Worthington Law, indirectly construed in *Ryan* vs. *Hoffman,* and the Burns Law, which we have to construe in this case and which was before the circuit court in *Rhodes* vs. *Toledo,* lies in the fact that the former governed proceedings of council in all cases in which council was to have anything to do; whereas the latter governs the proceedings not only of the council but also of administrative officers entering into contracts. Under the one statute the certificate is to be made in every instance to the council; under the other it is to be made to the council where the action is that of council and to the administrative officer where the action is his. Under the one statute no distinction is made between contracts, agreements and obligations involving the expenditure of money, on the one hand, and ordinances, resolutions and orders for the expenditure of money, on the other hand; under the other statute such a distinction is clearly drawn. Therefore, it seems to me that *Rhodes* vs. *Toledo,* whether correctly decided or not, is based upon erroneous reasoning, in that it assumes that a decision under the Worthington Law is authority for the interpretation of the Burns Law.

I am emboldened to make this criticism of the decision in *Rhodes* vs. *Toledo* by the fact that a contrary result was reached by a court of equal dignity in *Tyler* vs. *Columbus,* 6 C. C. 224. This decision, rendered after *Rhodes* vs. *Toledo* had been decided, holds simply that the Burns Law does not apply at all, that is, at any stage of the proceedings, to condemnation cases. I do not attempt to say which of these two decisions is right, except by pointing out that for the reasons stated *Rhodes* vs. *Toledo* and *Ryan* vs. *Hoffman* are not serviceable as authorities in regard to the present question and do not militate against the correctness of *Braman* vs. *Elyria,* supra. In *Braman* vs. *Elyria,* as I have said, *Ryan* vs. *Hofman* was considered.

There remains to be considered *Cincinnati* vs. *Holmes,* 56 O. S. 104, also referred to in Braman vs. Elyria. In that case the application of the Burns Law was involved because the original obligation sued on was that of the village of Avondale which had been subsequently annexed to the city of Cincinnati. The court held in the syllabus that the Burns Law did not apply to the village of Avondale, which had proceeded under special statutes construed as exceptions to that law. Certain reasoning in the opinion of Minshall, J., however, is of interest. Preliminary to a quotation of parts of his opinion I may observe that under the special statutes applicable to the village of Avondale when the petition of the requisite number of owners of feet front of a proposed improvement was filed with the council, it was the duty of the council to refer it to certain commissioners who were to make an investigation, adopt a grade and plans, ascertain the probable cost and, if satisfied,

recommend the making of the improvement. The statute then provided that "the council *shall* order the same to be made." It is obvious that such a statute is radically different from the statutes now in force relative to the making of improvements to be paid for in whole or in part by assessment. The difference lies in the fact that the petitioners when they had secured the recommendation of the commissioners for the improvement might *compel* the council to proceed with it; whereas under the statutes now in force council has at all times the control over the policy of making the improvement as vividly pointed out in *Braman* vs. *Elyria*, supra. It was upon this very point that the reasoning of Judge Minshall proceeded as the following quotation will make clear:

> "The order of the council, that the improvement be made, fixes an indebtedness for the entire cost of the improvement, one-half as an assessment on the property benefited and the other half on the general taxpayers of the village. It is against the fixing of an indebtedness on the corporation without the money being in the treasury to meet it, that the Burns Law is designed as a protection. Hence, it cannot apply to the act in question, for it would prohibit the council from making the *order* that the improvement be made—if not all the initiatory steps required by the law. How could any action be taken for the issue of bonds * * * until the order for the improvement had been made; and yet, if the Burns law is applicable, this order cannot be made until the money from the bonds and assessments are in the treasury. *It may be said that the indebtedness is not created until a contract for the improvement is made.* It is true that it does not exist in favor of any *particular creditor,* nevertheless, on making the order, the successive steps—the advertisement for bids, action on them, the letting of the work and making of the required contract—all follow as a necesssary sequence under *the statute.* If the council should refuse to take any of these steps without cause, *it could be compelled by mandamus to do so.* Hence, if the Burns Law can have any application *to this statute,* according to its spirit it must apply to the order of the council that the improvement be made. It is this order that fixes and entails the indebtedness upon the corporation. It is in fact an order for the expenditure of money. Therefore the Burns law *cannot apply to this statute* as it would render the statute nugatory. The plain purpose of the Burns Law was to prevent the incurring of an indebtedness by a municipal corporation beyond the ordinary resources of its revenue and whereby an annual excess of indebtedness will be created over these revenues. But it has not the vigor of a constitutional provision, * * *."

It is very evident that this language has been misunderstood by the courts which have quoted it as an interpretation of the Burns Law in its application to statutes like those which we now have under consideration. The reasoning is perfectly consistent with that in *Braman* vs. *Elyria* because in both cases the inquiry is made as to what is the last municipal act that fixes obligation upon the municipality in an irrevocable way. In *Cincinnati* vs. *Holmes* that action was determined to be the order of the council determining to proceed with the improvement because under the special statutes there involved such order—if not the recommendation of the commissioners made prior thereto—would give rise to rights in the petitioners which could be enforced by mandamus. In other words, the order of the council fixed the obligation of the municipality. In the general statutes considered in *Braman* vs. *Elyria* and before us now for consideration no such consequence attaches to any of the actions of council. After having adopted the resolution of necessity or after

having passed the ordinance determining to proceed council is still at liberty to change its mind and by appropriate repeal abandon the project. The difference is obvious.

The Burns Law was also under consideration in other cases like Akron vs. Dobson and Emmert vs. Elyria, both of which have been cited. I do not find in them, however, either reasoning or decision directly reflecting upon the problem now before me. True, in *Emmert* vs. *Elyria* Judge Summers says broadly that the Burns Law was an extension of the Worthington Law to cities other than Cincinnati (page 193). It is not clear, however, that any question in the case required him to make such a statement.

When we turn from these cases, which possibly leave the subject in some confusion, to Section 3806 of the General Code, itself, it seems to me that the answer to the question submitted by the city auditor can be reached without great difficulty. One has but to ask the question as to whether any given steps in the procedure for making public improvements is "an ordinance for the expenditure of money" or "a contract, agreement or other obligation involving the expenditure of money." Taking the latter first it is clear that nothing can belong in that class which does not create an obligation binding upon the municipality. Unless the award of the contract upon the opening of bids creates such an obligation there is certainly nothing in the ordinary legislation of council looking toward a public improvement under the existing statutes and the other procedure preliminary to the actual entering into a contract which fastens obligation upon the municipality. Neither the resolution of necessity nor the ordinance determining to proceed in the case of assessment improvements, nor an ordinance making an appropriation for a specific improvement and authorizing or directing the director of public service or safety to enter into a contract therefor gives rise in any third party to any contractual rights against the municipality. In the case at hand we are not concerned with the question as to whether or not the award of the contract creates such an obligation; for it is clear that new bids will have to be invited. If at the time the bids are opened and the award is made the necessary certificate is filed, it would seem clear that the statute would be complied with to the extent that it relates to a "contract, agreement or other obligation."

The sole remaining question is as to whether or not the ordinance determining to proceed or the resolution of necessity, or either of them, constitutes an "ordinance, resolution or order for the expenditure of money." In my opinion none of them comes within this description, nor would an ordinance appropriating money for a particular expenditure and authorizing or directing the head of the particular department to proceed with the work of an improvement not to be paid for in part by special assessments come within this class. Taking the three things named in this part of the section in the inverse order, it is clear that none of the legislative measures which I have mentioned constitutes an "order for the expenditure of money." They are not of this general character. They come under the headings "ordinance" or "resolution" and must be considered as such.

In my opinion such legislative action on the part of council does not constitute either an ordinance or resolution "for the expenditure of money." To say that a measure which authorizes a contract the discharge of which on the part of the municipality will give rise to an expenditure of money is "an ordinance for the expenditure of money," is to ignore the distinction between the two parts of the section in two respects:

First, such a view would not take into account the difference between the preposition "for" and the participle "involving." The sense in which the preposition is used here is believed to be that one defined in the Century Dictionary as follows:

"designed to be or serve as; with the purpose or function of (becoming or doing something) * * *."

The only other possible meaning is that expressed in the same lexicon, as follows:

"in the direction of; toward; with a view of reaching."

This latter, however, is opposed to the meaning of the participle "involving." The verb from which it is derived is defined, in the sense in which the participle is used here, as follows:

"to bring into a common relation or connection; hence, to include as a necessary or logical consequence, * * *."

The simple question is as to whether the expression "an ordinance * * * for the expenditure of money" implies an ordinance which is a part of a procedure which logically will lead to an expenditure of money, on the one hand, or an ordinance which is passed for the direct purpose of making an expenditure of money. As suggested, choice between these two meanings would be difficult and the broader one, which is the former, might be chosen, as it was by the court in construing the Worthington Law, if it were not for the fact that the word "involving" is also used in the statute in such way as to indicate a distinction between the two.

In the second place, a holding to the effect that any of the ordinances or resolutions which I have been considering would be one "for the expenditure of money" would ignore distinctions apparent on the face of the statute, in that it would fail to take into account the separate enumeration therein of ordinances and contracts. Section 3806 is of general application to all classes of municipalities governed by the General Code. Without going into detail, it is familiar statutory law that the council of a village possesses the power to enter into contracts to a much greater degree than does the council of a city. Indeed, it may be safely asserted, as a general proposition applicable to the facts now under consideration at any rate, that the council of a city has no contractual power. Nowhere is this better expressed than in General Code Section 4211, which provides that

"The power of council shall be legislative only, and it shall perform no administrative duties whatever * * *. All contracts requiring the authority of council for their execution shall be entered into and conducted to performance by the board or officers having charge of the matters to which they relate, and after authority to make such contracts has been given and the necessary appropriation made, council shall take no further action thereon."

One gets the impression at least that the dual aspect of Section 3806 may be due to a desire on the part of the legislature to cover the case of a city and that of a village in a single section, and that accordingly that part which deals with ordinances, resolutions and orders may have been primarily intended to govern villages and that part which deals with contracts, agreements and other obligations involving the expenditure of money may have been intended for the regulation of the affairs of cities. I do not pursue this thought further because other considerations bearing upon the same problem sufficiently disclose the correct answer to the question involved. It is at least true that in a city governed by the General Code the underlying legislation of council of the character under consideration is not creative of legal obligation. This much I have previously stated. If that is the case,

then the thing that does create a legal obligation must be the administrative act of some such officer as the director of public service. If this is true, then Section 3806 clearly requires a certificate to be filed as a condition of the lawful exercise of such functions by such administrative officer; moreover, the certificate is to be filed with the "proper board," which now means, as I take it, the proper director. In this connection it must be remembered that when Section 3806 took its present form the Municipal Code was framed on the "Board Plan," so-called, that is, instead of a director of public service and a director of public safety we had a board of public service and a board of public safety. The reference in Section 3806 is to these boards. When the law was changed so as to abolish these boards and substitute for them single officers as heads of departments the legislature overlooked the propriety of amending Section 3806. Nevertheless, the section now has application, in my opinion, to such directors as the successors in function to the boards which formerly existed.

Now I do not think that Section 3806 contemplates the making of two certificates as a part of any one procedure. That is, I do not think it would be necessary to have a certificate on file in connection with the action of council and also to have another certificate on file in connection with the action of the service director, for example; and yet if Section 3806 means what I have said it does mean in connection with the action of the service director, the filing of two certificates would be required by such construction of the statute as would characterize the underlying legislation of council as an ordinance or resolution "for the expenditure of money."

From these considerations I arrive at the conclusion that wherever an administrative officer has the power to do the final act which binds the city and leads to the expenditure of money as a necessary result of that act, the case is within that part of the section which deals with contracts, agreements and other obligations involving the expenditure of money; but that wherever the action of council is the final act which not only logically leads to the expenditure of money, but makes such expenditure on the part of disbursing officers a mere ministerial act when ordered by council, the other part of the section applies. Whether such a case can occur in a city I am not prepared to say. It is clear that it could occur in a village; so that inasmuch as Section 3806 applies both to cities and villages this part of it is not deprived of meaning by the construction which I have given to it.

What I have just said constitutes merely a statement of additional reasons for arriving at the result reached in *Braman* vs. *Elyria*. I have already given my approval to the reasons advanced by the court in that case for arriving at that result.

For the reasons mentioned, then, and upon the authority of the cases which seem to me to be in point, I am of the opinion that in the case described by the auditor a valid contract for the completion of the improvement in question can be entered into without re-passing any of the ordinances or resolutions of council which have been adopted in connection with the improvement; but that to be on the safe side the certificate required by Section 3806 should be filed with the director of public service preliminary to awarding the contract to a particular bidder.

I may say that I have not heretofore considered the meaning of the word "appropriation" as it occurs in Section 3806. It might be argued from this word that any ordinance making an appropriation would be subject to the requirements of this section. Such an argument, however, is answered, in my opinion, by the statement that it is not every appropriation that must be certified to but only appropriations made by the ordinances or resolutions described in the section.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1620.

COLLATERAL INHERITANCE TAX—FEES OF ATTORNEYS FOR CONTESTORS OF WILL NOT DEDUCTIBLE.

The fee of an attorney employed by contestors of a will who succeed in having the same set aside should not be deducted from the value of the estates passing to the heirs and next of kin for purpose of assessing the inheritance tax.

COLUMBUS, OHIO, December 20, 1918.

HON. D. M. CUPP, *Prosecuting Attorney, Delaware, Ohio.*

DEAR SIR:—I have previously acknowledged receipt of your letter of December 9, requesting my opinion upon the following facts and question:

> "S. C. P., late of Delaware county, died possessed of an estate, leaving no children but a brother and sister, as her only next of kin.
>
> She died leaving what purported to be a last will, devising the major portion of her estate to strangers.
>
> The brother and sister instituted proceedings to contest the will and by the verdict of the jury the will was set aside, and her estate passes to this brother and sister as her only next of kin.
>
> The brother and sister entered into an agreement with their counsel to pay such counsel thirty-three per cent of the estate recovered, if the will should be set aside.
>
> The administrator has filed his account, and the question now arises, are the heirs the brother and sister, required to pay the tax on the entire estate, or only on two-thirds thereof, which they in fact realize? We might put the question this way:
>
> Is such counsel fee a part of the costs of administration as would be exempt from the tax?"

In my opinion, the attorney's fee about which you inquire is no part of the costs of administration and should not be deducted from the amount upon which the inheritance tax in the case inquired about should be computed.

In Re: Westburn, 152 N. Y. 93.

The fees of the attorney for the administrator would have been a proper administration expense, had the contest suit turned out the other way.

Connell vs. Crosby, 210, Ill. 380.

The distinction is based upon the principle that the defense of a contest case is for the preservation of the estate; while the prosecution of such a case is for the assertion of the individual rights of the heirs and does not in any way involve the estate, as such, either by asserting a claim against it or by defending one in its behalf.

The distinction may seem to be a fine one, but the cases so hold.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1621.

MUNICIPAL CORPORATIONS—COUNCIL OF CITY AUTHORIZED TO TRANSFER TO LIBRARY TRUSTEES OF SCHOOL DISTRICT A SITE FOR LIBRARY PURPOSES—CITY COUNCIL CANNOT ISSUE BONDS UNDER SECTION 3939 FOR BENEFIT OF TRUSTEES OF SCHOOL DISTRICT LIBRARY.

(1) *Sections 3711 and 3712 of the General Code confer ample authority upon the council of the city of Cincinnati to transfer to the board of trustees of the Library of the School district of Cincinnati a site and buildings thereon suitable for library purposes, without the assumption of any indebtedness of the city existing on account of the acquisition of such sites and buildings by the city, and without the receipt of enough money to reimburse the city for the indebtedness thus incurred; and upon such board of trustees to take title thus transferred.*

(2) *The city council may not lawfully issue bonds under Section 3939 G. C. for the purpose of creating a fund to be paid over to the trustees of the School District Library to enable the latter to purchase a site for library purposes.*

COLUMBUS, OHIO, December 20, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your letter of recent date requesting my opinion as follows:

> "We are referring you to the Cincinnati library created under authority of Sections 14993 to 15005 G. C., and are advising that some years ago by annexation of the village of Madisonville, the city of Cincinnati acquired the Madisonville town hall and site, and also assumed a considerable indebtedness thereon, about $25,000.00 of such bonds being still unpaid and to a considerable degree unprovided for at the present. We are calling your attention to Section 3704 G. C., and are enclosing copy of ordinance No. 85 by which the city of Cincinnati has given this property to the library trustees.
>
> *Question* 1: In view of the indebtedness mentioned above can the city of Cincinnati legally transfer such property to the trustees of the library under authority of Sections 3711 and 3712 of the General Code?
>
> We are also enclosing copy of ordinance No. 203 of 1913 under which the city issued bonds to pay for the site for a library.
>
> *Question* 2: May the city legally issue bonds or expend moneys to provide a site or sites for libraries?
>
> You will understand it is not a municipal library, but a separate and distinct levy is made for such library, while the city proper must pay the bonds and interest and the bonds issued under the last named ordinance were issued under authority of the Longworth act."

Ordinance No. 85 of the council of the city of Cincinnati, referred to in your first question, provides that the city of Cincinnati shall, by deed to be executed by the mayor of the city, convey to the trustees of the public library of the School district of Cincinnati a certain tract of land described by metes and bounds and located in the village of Madisonville, upon such terms as that the trustees of the public library shall, at their own expense, put the property in good repair and beautify the premises and at all times maintain the premises in good condition and

repair, and use the same for public library purposes, paying all expenses and charges in connection with the ownership, maintenance and upkeep thereof; and that the trustees of the public library shall assume and perform the obligations of the city of Cincinnati under any and all outstanding agreements or leases for the occupancy of any part of the premises. This is the only consideration named in the ordinance for the transfer of the real estate in question.

The trustees of the public library of the School district of Cincinnati occupy a peculiar position. In the first instance this body seems to owe its existence to an act of April 30, 1891, amending Section 3999 Revised Statutes (88 Ohio Laws, 446). The section had theretofore provided that in cities not having less than twenty thousand inhabitants it should be lawful for the board of education having custody of any public library therein to constitute a board of managers for said library. (64 Ohio Laws, 100). The amendment introduced a proviso to the effect

> "that in cities of the first grade of the first class, the board of managers of the public library therein is hereby abolished, and a board of trustees of such library shall be appointed, as follows, viz: the board of education of the school district of such city, the union board of high schools, and the board of directors of the university of said city shall each by ballot appoint two persons to serve for a term of three years each as members of a board of trustees of said public library, and at the expiration of each term of three years, said boards shall each likewise make appointments for the succeeding three years. * * *"

Nothing is said in this act as to the legal title of property belonging to the public library to be thus administered.

Subsequently, on April 21, 1898, the general assembly amended and supplemented Section 3999 of the Revised Statutes, (93 Ohio Laws, 192). I quote certain provisions of this act:

> "Section 3999.—* * * provided, that in cities of the first grade of the first class upon the expiration of the terms of office of the trustees of the public library therein, heretofore appointed under this section, as amended April 30, 1891, there shall be appointed as successors to said board, a board of trustees of said library consisting of seven persons, as follows: Two by the board of education of the school district within which such city is situated, two by the board having charge of the high schools of such city, two by the directors of the university in such city, * * *; and one by the judges of the court of common pleas of the county within which such city is situated, * * *; and thereafter said boards and said judges shall, upon the expiration of the terms of office of said appointees, and each three years thereafter, appoint successors to said trustees. * * *"
>
> "Section 3999a.—Each and every resident of the county within which is situate any city of the first grade of the first class, having therein established a public library, shall be entitled to the free use of such library, reading rooms, and any branch of the same, and all the privileges thereof, upon such terms and conditions not inconsistent therewith, as the board of trustees of such library may prescribe."
>
> "Section 3999b—The board of trustees of the public library in cities of the first grade of the first class shall have sole and exclusive charge, custody and control of the public library in such city, including all property, both real and personal, used and occupied by such library. * * *.

Said board of trustees shall have power over, and exclusive control of, the library fund hereinafter provided for, and of the expenditure of all moneys collected to the credit thereof. They shall have power and it shall be their duty to establish in said city and throughout the county within which is situated said library, reading rooms, branch libraries and library stations in connection with said library, * * *"

"Section 3999c.—For the purpose of increasing, maintaining and managing the public library in cities of the first grade of the first class, the board of trustees thereof may levy annually a tax of not to exceed three-tenths of one mill on each dollar valuation of the taxable property in the *county* wherein is situated such city, to be assessed, collected and paid in the same manner as are other taxes levied throughout the county. * * *"

"Section 3999d.—The amount of any fund heretofore raised by a levy or tax by the board of education in such city for school library purposes, and all library funds remaining unexpended, shall be transferred from the respective funds to the library fund herein created, to be expended and paid out as herein provided * * * and any and all funds, bonds, stocks *or other species of property* held by the board of education of such city, or by any of the departments of such city for the benefit of the public library thereof, shall be transferred to the board of trustees of such public library, to be held and controlled by them subject to the terms of the respective donations."

This act, assuming it is constitutional (which will not be disputed for the purposes of this opinion) had the effect of transforming the school library in the city of Cincinnati into a public library of the county of Hamilton, to be managed and controlled by a board of trustees as therein provided. The legal title to personal property, at least, was vested in the board of trustees by transfer from the former board of trustees or the board of education. Nothing, however, was said in this act about transferring the legal title of the real estate formerly devoted to school library purposes. So far it would seem that the title to such real estate was still in the board of education of the city of Cincinnati; at least I have not been able to find any indication to the effect that the public school library, which had been in Cincinnati for a number of years prior to this time, belonged, in legal effect, to any other than the board of education of the city.

The last mentioned act was again amended by act passed April 14, 1900 (94 Ohio Laws, 204); but the amendments therein made are not important. Suffice it to say that the supplementary sections, designated as Sections 3999a et seq. of the Revised Statutes, as so enacted and amended are now found in the Appendix to the General Code, as Sections 14993 to 14998, inclusive.

On May 19, 1902, the general assembly passed another act affecting these library trustees (95 Ohio Laws, 902). This act was passed for the evident purpose of authorizing the board of trustees in question (now more accurately designated as "the board of trustees of the public library of the *school district* of Cincinnati") to accept a donation to be made by Andrew Carnegie for the construction of branch libraries. The board is authorized to issue bonds for this purpose, known and designated as "The Public Library bonds of the School district of Cincinnati," and "to purchase or lease and to hold land necessary for suitable sites on which to erect said branch libraries." (See Sections 14999 to 15005, inclusive, Appendix to General Code).

I quote from the act as follows:

"WHEREAS, Andrew Carnegie, Esquire, of New York City, has offered to give the board of trustees of the public library of the school dis-

trict of Cincinnati, the sum of one hundred and eighty thousand dollars for the erection of branch libraries in said city on condition that the sites therefor be provided by the said board * * *; and * * *

WHEREAS, the said board under its powers is able to support said branch libraries as required by the conditions of said offer, but immediate legislation is necessary to authorize the acceptance of said offer, and to enable the said board to obtain the means with which to provide the sites for and equip said branch libraries; therefore

Be it enacted by the general assembly of the State of Ohio:

Section 1.—(Section 3999f Bates' Revised Statutes, Section 14999 Appendix to General Code.) That the board of trustees of the public library of the school district of Cincinnati be and it is hereby authorized to receive and accept the said donation of Andrew Carnegie upon the terms and conditions therein expressed, the branch libraries constructed under the provisions of said donation to be * * * forever kept open for the free use of the public.

Section 2.—(Section 15000 Appendix to General Code.) That for the purpose of providing the sites and furnishing the equipment necessary for *said* branch libraries the said board of trustees is hereby authorized and empowered to borrow * * such sum as may be necessary, not exceeding one hundred and eighty thousand dollars, and to issue * * * bonds therefor, which shall be known and designated as 'The Public Library bonds of the School district of Cincinnati' * * . For the purpose of paying the interest and providing a sinking fund for the final redemption of said bonds, the said board of trustees shall levy annually a tax upon the taxable property *of said school district* sufficient in amount to pay the said interest, etc. * * *"

Secton 3. —(Section 15001 Appendix to General Code.) Said library trustees shall have power to purchase or lease and to hold land necessary for suitable sites on which to erect *said* branch libraries, and shall use said fund in the payment therefor, * * *. Said trustees shall have power and they are hereby authorized to make all necessary contracts for the construction, furnishing and equipping of *such* branch libraries. The title to the land acquired *under this act* shall be taken in the name of 'The Trustees of the Public Library of the School district of Cincinnati,' and shall be held by them in trust for public library purposes, and said trustees shall have the care, custody, management, and control of all property provided for public library purposes *under this act.*"

I pause here to remark that so far there is no power to acquire title to land or lands and buildings for branch library purposes vested in the board of trustees, save in so far as may be necessary in order to accept Mr. Carnegie's donation. The power to purchase and take title to lands is strictly limited in this way, and can not be the predicate of any acquisition of title by donation, or otherwise, of any other lands required for branch library purposes.

"Section 5.—(Section 15003 Appendix to General Code.) Said trustees shall have the right to receive and accept donations of land, money, or other things of value, and to invest, use, or dispose of the same in the interest of the library."

Here is a provision which probably does give to the trustees, as a quasi corporation, capacity to take title to lands other than those acquired for the purpose of

establishing branch libraries in accordance with the terms of Mr. Carnegie's gift; but no power is reposed in the board of library trustees to establish branch libraries otherwise than perhaps in the administration of an express trust.

I have traced the legislative history of the board of trustees of the Cincinnati school library to show the exact situation so far as this body is concerned. Your question, however, does not relate to the power of this board to take, but rather to the power of the city of Cincinnati to give, as it has attempted to do by and through Ordinance No. 85 of the year 1918. That ordinance treats the transaction as if it involved the conveyance of the title vested in the city of Cincinnati to this board of trustees. The attempt of the council to dispose of the city's property in this way invokes consideration of Section 3704 of the General Code, referred to by you, in connection with other sections in the same chapter relating to the sale or lease of property.

Section 3698 of the General Code provides as follows:

> "Municipal corporations shall have special power to sell or lease real estate or to sell personal property belonging to the corporation, when such real estate or personal property is not needed for any municipal purpose. Such power shall be exercised in the manner provided in this chapter."

Section 3704 General Code, referred to by you, provides as follows:

> "Money arising from the sale or lease of real estate, or a public building or from the sale of personal property, belonging to the corporation, shall be deposited in the treasury in the particular fund by which such property was acquired, or is maintained, and if there be no such fund it shall be deposited in the general fund. If the property was acquired by an issue of bonds the whole or a part of which issue is still outstanding, unpaid and unprovided for, such money, after deducting therefrom the cost of maintenance and administration of the property, shall on warrant of the city auditor be transferred to the trustees of the sinking fund to be applied in the payment of the principal of the bond issue."

If these sections stood alone there would be strong ground for asserting that Ordinance No. 85 could not be sustained as a valid exercise of the legislative power of the council of the city of Cincinnati. Unquestionably, the transaction authorized, or attempted to be authorized by that ordinance, is not a "sale," and on this ground, as well as that suggested by you in view of Section 3704 of the General Code, I would be inclined to question the transaction. However, you call attention to Sections 3711 and 3712 of the General Code. These sections provide as follows:

> "Section 3711.—A municipal corporation may transfer by ordinance duly passed, any property, real or personal, acquired or suitable for library purposes, to the trustees of any public library for the school district within which such municipal corporation is situated, upon such lawful terms and conditions as are agreed to between the municipal corporation and trustees."
>
> "Section 3712.—The trustees of a public library in such district may receive and accept such transfer, and receive and accept from any other source or acquire in any other manner, any property, real or personal, for library purposes, and use and apply it for such purposes, and enter into any contract relating thereto."

Here is found independent authority in the council to transfer the property to the trustees of the library and independent capacity in the trustees of the library

to receive the title. These sections solve all the questions raised by the consideration of the other sections which have been referred to, as relating to the powers of the trustees, on the one hand, and the council, on the other.

Ordinance No. 85 is, in my opinion, authorized by these sections and the trustees of the public library are, in my opinion, empowered by these sections to accept the ordinance and receive the conveyance.

Section 3704 G. C. does not prevent the transaction from being consummated under authority of Section 3711, because Section 3704 does not operate unless there has been a sale or lease. However disadvantageous the transaction may be from the viewpoint of the city of Cincinnati, which is divested of the title to the property in question, but remains liable for the debt incurred on account of its original purchase by the village of Madisonville, the legality of the transaction is, in view of the sections last above mentioned, not open to question.

Ordinance No. 203 of the year 1913, referred to in your second question, provides, in part, as follows:

> "Section 1.—That it is deemed necessary by the council of the city of Cincinnati to issue and sell the bonds of said city * * * for establishing a free public library on north side of West Eighth street, between State and Glenway avenues, * * * as a branch of the Public library of the city of Cincinnati. * * *"
>
> "Section 3.—The proceeds from the sale of said bonds * * * shall be credited to the fund for said purpose aforesaid, and shall be paid out upon the order of the board of trustees of the Public library of the city of Cincinnati, and shall be expended by said board of trustees of the Public library of the city of Cincinnati for the purposes specified in Section 1 of this ordinance."

It is apparent, as you say, that this bond issue was made under the supposed authority of Section 3939 of the General Code, known as the "Longworth Act," one subdivision of which authorizes council to issue bonds "for establishing free public libraries and reading rooms" and another of which authorizes bonds to be issued "for procuring the real estate for an improvement authorized by this section * *."

I assume from the statement in your letter that the city of Cincinnati does not maintain any free public library under authority of Sections 4004 et seq. of the General Code; or that if it does, the reference in the ordinance is not to the trustees of such a municipal library (who are appointed by the mayor), but to the trustees of the school library, the legislative history of which has been traced in dealing with your first question. Of course, if the city of Cincinnati actually does maintain a municipal library, and if the proceeds of the sale of the bonds issued under authority of Ordinance No. 203 of the year 1913 were to be expended for such purpose by the trustees of such municipal library, no question as to the legality of the transaction could arise. I take it, however, that, as above suggested, the ordinance discloses a transaction whereby the city council issued bonds of the city and turned the proceeds over to the trustees of the independent library, which seems to be, in one aspect of the case, a school library and, in another aspect, a county library. I know of no authority to do this, and if this is actually what was done I am of the opinion that Ordinance No. 203 was illegal.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1622.

MUNICIPAL CORPORATIONS—CITY SOLICITOR HAS NO AUTHORITY IN OWN RIGHT TO COMPROMISE CLAIMS—COUNCIL CANNOT AUTHORIZE SOLICITOR GENERALLY TO COMPROMISE CLAIMS.

The city solicitor has no authority in his own right to compromise claims for damages against the city and to pay the same from an appropriation to his account for "court costs and damages."

Council may not authorize the city solicitor by general or blanket resolution or ordinance to compromise any and all claims against the city. He may be authorized to negotiate settlements, but each settlement must be separately approved by council.

COLUMBUS, OHIO, December 20, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I have your letter of November 20 in which you request my opinion as follows:

> "The council of a municipality of this state in its semi-annual appropriation ordinance regularly appropriates from the general fund for 'Court costs and damages.'
>
> *Question* 1: Has the city solicitor legal authority to compromise claims of damages and have the same paid from this appropriation without authority of council to compromise claims?
>
> *Question* 2: Can such authority of council legally authorize such compromise, and if so may it be by blanket authority or should there be authority of council covering each individual case?"

The city solicitor has no power under the statutes to act for the city in compromising damage claims; that is to say, this is not one of his functions as expressed in the statutes relative to his office or fairly implied therefrom.

His duties in so far as they approach the matter inquired about are set forth in the following sections of the General Code:

> *Section* 4308.—"When required so to do by resolution of the council, the solicitor shall prosecute or defend, as the case may be, for and in behalf of the corporation, all complaints, suits and controversies in which the corporation is a party, and such other suits, matters and controversies as he shall, by resolution or ordinance, be directed to prosecute, but shall not be required to prosecute any action before the mayor for the violation of an ordinance without first advising such action."
>
> *Section* 4311.—"The solicitor shall apply in the name of the corporation, to a court of competent jurisdiction for an order of injunction to restrain the misapplication of funds of the corporation, or the abuse of its corporate powers, or the execution or performance of any contract made in behalf of the corporation in contravention of the laws or ordinance governing it, or which was procured by fraud or corruption."
>
> *Section* 4312.—"When an obligation or contract made on behalf of the corporation granting a right or easement, or creating a public duty, is being evaded or violated, the solicitor shall likewise apply for the forfeiture or the specific performance thereof as the nature of the case requires."
>
> *Section* 4313.—"In case an officer or board fails to perform any duty

expressly enjoined by law or ordinance, the solicitor shall apply to a court of competent jurisdiction for a writ of mandamus to compel the performance of such duty."

It will be observed that the authority of the solicitor to act generally—that is in cases other than those specifically enumerated in Sections 4311 et seq. as above quoted, none of which touch the present case—is carefully safeguarded, in that an ordinance or resolution of council is required to confer upon him the powers of an attorney for the city. In other words, in his own proper office, so to speak, he can not exercise the capacity of the city to sue and be sued, nor any implied authority that might flow from such basic power. On the other hand, Section 4308 itself makes it clear that the corporate power of the city to sue and be sued is lodged in and controlled by the council. It is the corporate body which must act for the city, at least primarily, on this side of its corporate existence; the solicitor is rather the public officer whose duty it is when moved to action by the corporation as a litigant to represent it as its attorney.

I assume that you are inquiring about a case where council has made an appropriation for "damages" under such circumstances as to make it clear that the intention was that the city solicitor was to draw on this appropriation. This would not, in my opinion, be enough to authorize the solicitor to compromise a particular case. It is sufficient authority to authorize him to draw on the appropriation when he has made a compromise which council has authorized. That is the full effect which I feel able to give to an appropriation of this sort.

I have already said enough to answer your first question, which is that on the basis of the appropriation only and without other authority of council, a city solicitor would not have power to compromise claims for damages against the city and draw on the appropriation in settlement of such compromises. I would, however, be of the opinion further that in case such action had been taken a subsequent resolution or ordinance by council ratifying the settlement made by the solicitor would validate the entire proceeding.

I have already indicated partially what my answer to your second question must be. Council can authorize the solicitor to defend any case against the corporation. It is, as I have said, that municipal functionary which may exercise all incidents of the capacity of the municipality to sue and be sued. In other words, it may control municipal litigation. Therefore it may direct the settlement or compromise of any claim either for or against the city which is or may be the subject of litigation.

The question that now arises is as to whether or not this power may be delegated to the solicitor. Strictly speaking, it may not be so delegated. Each settlement which the solicitor makes must be specifically approved by council. Council may require and thus authorize the solicitor to defend any controversy, though not in suit, and this gives to the solicitor all the powers usually reposed in an attorney in the conduct of the controversy from the legal standpoint. The solicitor thus becomes the agent of the municipality as represented by the council with full authority to act as an attorney might act in a similar case. Such authority would not go so far, however, as to permit the solicitor to bind the city finally and in his own right as such agent by the terms of any compromise upon which he might agree. He would be authorized to negotiate no doubt and to formulate terms; but before the settlement would be binding upon the city the action of council would be necessary. Such action should, in my opinion, be taken in each individual case. For the council to attempt to confer upon the solicitor blanket authority to compromise at his discretion damage claims of any given class asserted against the city would be for the council to delegate discretion which is reposed by the law in it to the solicitor. This can not lawfully be done.

I answer your second question therefore by saying that council may legally authorize the solicitor to effect a compromise for not more than a stated figure in the case of a damage claim against the city, and when such compromise is effected it would be complete and binding upon the city. Council may also ratify and confirm the compromise of damage claims negotiated by the city solicitor where he is authorized to represent the city generally in such controversies. Authority to act to this extent may be conferred upon the solicitor generally, that is by blanket ordinance or resolution, but council may not by such a general ordinance confer upon the solicitor power to compromise individual cases at his own discretion.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1623.

CHILDREN'S HOMES—MEANING OF PHRASE "SEMI-PUBLIC CHILDREN'S HOME" IN SECTION 3088, 7676, 7677, 7678 AND 7681.

The phrase "semi-public children's home" appearing in Sections 3088, 7676, 7677, 7678 *and* 7681 *of the General Code refers to institutions established and maintained by private donations but operated by or under public authority as exemplified by Sections* 3070 *et seq. and* 3110 *G. C. Charitable institutions wholly under private management, though open to all on the same terms, are not such institutions.*

COLUMBUS, OHIO, December 20, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—From several sources the question as to the meaning of the phrase "semi-public children's home" as used in Section 7676 General Code, pertaining to the admission of pupils to the public schools, has been raised. Most recently there has come to this office a letter from the office of the city solicitor of Cincinnati presenting specific facts involving an interpretation of this language, which facts are as follows:

> "Your opinion on this point is desired in order that the board of education of the school district of the city of Cincinnati may determine the rights of the inmates of the Home for Colored Girls and inmates of the Children's Home of Cincinnati to attend the public schools of this district.
>
> There is located in this city a home for colored girls, and the management of the home has advised us that the home is a semi-charitable institution. This home has existed for seven years; it has a capacity for twenty-five girls, and is always crowded. Girls are received from improper homes and also those homes broken by death and other misfortune. These girls are placed with the home either by the juvenile court (which usually includes commitment) or they are brought to the home voluntarily by parents or other relatives, and of this latter class there are usually three or four girls from school districts of this county outside of the school district of the city of Cincinnati.
>
> The home is careful to receive only those girls for whom no other provision can be made, those whose morals are in jeopardy and who stand much in need of the protection and training that the home endeavors to give. For obvious reasons they demand as much financial support as can be secured from some relative. This, however, never covers the cost of maintenance and the home is compelled to solicit funds through the Council of Social Agencies of the city of Cincinnati.

> The Children's Home is a corporaton not for profit organized under the laws of the State of Ohio; it makes no charge for the care of children entrusted to it and is wholly supported by its endowment fund by voluntary contributions in the form of money and supplies. If a child is placed in the home and the parents pay a stated sum per week, this sum is not accepted as a charge for the care of this child, but is considered as a donation for the general support of the Children's Home. Persons of this city and other localities make bequests by will to the Children's Home and it also receives money from persons charitably inclined, while still other persons send it supplies in the way of clothing and food. These various donations constitute the means of support of the Children's Home and are used for the support of the home in general."

In view of the importance of the question and the frequency with which it has been raised throughout the state, I venture to address an opinion to the Bureau of Inspection and Supervision of Public Offices.

I may say at the outset that on the facts pertaining to the two Cincinnati institutions as they are presented by the letter from which I have quoted, I would have no hesitancy in pronouncing each of them an "institution of purely public charity" within the meaning of the former language of the constitution respecting the exemption of property from taxation, the statutes passed in the exercise of the power to exempt, and the decisions interpreting such constitutional and statutory provisions. That is to say, these institutions, both of which are charitable, are "public" in the sense that they form proper beneficiaries of tax exemptions; that is, they seem to be open to all members of certain natural classes on equal terms, and are clearly instrumentalities for the satisfaction of public needs.

It would seem, however, that if the legislature had intended to refer to properly charitable institutions or institutions of public charity, it would have used some other term than "semi-public" to describe such institutions. In point of fact, as the solicitor states in his letter, Section 7681 of the General Code distinguishes between "semi-public children's homes" and "private children's homes."

Inasmuch as practically all institutions which would be called "children's homes" are charitable and most of them open to the public on equal terms, it would seem most likely that the distinction here drawn was not intended to be based upon the principles to which I have referred.

Of course, there may be children's homes in the state which are open, for example, only to children of parents of a certain religious denomination or fraternal order, in which event, of course, they could be classed as "private children's homes" in contradistinction to institutions of the class described in the letter from which quotation has been made. Therefore, I do not place much reliance upon the argument just advanced.

The phrase under consideration is new in legislation passed in 1917 (107 Ohio Laws, 60). I find it most helpful, therefore, to turn to that act in an effort to find a clue to the meaning of the term, which is not used elsewhere in the statutes.

The act found in 107 Ohio Laws, 60, amends Sections 3085, 3088, 7676 to 7678, inclusive, and 7681 of the General Code. The phrase "semi-public children's home" is found in Sections 3088, 7676, 7677, 7678 and 7681 of these sections. Of the enumerated statutes the last four which I have mentioned relate to public schools and attendance therein, and consideration of these sections by themselves does not shed any light upon the meaning of the phrase "semi-public children's home," which it will be remembered is apparently used in contradistinction to the phrase "county or district children's home" on the one hand and "private children's home or orphan asylum" on the other hand.

In other words, consideration of these sections by themselves will show merely that a "semi-public children's home" is a children's home which is neither a county or district children's home nor a private children's home or orphan asylum.

But, as indicated, the phrase is found in Section 3088 of the General Code. This section is a part of the act relating to the powers and duties of county officials with respect to children's homes. One would naturally suppose, therefore, that the phrase "semi-public children's home" would have some reference to a type of institution recognized by the statutes found in the chapter in which Section 3088 General Code appears.

I call attention to Sections 3070 et seq. and 3110 of the General Code, which are found in the chapter under the heading "Children's Homes." The first group of statutes authorizes county commissioners to receive bequests, donations and gifts, real and personal, for the purchase of a site to erect thereon and maintain an orphans' asylum, which is to be under the control of a board of six persons serving gratuitiously. These sections seem to contemplate that private bequests and donations shall form the source of the revenues applied to the maintenance of such a home. Section 3110 authorizes the commissioners of any county or district to accept any donation or bequest of land, money or other personal property for the use and benefit of children's homes " on such terms as are agreed upon by such board, and such persons, agents or executors."

Under these statutes an institution would exist under the control of the county commissioners and yet be distinguishable from a regular county or district children's home, in that such institutions would be established and partly or wholly maintained through the use of privately donated trust funds, whereas a regular county or district children's home is established by the county or district and maintained by taxation.

There may be other statutes authorizing cities to engage in similar enterprises. I have not made a search in an effort to find out whether the statutes to which I have referred constitute the only ones under which such arrangements for the establishment and maintenance of children's homes may be carried out. I say merely that these sections do provide for institutions which do not constitute private children's homes on the one hand, because they are under the control in a greater or lesser degree of public officials; and do not constitute county or district children's homes on the other hand because they are not established in the manner in which regular county or district homes are established, because they are not supported only by taxation as regular county children's homes are maintained, and because finally they are not under the control of the trustees provided for in Section 3881 and 3112 for county and district children's homes respectively.

Such institutions being, therefore, neither county or district homes on the one hand nor private homes on the other hand, I take it that they must constitute the class of institutions which the legislature had in mind in speaking of "semi-public children's homes."

I am of the opinion, therefore, that a "semi-public children's home" within the meaning of the sections referred to is one of the type exemplified by Sections 3070 et seq. and 3110 of the General Code. Inasmuch as neither of the institutions referred to in the letter of the solicitor appears to be such an institution, as both of them are under private management, I am further of the opinion that the institutions referred to in the letter constitute private children's homes and not semi-public children's homes within the meaning of the related statutes.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1624.

DITCHES AND DRAINAGE—NOT NECESSARY FOR COUNTY COMMISSIONERS TO ACT WITH EMERGENCY COMMISSIONERS, WHEN.

In straightening or cleaning out a creek, river or water course, for the protection of a bridge or road, under the provisions of Sections 2428 et seq. G. C. (107 O. L. 549-550), the commissioners need not act in conjunction with the emergency commission created in the act found in 103 O. L. 206.

COLUMBUS, OHIO, December 20, 1918.

HON. HARRY S. CORE, *Prosecuting Attorney, Ottawa, Ohio.*

DEAR SIR:—I have your communication which reads as follows:

"The commissioners of Putnam county are acting on a petition filed about August, 1918, under Section 2428, to straighten Sugar Creek for the protection of a bridge and fill leading to said bridge, which crosses said creek.

The bridge crosses the creek at right angles, running east and west, and the improvement in the creek will reach from the bridge directly south about forty rods straightening the channel which is, as it now exists, long and winding, and coming toward the grade, and the improvement as they have undertaken is by petition under the section above referred to and Sections 2429, 2430 and 2431.

Referring to Attorney-General's Opinion in Volume II, 1913, pages 1269 to 1274, which seems to join the emergency commission in action with the county commissioners in such work, the question to be determined here is, does the act referred to anticipate the necessity of the appointment of an emergency commission to act with the commissioners in this matter, or does the act stand alone and may the commissioners of the county, themselves, perform this duty?"

Sections 2428, 2429, 2430 and 2431 G. C. (107 O. L. 549-550) under which your county commissioners are proceeding, read as follows:

"Section 2428.—The commissioners may cause a river, creek or watercourse to be straightened or cleaned out for the protection of any bridge or road within their control."

"Section 2429.—Before the commissioners proceed to straighten or clean out any river, creek or watercourse, there must be filed with the county auditor of the county a petition, signed by one or more taxpayers of the county, setting forth the benefits to be derived from straightening or cleaning out such river, creek or watercourse, the starting point and terminus, with a description of such river, creek or watercourse, and an estimate of costs to be incurred to complete the work. At the next regular or special meeting of the commissioners, the auditor shall notify them of the filing of the petition."

"Section 2430.—Upon receiving the petition, the commissioners shall forthwith appoint a competent engineer, resident of the county, who shall go upon the line of the river, creek or watercourse, carefully examine, and make his report to the county auditor in writing, stating whether he deems the straightening or cleaning out of the river, creek or watercourse will be

beneficial for the protection of any bridge, state, or county road, or other road in control of the commissioners, and, if so, an estimate of the costs thereof."

"Section 2431.—If the engineer recommends the straightening or cleaning out of such river, creek or watercourse, and the commissioners deem it advisable, at the first regular session after receiving the report, they shall advertise the letting of the work at least twenty days, and let it to the lowest responsible bidder, taking from him a bond in a sum fixed by them, payable to the state, with good sureties, for the performance of the work in a proper manner, and within a time therein named. No bid shall be accepted that exceeds the estimated cost in such report, and the commissioners may reject all bids."

Your question is as to whether, under the opinion to which you refer, the county commissioners ought to join with the emergency commission provided for in an act found in 103 O. L. 206, or whether the commissioners can proceed independently with the improvement asked for in the petition filed with them.

It is my opinion that the county commissioners may proceed with said improvement, without being joined with the emergency commission as provided for in said act.

The part of Mr. Hogan's opinion, to which you refer, is found on page 1272 of Volume II of Annual Report of the Attorney General for 1913 and is as follows:

"I am, therefore, further of the opinion that because of the fact that the two acts of the legislature above referred to must be construed together, the powers of the emergency commission extend to the proceedings provided for in Section 2428 et seq., so that although the taxpayer's petition would be filed with the county auditor as provided in Section 2431 and the employment authorized by Section 2430 should be made by the county commissioners with the approval of the emergency commissioners. It therefore follows that upon the necessary jurisdictional steps being taken, the employment of the resident engineer, authorized to be employed under Section 2430, should be made jointly by the county commissioners and the emergency board. The foregoing constitutes an answer to your first and second questions."

It is my view that this finding of Mr. Hogan does not apply to your case. It must be remembered that the act as found in 103 O. L. 206 was merely an emergency act to take care of the damages caused by the floods of March and April, 1913. The title to this act is as follows:

"An act to establish the Ohio flood relief commission; to define its powers and duties and to provide for the establishment of emergency commissions in certain counties and municipalities of the state, to assist in restoring the public works and public property damaged by the floods of March and April, 1913."

Section 10 of said act reads as follows:

"The emergency commission of any county shall exercise in conjunction with the county commissioners such powers and duties as are con-

ferred upon the county commissioners in so far as they extend to the repairing, rebuilding and restoring of public works destroyed or damaged by the floods of March and April, 1913, and the emergency commission shall exercise and perform such duties jointly with such county commissioners."

Here again we note that the emergency commission of a county unites with the county commissioners only to the extent of repairing, rebuilding and restoring public works destroyed or damaged by the floods of March and April, 1913.

The provisions of this act should not be extended beyond the purpose for which the act was passed, and as the improvement which your county commissioners have under consideration has nothing whatever to do with the restoring of public works destroyed or damaged by said floods of March and April, 1913, it is my opinion that the act referred to does not apply to the matter.

Hence in view of all the above it is my opinion that the county commissioners may cause a creek, river or water course to be straightened or cleaned out for the protection of any bridge in conjunction with the emergency commission created in the act found in 103 O. L. 206.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1625.

AUDITOR OF STATE—HAS NO AUTHORITY TO PRESCRIBE ACCOUNTING SYSTEM FOR LEGISLATURE.

The auditor of state, as chief inspector and supervisor of public offices, has no authority to prescribe a system of accounting for the houses of the general assembly.

COLUMBUS, OHIO, December 20, 1918.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of recent date requesting an early opinion upon the following questions:

"As Chief Inspector and Supervisor of Public Offices may the auditor of state legally prescribe a system of accounting for the State Senate and House of Representatives?

If he has such right, and the members of said body ignore the same by resolution, or otherwise than by the enactment of a statute, do they come within the provisions of Section 283 G. C., and what is the proper authority to pass upon their removal?

Referring again to the provisions of Section 283 G. C., kindly designate the proper authorities to pass upon the removal of the following officials for failure to keep the accounts and make the reports required by the Bureau of Inspection and Supervision of Public Offices, also the proper

procedure to accomplish the same; viz: State officials, county officials, municipal officials, school officials, township officials and justices of the peace."

The answer to your first question is in the negative. The only authority which the auditor of state has to prescribe systems of accounting for anybody is that which exists under the act creating the Bureau of Inspection and Supervision of Public Offices. This act, which begins with Section 274 of the General Code, authorizes the bureau to

"inspect and supervise the accounts and reports of all state offices, including every state, educational, benevolent, penal and reformatory institution, public institution and the offices of each taxing district or public institution in the state of Ohio."

Section 277, which is the particular section which gives the power under consideration, authorizes the auditor of state "as chief inspector and supervisor" to "prescribe and require the installation of a system of accounting and reporting for the public offices, named in Section two hundred seventy-four."

The general assembly of the state is not a "state office"; it is not "named in Section two hundred seventy-four."

These statements answer your first question and make unnecessary an answer to your second question.

Your third question refers to Section 283 of the General Code, which provides as follows:

"A public officer or employe who refuses or neglects to keep the accounts of his office in the form prescribed, or make the reports required by the bureau of inspection and supervision, shall be removed from office on hearing before *the proper authority.*"

To answer your third question as you have asked it would require me separately to consider the case of every public officer in the state subject to the supervision of the Bureau of Inspection and Supervision of Public Offices. No one of them would suffice as an answer to the whole question nor as an answer applicable to any particular class of officers, such as "state officials," "county officials," etc. With the exception of certain general statutes which authorize removal of any public official upon complaint signed by citizens and heard in a court, the general policy of our statutes is to provide specifically for the question of removal in connection with each particular officer. In other words, it is purely accidental that any two officers happen to be subject to removal by the same authority and in the same way. Indeed there is no provision whatsoever for the removal of some officers.

Unless advised that you wish me to write a lengthy article on the subject of the removal of public officers in the state of Ohio and to spend the time necessary to prepare such an article, I must answer this part of your letter by advising that I should be pleased to state the law in this respect as to any particular officer or officers whom you may have in mind upon receipt of advice from you as to who they may be. Any other course would make it impossible for me to render an opinion at an early date, which seems to be one of the points in your mind.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1626.

APPROVAL OF BOND ISSUE OF MORGAN COUNTY, OHIO—$10,000.00.

COLUMBUS, OHIO, December 20, 1918.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

In Re: Bonds of Morgan county, Ohio, in the sum of $10,000.00, for the purpose of providing a fund for the repair of certain bridges in said county.

I have carefully examined the transcript of the proceedings of the board of county commissioners of Morgan county, Ohio, relating to the above issue of bonds and find said proceedings to be in conformity to the provisions of the constitution and the laws of Ohio in regard to bond issues of this kind.

I am therefore of the opinion that bonds properly prepared according to bond form submitted, when the same are properly executed and delivered, will constitute valid and binding obligations of said county, to be paid in accordance with the terms thereof.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1627.

APPROVAL OF BOND ISSUE OF CITY OF BELLEFONTAINE, OHIO—$20,000.00.

COLUMBUS, OHIO, December 20, 1918.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

In Re: Bonds of the city of Bellefontaine, in the sum of $20,000.00, for the purpose of equipping and furnishing city hospital building.

I have carefully examined the transcript of the proceedings of the council and other officers of the city of Bellefontaine, Ohio, relating to the above issue of bonds, and find the same to be in conformity to the provisions of the constitution and the laws of Ohio in regard to bond issues of this kind.

I am therefore of the opinion that bonds properly prepared according to bond form submitted, when the same are properly executed and delivered, will constitute valid and binding obligations of said city, to be paid in accordance with the terms thereof.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1628.

APPROVAL OF BOND ISSUES OF THE CITY OF WARREN, OHIO—$107,000.00.

COLUMBUS, OHIO, December 20, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In Re: Bonds of the city of Warren, Ohio, four issues in the aggregate amount of $107,000.00, as follows:

$70,000 in anticipation of the collection of assessments for the sewer in sub-district No. 2 of the southeast sewer district.

$19,000 to pay the city's share of the cost of construction of a sanitary trunk sewer in sub-district No. 2 of the southeast sewer district.

$14,000 in anticipation of the collection of assessments for the sewer in sub-district No. 1 of the northeast sewer district.

$4,000 to pay the city's share of the cost and expense of constructing sewer in sub-district No. 1 of the northeast sewer district.

I have examined the consolidated transcript of the proceedings of the council and other officers of the city of Warren, Ohio, in the issuance and sale of the above described bonds, and find that said proceedings are in all respects legal.

I am therefore of the opinion that said bonds, when issued, will constitute valid, legal and binding obligations of the city of Warren, payable in accordance with the provisions thereof.

A form for the bonds has been examined and approved.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1629.

SCHOOL LANDS—SALE IF COMMENCED PRIOR TO ACT OF 97 O. L., 617, CONTINUES UNDER PRIOR LAW.

Where an action is started under authority of the Act of 97 Ohio Laws, 617, for the sale of a tract of school lands, such action is not discontinued by virtue of the Act of 107 Ohio Laws, 357, and such action may continue and the tract of land legally sold thereunder.

COLUMBUS, OHIO, December 20, 1918.

HON. E. E. LINDSAY, *Prosecuting Attorney, New Philadelphia, Ohio.*

DEAR SIR:—Under date of November 12, 1918, you submit the following statement of facts and inquiry:

"By an Act of Congress under date of May 26, 1824, one-thirty-sixth part of certain tracts of land lying in Clay, Goshen and Salem townships in this county was vested in the state to be held in trust for the use of

schools for the benefit of the purchasers of said several tracts of land, each containing four thousand acres and designated as follows: Gnadenhutten tract in Clay township, Schoenbrun tract in Goshen township and Salem tract in Salem township.

The Legislature of our state on the 20th day of March, 1840, passed an Act found in Volume 38, page 164, of Ohio Laws, providing the manner in which all said school lands could be sold or leased.

Under the terms of said Act the school lands known as the Schoenbrun tract and the Salem tract were sold.

The school tract known as the Gnadenhutten tract containing about 120 acres of land was not sold under said act, but has been used ever since for school purposes under the terms and conditions of said Act of Congress and said Act of the Legislature and the amendments.

On the 6th day of April, 1877, Volume 74, page 429, of Ohio Laws, said last mentioned Act was amended in certain particulars.

On the 15th day of March, 1904, said Acts were amended and supplemented by the Legislature and provided the means and manner by which said Gnadenhutten tract could be sold, Volume 97, page 617, Ohio Laws.

Said acts remain in force still unless they were repealed by implication by the last Legislature, passed on the 20th day of March 1917, Volume 107, page 357, of Ohio Laws.

On the 16th day of February, 1917, we filed a petition in the court of common pleas in this county to sell said Gnadenhutten tract as provided by the terms of the aforesaid laws for the trustees of said Gnadenhutten tract, and this action was still pending in court when the Act of March 20, 1917, was passed.

It is important for the reason that we desire to make a good title in the event of sale and it is important by reason of the fact that the auditor of state may claim jurisdiction over said lands by reason of said last mentioned Act."

You refer to the amended acts of the Legislature passed for the purpose of granting authority for the control and sale of certain school lands. The only acts that need to be referred to in this opinion are those contained in 97 Ohio Laws, 617, and in 107 Ohio Laws, 357.

Section 1 of the Act of 97 Ohio Laws, 617, provides as follows:

"That the three trustees of the school lot in the Gnadenhutten tract in the township of Clay, county of Tuscarawas and state of Ohio, elected under and by virtue of an act of the general assembly of the state of Ohio, entitled 'An Act supplementary to an act to provide for the sale of three several tracts of Moravian lands in the county of Tuscarawas, passed March 20, 1840,' passed April 6, 1877 (Ohio Laws Volume 74, page 429), be and they are hereby authorized to file a petition in the court of common pleas of said Tuscarawas county, Ohio, containing a pertinent description of said school lot in said Gnadenhutton tract, and setting forth that they are the proper and lawful trustees for the management thereof under said act of the general assembly of the state of Ohio, passed April 6. 1877, that it is the desire of two-thirds majority of said inhabitants of said Gnadenhutten tract, that said school lot be sold, and the interest arising from the proceeds of said sale be applied to the use of the common schools of said Gnadenhutten tract, and praying for a sale thereof. And within thirty days thereafter said trustees shall procure and file in said court in the same

proceeding, a written consent to the sale of said school lot, in the nature of an answer to said petition, signed by not less than two-thirds of the qualified electors residing within said Gnadenhutten tract."

Sections 2 and 3 of said Act prescribe the duties of the court and other details and need not be here quoted.

It appears from your inquiry that on February 16, 1917, a petition was filed in the common pleas court of your county, to sell the Gnadenhutten tract of land under authority of the above act; that action was still pending when the Legislature passed the Act of 107 Ohio Laws, 357. The title to said Act reads as follows:

"An Act—To provide for the better administration of the school and ministerial land held in trust by the state of Ohio, to codify the laws relating thereto, to safeguard both the trust and the rights of the citizens of Ohio holding leasehold or fee simple titles in and to said lands, and make more certain the rights and obligations of the state and the lessees of such lands."

Section 1 of said Act, known as Section 3181 General Code, reads as follows:

"It shall be the duty of the treasurer, clerk and trustees of all original surveyed townships, and all other officers, excepting county recorders, charged with or having the possession or custody of records or papers pertaining to the lands appropriated by congress for the support of schools, or the purposes of religion, and of all officers charged by law with the administration of such lands, to transfer and deliver to the state supervisor of school and ministerial lands, all field notes, maps, surveys, books, records, deeds or leases and copies thereof, school land sales, records, documents and papers of every description, in their possession, relating to any school or ministerial lands in the state, whether such lands shall have been sold or still remain unsold. The state supervisor shall be the custodian thereof."

Sections 36 to 42, both inclusive, known as Sections 3203-13 to 3203-19 inclusive, General Code, provides for the sale of school lands. It is not necessary to quote from said sections:

Section 59 provides:

"That all acts or parts of acts that conflict with any of the provisions of this act are hereby repealed. * * *"

Here follow a number of sections of the General Code which are specifically repealed.

This act must be read in connection with Section 26 of the General Code, which reads as follows:

"Whenever a statute is repealed or amended, such repeal or amendment shall in no manner affect pending actions, prosecutions, or proceedings, civil or criminal, and when the repeal or amendment relates to the remedy, it shall not affect pending actions, prosecutions, or proceedings, unless so expressed, nor shall any repeal or amendment affect causes of such action, prosecution or proceedings, existing at the time of such amendment or repeal, unless otherwise expressly provided in the amending or repealing act."

In the case of Elder vs. Shoffstall, 90 O. S., 265, the supreme court had under consideration the application of the three-fourths jury law to pending actions. The first branch of the syllabus reads as follows:

> "Section 11455 General Code, as amended February 6, 1913 (effective May 14, 1913), does not apply to causes pending in the common pleas courts of this state on the 13th day of May, 1913."

On page 271 of the Opinion, Donahue, J., says:

> "This act of the general assembly is remedial in its nature and must be considered and construed in connection with Section 26 of the General Code, for so long as that section remains the law of Ohio, all subsequent legislation must be construed in accordance therewith."

In the case of Kelley vs. The State, 94 O. S. 331, the first and second branches of the syllabus read:

> "The amendment of Section 1637, General Code, passed February 6, 1914 (104 O. L. 179), withdrawing the jurisdiction of the court of insolvency of Hamilton county after December 31, 1914, in actions for divorce and alimony, being an act remedial in its nature must be read and construed as though Section 26, General Code, were a part thereof.
>
> The legislature having failed to incorporate in such amending and repealing act an express provision making it applicable to pending actions, those actions by virtue of the provisions of Section 26, General Code, are exempt from the operation of the amended statute. The insolvency court of Hamilton county, therefore, was authorized to hear and determine all actions in divorce and alimony which were pending in that court December 31, 1914."

On page 338, Matthias, J., says:

> "The language of Section 26, General Code, is not that such repeal or amendment shall not affect pending actions, prosecutions or proceedings unless such inference may be gathered from the repealing statute, but it is that such repeal or amendment shall not affect pending actions, prosecutions or proceedings unless so expressed. When therefore the intention of the legislature is to give to such repealing or amending act a retroactive effect such intention must not be left to inference or construction, but must be manifested by express provision in the repealing or amending act."

There is no express provisions in the Act of 107 Ohio Laws, 357, which makes that act applicable to pending actions. The case which was filed on February 16, 1917, to sell the Gnadenhutten tract of land was a pending action when the act of 107 Ohio Laws, 357, became effective. Said action is continued by virtue of the provisions of Section 26 General Code.

It is my opinion therefore that the trustees may proceed under and by virtue of the proceedings now pending in common pleas court and legally sell the Gnadenhutten tract in question.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

1630.

DEPUTY STATE SUPERVISORS OF ELECTION MAY DRAW INCREASED COMPENSATION DURING TERM.

The provisions of Section 20 of Article II of the Constitution do not apply to members of the board of deputy state supervisors of elections, and they can draw the increased compensation as provided for in Section 4943 G. C. (107 O. L. 684), even though they were holding office at the time said amendment became effective, for the reason that they do not draw a salary as therein contemplated, but merely compensation.

COLUMBUS, OHIO, December 20, 1918.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I have your communication requesting my opinion upon the following matter:

> "Are members of boards of election officers whose salaries (general salaries) can not be increased during the term for which they were appointed?"

Your question rests upon the provisions of Section 20 of Article II of the Constitution, which reads as follows:

> "The general assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished."

You call attention to Section 4943 G. C. (107 O. L. 684). As this section relates to deputy state supervisors of elections and not to deputy state supervisors and inspectors of elections, I shall limit my consideration to deputy state supervisors of elections.

Section 4822 G. C. provides for compensation of members of boards of deputy state supervisors of elections and reads as follows:

> "Section 4822.—Each deputy state supervisor shall receive for his services the sum of three dollars for each election precinct in his respective county, and the clerk shall receive for his services the sum of four dollars for each election precinct in his respective county. The compensation so allowed such officers during any year shall be determined by the number of precincts in such county at the November election of the next preceding year. The compensation paid to each of such deputy state supervisors under this section shall in no case be less than one hundred dollars each year and the compensation paid to the clerk shall in no case be less than one hundred and twenty-five dollars each year. Such compensation shall be paid quarterly from the general revenue fund of the county upon vouchers of the board, made and certified by the chief deputy and the clerk thereof. Upon presentation of any such voucher, the county auditor shall issue his warrant upon the county treasurer for the amount thereof, and the treasurer shall pay it."

In addition to the provisions of this section, we must consider Section 4942 G. C., which covers counties containing registration cities and reads as follows:

"Section 4942.—In addition to the compensation provided in Section forty-eight hundred and twenty-two, each deputy state supervisor of elections in counties containing cities in which registration is required shall receive for his services the sum of five dollars for each election precinct in such city, and the clerk in such counties, in addition to his compensation so provided, shall receive for his services the sum of six dollars for each election precinct in such cities. The compensation so allowed such officers during any year shall be determined by the number of precincts in such city at the November election of the next preceding year. The compensation paid to each such deputy state supervisor under this section shall in no case be less than one hundred dollars each year and the compensation paid to the clerk under this section shall in no case be less than one hundred twenty-five dollars each year. The additional compensation provided by this section shall be paid monthly from the city treasury on warrants drawn by the city auditor upon vouchers signed by the chief deputy and clerk of the board."

Section 4943 G. C. provides a maximum compensation which may be paid to each deputy state supervisor of elections under the two sections above quoted. This section before its amendment provided in part as follows:

"Section 4943.—* * * In counties containing cities having a population of fifty thousand and less than seventy-five thousand, each deputy state supervisor, seven hundred fifty dollars and the clerk, nine hundred dollars;

In counties containing cities having a population of twenty-five thousand and less than fifty thousand, each deputy state supervisor, six hundred fifty dollars, and the clerk, eight hundred fifty dollars; * * *."

This section as amended (107 O. L. 684) reads in part as follows:

"In counties containing cities having a population of fifty thousand and less than seventy-five thousand, each deputy state supervisor, twelve hundred dollars and the clerk fifteen hundred dollars.

In counties containing cities having a population of twenty-five thousand and less than fifty thousand, each deputy state supervisor, eleven hundred dollars, and the clerk fourteen hundred dollars."

It will be seen that the section as amended raises the maximum salary which may be received by members of the boards of deputy state supervisors of elections in those counties containing cities with a population between fifty and seventy-five thousand, from seven hundred fifty to twelve hundred dollars, and in the counties having cities of a population between twenty-five and fifty thousand, from six hundred fifty to eleven hundred dollars.

The question is whether those members of the boards of deputy state supervisors of elections who were in office at the time this amendment became effective would be entitled to draw this maximum salary as provided for in the amendment. or whether they would be limited to the maximum salary provided for in the section as it stood at the time of their appointment.

We will first consider the nature of the compensation which is received by the

deputy state supervisors of elections, in order to determine whether it is a salary or compensation only, for the reason that said Section 20 of Article II provides that:

> "* * * no change therein *shall affect the salary* of any officer during his existing term, unless the office be abolished."

The fundamental and basic compensation of these offices is not changed. Section 4822 G. C., which fixes the compensation of these offices at three dollars for each election precinct, is not amended.

Section 4942 G. C., fixing the compensation of said officers in those counties having registration cities at five dollars for each election precinct in said cities, is not changed or amended.

The only change that is made is to the effect that the maximum compensation which may be received under said two sections is in certain cases increased. It must be further noted that these persons do not receive a fixed and definite salary for services rendered during a fixed term, but receive compensation based upon the number of precincts in the county and in registration cities, or in other words they receive a compensation to be determined by the services they render. The greater the number of precincts in any county and in any registration city in the county, the greater would be the services rendered by the members of the board.

In State ex rel. Taylor vs. Carlisle, et al., 3 O. N. P. (N. S.) 544, the court was passing upon a question somewhat similar to the one now under consideration. In that case the legislature had increased the compensation of county commissioners of Franklin county from $2,000.00 to $3,500.00 per annum. The compensation of the county commissioners for any one year was to be determined by the amount of the tax duplicate in each county for real and personal property. Judge Evans, in rendering the opinion in this case, held that this did not come within the inhibition of Section 20 Article II of the Constitution, upon two grounds, viz., because the law under which the county commissioners had formerly drawn compensation was unconstitutional and void and hence in reality there was no law fixing the compensation of county commissioners until the amended act was passed. This practically disposed of the case, but Judge Evans went further and made the following suggestion in the opinion (p. 548):

> "Another consideraton of this question is whether the amended act of 1904 provides for a salary such as comes within the inhibition of said Article II, Section 20 of the Constitution.
>
> The act does not provide for any definite fixed salary. The compensation depends on the aggregate of the tax duplicate from year to year. It may be less one year and greater another, depending on the variation of the tax duplicate, and the amount from one year to another can not be determined until December of each year when the aggregate is ascertained."

He based this statement upon the holding of our supreme court in Thompson, ex rel. vs. Phillips, 12 O. S. 617. In this case the court was passing upon the question we have before us, as it pertained to a county auditor whose compensation was not a fixed sum for a definite period of time, but was based upon the tax duplicate—that is, on the amount of services rendered by the county auditor in any one year. This was a *per curiam* opinion and reads as follows (pages 617-8):

> "The relator, to show that he is not affected by the act of April 9, 1861, relies on the following section of the constitution:
>
> 'The general assembly in cases not provided for in this constitution,

shall fix the term of office and *the compensation* of all officers, but no change therein shall affect *the salary* of any officer during his existing term, unless the office be abolished.' Section 20, Article II.

It is manifest, from the change of expression in the two clauses of the section, that the word 'salary' was not used in a general sense, embracing any compensation fixed for an officer, but in its limited sense, of an annual or periodical payment for services—a payment dependent on the time, and not on the amount of the services rendered. Where the compensation, as in this case, is to be ascertained by a percentage on the amount of money received and disbursed, we think it is not a salary within the meaning of the section of the constitution."

Hence it is my view that from the holdings of the courts in the two cases above quoted, and especially in the latter, and the fact that the basic compensation of the deputy state supervisors of elections has not been changed, but that merely the maximum which may be received under the sections providing a basic compensation is increased, said members of the boards of deputy state supervisors of elections do not come within the prohibition of Section 20 of Article II of the Constitution, and that they would be entitled to draw the compensation fixed in said amended Section 4943, supra, even though they were holding said office at the time said change became effective.

I am not passing upon whether or not members of boards of deputy state supervisors of elections are officers. They have many of the indicia of officers. They have a fixed term, take an oath very much the same as that taken by officers generally and they perform many sovereign and independent functions of the state, and one might readily conclude they are officers; but the court in State ex rel. vs. Craig, et. al., 8 O. N. P. 148, held they are not officers, the syllabus in said case reading as follows:

"The deputy state supervisors of elections are not officers within the legal definition of that term and though their jurisdiction may be coterminous with that of the county, they are not county officers.

Hence we note that this court held that said members are not officers. If this be accepted as authority, they would not come within the prohibition set out in Section 20 of Article II of the Constitution, for the reason that they are employes and not officers. But however this may be, it is my view they would not come within said prohibition because they receive compensation and not a salary.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1631.

APPROVAL OF ABSTRACT OF TITLE COVERING LOTS 18, 19, 20 AND 21 OF WOOD BROWN PLACE SUBDIVISION, COLUMBUS, OHIO.

COLUMBUS, OHIO, December 20, 1918.

HON. CARL E. STEEB, *Secretary Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—I am in receipt of abstract of title covering the following lots of lands located in the city of Columbus, county of Franklin and state of Ohio, and described as follows:

Beings lots No. 18, 19, 20 and 21 of Wood Brown Place subdivision, as the same are numbered and delineated upon the recorded plat thereof of the record in plat book 5, page 196, recorder's office, Franklin county, Ohio.

I have examined said abstract and as it applies to lots No. 19, 20 and 21 I find no material defects in the chain of title to said premises as disclosed thereby. In reference to said lots, said abstract does not show any liens or incumbrances on said property, except the taxes for the year 1918, which is small in amount and still unpaid. It is true there is a suit pending in the court of common pleas of Franklin county, Ohio, styled Rhoda J. Sells vs. The Kroger Grocery and Baking Company, for money only to the amount of $1,151.56. At best, possibly the plaintiff would be liable for nothing more than costs in this case if the suit should terminate against her and therefore said suit is not of any great moment.

I am therefore of the opinion that said abstract discloses on December 2, 1918, a good title in said lots 19, 20 and 21, in Rhoda J. Sells and Mary K. Sells Bower.

I am returning herewith the abstract submitted by you, without passing favorably upon the same, in so far as it applies to lot No. 18. There are defects in connection with the title to this lot which it seems to me should be corrected before the state accepts title to the same.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1632.

TREASURER OF STATE—AS CUSTODIAN OF INSURANCE FUND SHOULD GIVE SINGLE BOND.

Under Section 1465-56a *G. C. the treasurer of state should give a single bond in the amount fixed by the governor and not give a number of bonds for said sum so fixed.*

COLUMBUS, OHIO, December 21, 1918.

HON. JAMES M. COX, *Governor of Ohio, Columbus, Ohio.*

DEAR SIR:—The State Treasurer-Elect, Hon. Rudolph W. Archer, has submitted to me four separate and distinct bonds, each in the sum of $25,000.00, said bonds being signed by various bonding companies as sureties. These bonds are given to comply with the provisions of Section 1456-56a G. C. and are conditioned for the faithful performance of his duties as custodian of the state insurance fund. This section reads as follows:

"Section 1465-56a.—The treasurer of state shall give a separate and additional bond, in such amount as may be fixed by the governor, and with sureties to his approval, conditioned for the faithful performance of his duties as custodian of the state insurance fund herein provided for. Such bond shall be deposited with the secretary of state and kept in his office."

Upon inquiry I find that the governor has fixed the amount of the bond under this section at $100,000.00. Hence, in so far as this feature is concerned, the bonds comply with the provisions of said Section 1465-56a G. C.

However, I desire to call attention to an opinion rendered by my predecessor, Hon. Edward C. Turner, found in Volume I, Opinions of the Attorney General for 1915, p. 320. In this opinion Mr. Turner was passing upon whether the state

librarian could give two bonds of $5,000,00 each, in compliance with a statute which required a bond of $10,000.00. This section was Section 790 G. C. and read as follows:

> "Before entering upon the discharge of the duties of his office, the librarian and each assistant shall give bond to the state, the former in the sum of ten thousand dollars, and the latter in the sum of one thousand dollars, with two or more sureties approved by the board of library commissioners, conditioned for the faithful discharge of the duties of his office. Such bond, with the approval of the board and the oath of office indorsed thereon, shall be deposited with the secretary of state and kept in his office."

In passing upon this question Mr. Turner held as follows (p. 321):

> "It is my opinion that in enacting Section 790 of the General Code, as amended, the legislature intended that one bond for ten thousand dollars with two or more sureties should be given, and it would therefore not be in accordance with law to accept two bonds of five thousand dollars each, as suggested by Mr. Galbreath in his letter.
>
> I have to advise you, therefore, that unless the bond of the librarian submitted to you for your approval is in the sum of ten thousand dollars and contains the names of at least two sureties, if a personal bond, or a surety company under Section 9573 of the General Code, the same should not be approved by you."

When the language of Section 1465-56a G. C. is compared with that of Section 790 G. C., it will be noted that there is very little difference in the two sections. Section 1465-56a G. C. is even more susceptible of the construction given by Mr. Turner than is Section 790. Section 1465-56a provides that "the treasurer of state shall give *a separate and additional bond.*"

It is my opinion that the conclusion reached by Mr. Turner should be followed and that you would not therefore be justified in law in approving the bond of Mr. Archer in compliance with Section 1465-56a G. C., unless a single bond is submitted in the sum of $100,000.00, with sufficient surety to meet your approval.

Inasmuch as the statute provides that the sureties on the bond must be approved by you as governor, I am addressing this opinion to you and am forwarding a copy of the same to Mr. Archer.

I am enclosing the four bonds.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1633.

MADISON HOME—PROPERTY OF, CANNOT BE SOLD FREE OF TRUSTS.

The property located in Madison township, Lake county, Ohio, sold to the National Women's Relief Corps is burdened with the trusts imposed upon it in said deeds to said Relief Corps. It therefore cannot be sold so as to eliminate said trust conditions.

COLUMBUS, OHIO, December 23, 1918.

HON. JAMES M. COX, *Governor of Ohio, Columbus, Ohio.*

DEAR SIR:—I have your communication, signed by your executive clerk, which reads as follows:

"The examiner from the bureau of accounting in a report filed with the governor has recommended that the Madison Home in Lake county be abolished and the inmates taken care of in some other institution. The expenses of operation are heavy and the number of inmates constantly growing smaller, there being at the present time but twenty-seven.

Before making any recommendations to the legislature, the governor would like to have an opinion from your office on the following questions:

(1) Can the property on which the Madison Home is located be legally sold? We understand that the deed made to the state grantors restricts the use of the land to certain charitable purposes.

(2) If the property can be legally sold, what steps will it be necessary to take?"

There are a number of facts which must be taken into consideration, in answering your questions.

On March 5, 1914, the National Women's Relief Corps deeded to the State of Ohio the fifteen acres located in Madison township, Lake county, Ohio, by warranty deed. This land was made up of three tracts, containing respectively two acres, 98 rods, seven acres, 62 rods and five acres.

In connection with this deed made to the state of Ohio by the National Women's Relief Corps, we must also consider the manner in which said National Women's Relief Corps acquired title to this same property.

On July 11, 1890, the trustees of Madison Seminary deeded to the National Women's Relief Corps the two acres, 98 rods contained in the deed to the state, by a warranty deed, for certain uses and purposes therein set out, viz:

"as a home for army nurses of the Civil war, who by reason of age or disability are unable to support themselves, dependents or widows of Union veterans, disabled veterans with their wives under such regulations and instructions as the National Convention of the Women's Relief Corps from time to time may give."

On July 20, 1892, the same grantor deeded the same premises to the same grantee, modifying to a slight extent the trust to which the property should be devoted and with this additional provision:

"When the National Women's Relief Corps shall have ceased to exist as an organization, the said premises shall pass to and become the property of the state of Ohio, in trust for some benevolent or charitable use, in the manner, under the rules and regulations and upon the terms and conditions which may be prescribed by the General Assembly."

On July 15, 1890, C. M. Gillett deeded to the National Women's Relief Corps, by warranty deed, the seven acres, 62 rods contained in the deed to the state of Ohio from the Women's National Relief Corps. This deed contained the same language as that set out in the deed made by the trustees of Madison Seminary to the Relief Corps.

On July 30, 1892, the said C. M. Gillett made another deed to the same grantee for the same premises, and modified to some extent the trust which was imposed upon the property so granted and with the following additional condition:

"* * * so long as the National Women's Relief Corps shall exist as an organized society, and when it shall have ceased to exist as an organization, then unto the state of Ohio."

In the habendum clause of this deed we find the following:

> "When the National Women's Relief Corps shall have ceased to exist as an organization, the said premises shall pass to and become the property of the state of Ohio, in trust for some benevolent or charitable use, in the manner, under the rules and regulations and upon the terms and conditions which may be prescribed by the General Assembly."

On May 25, 1894, S. Lee Colby and others deeded to the National Women's Relief Corps the five acres of land set out in the deed to the state of Ohio from the Relief Corps, with the same trust imposed upon the land as that found in the deeds above set out, but with this additional provision:

> "* * * but nothing herein is intended to restrict the ownership of said grantee—but that it shall, through its own proper officers, have the full right to sell the same, or to make such other disposition thereof, as the national convention of said National Women's Relief Corps may, by its action, legally determine."

On account of this last quoted matter it can safely be asserted that the title to the five acres is vested in the state of Ohio absolutely, with no trust imposed upon it, especially in so far as the deeds themselves are concerned.

But what can be said in reference to the other two deeds, in which certain trusts were imposed upon the land deeded, so long as the National Women's Relief Corps should be in existence, and after that passing to the state of Ohio with certain trusts imposed upon said property?

It is my view that the grantors to the National Women's Relief Corps have no interest in this property. The trust imposed upon the property is neither a condition precedent nor a condition subsequent, so that if the property should no longer be used for the purposes for which it was deeded in trust, it would revert to the original grantors. This is clear from the finding of the court in Watterson, Trustee, vs. Ury. et al., 5 C. C. 347, and Methodist Episcopal Church of Cincinnati vs. Gamble, 4 C. C. (N. S.) 45.

However, we have the further proposition to consider as to whether the property now held by the state of Ohio can be sold and the trusts, which were imposed upon said property by the grantors to the National Women's Relief Corps, eliminated. I call your attention to an act found in 97 O. L. 69, entitled:

> "An act to provide for the establishment and maintenance of a home for indigent ex-soldiers, sailors, and marines of Ohio, with their wives and widows of ex-soldiers and marines and army nurses."

This act was passed on April 5, 1904. It is now found in the General Code as Sections 1919 to 1925 inclusive. Section 1 of the act, as originally passed, read as follows:

> "Section 1.—That there shall be established at Madison, Lake county, state of Ohio, on a tract of land containing fifteen acres which has been deeded to the state of Ohio by the National Women's Relief Corps of the United States, the title to which in the state has been approved by the attorney-general of the state of Ohio, an institution under the name of The Home of the Ohio Soldiers, Sailors, Marines, and their Wives, Mothers and Widows; and Army Nurses. Provided that the benefits of this act

shall not extend to persons who are now the inmates of any home or institution established by the state or national government for the care of soldiers, sailors and marines, and provided further that the present inmates of said Madison Ohio Home shall be entitled to all the benefits of this act."

It can be readily seen that this act was passed as a result of the deed made by the National Women's Relief Corps to the state of Ohio, in order to carry out the trust provisions found in the deeds made to the National Women's Relief Corps.

In view of all the above, the question is, could the state of Ohio sell this property and thus eliminate the trusts which were imposed upon the property when it was deeded to the Relief Corps? As stated above I do not feel that the grantors of this property could object to such a course as this being pursued by the state of Ohio. They made a deed in fee simple without any conditions of reversion attached to it. But the question remains whether the public has such an interest in this property that a court of equity would protect it and compel the state to carry out the uses and purposes for which this property was deeded, or the state's grantee, if the state should sell.

Baldwin, et al. vs. Atwood, 23 Conn. 367 is a case in which the trusts imposed upon certain lands were very similar to those under consideration. The syllabus in this case reads as follows:

"Where a deed of land stated in the premises that the land was conveyed 'in trust, for the uses and purposes hereinafter mentioned,' and in the habendum, that the grantees were 'to have and to hold said land in trust, that they shall at all times forever hereafter permit such ministers and teachers belonging to the Methodist Episcopal church in the United States of America, as shall be duly authorized, from time to time, by the general conference of the ministers and teachers of said church, or by the annual conference authorized by the general conference, to preach and expound God's holy word in the house, or place of worship, which has been erected on said land for the use of the members of said church;' and said deed subsequently prescribed the mode of supplying trustees in the place of the grantees, who might die or cease to be members of the church, for whose benefit the grant was made, in further trust and confidence; it was held, that such deed was not to be construed as a deed on condition, in which case the breach of it would be followed by a forfeiture of the estate, but as a deed in trust, cognizable in chancery.

Therefore, where the land described in such deed was afterwards conveyed, with the consent of the *cestuis que trust,* and sold by the trustees for other purposes, it was held, that such disposition did not operate as a forfeiture of the estate to the heirs of the grantor."

In the opinion the court uses the following language (p. 371):

"The defendant, however, insists that, by the just construction of the language used in this conveyance, in reference to the use to which the property was to be appropriated, it was not the intention of the parties, that the estate granted should be defeated by the use of it for other purposes, and that therefore no conditional estate was granted, but that it was an absolute grant, creating only a trust for the purpose specified, to be enforced, if not complied with, by a court of equity, but not followed, in case of a violation of such trust, by a forfeiture of the legal estate granted, or a reverter of it to the heirs of the grantor."

In Barclay, et al., vs. Howell's Lessee, 6 Peters Rep. 498, in the opinion on p. 507, the court uses the following language:

> "If this ground had been dedicated for a particular purpose, and the city authorities had appropriated it to an entirely different purpose; it might afford ground for the interference of a court of chancery, to compel a specific execution of the trust, by restraining the corporation, or by causing the removal of obstructions. But, even in such a case, the property dedicated would not revert to the original owner."

From all the above it is my opinion that the state of Ohio has no authority to sell the land in question and thus defeat the trusts which were imposed upon the land in the deeds made to the National Women's Relief Corps, and that a court of equity might interfere and compel the owner of the property, whether it be the state or the state's grantee, to carry out the trusts imposed upon it under said deeds. This, as said before, does not apply to the five acre tract, inasmuch as the grantee of said tract was given full power and authority in the deed to sell, but it does apply to the other two tracts.

On March 17, 1908, Hon. Wade H. Ellis rendered an opinion in reference to this same transaction, in which he found that the state would be obliged to devote the land to some charitable use, similar to that created in the deeds. He used the following language in said opinion:

> "* * * This procedure would accomplish the result sought to be accomplished by the supplementary deeds above described and would give the state of Ohio a perfect title in fee simple to the premises, subject, however, to the trust created by the terms of the first deeds from the seminary trustees and Gillett respectively. The state would be obliged to devote the land to some charitable use similar to that created by the first two deeds above mentioned.
>
> In my opinion the use to which the property is now being put under Sections 674-16, et seq., above referred to, is such a use as conforms to the terms of the trust imposed upon the property."

In passing I might say that I do not see how the two supplementary deeds above set out could have any effect upon the title granted in the deeds first made by the seminary and by Gillett, but even if we should so hold, it must be remembered that a certain trust was imposed upon this land in the deeds first made by the seminary and by Gillett, and that therefore the National Women's Relief Corps could not sell the land and defeat the trusts, in so far as the public is concerned. Neither do I know of any principle whereby a court might free this property from said trust conditions. In *Robbins et al.*, vs. *Smith, Admr. et al.*, 72 O. S. 1, the court say in the first branch of the syllabus:

> "A trust created by will, the provisions of which are not repugnant to law or contrary to public policy, will not be decreed terminated where the objects of the trust have not been fully accomplished and their accomplishment has not been made impossible."

In the opinion, on page 21, the court say:

"It is enough to say that this purpose was a lawful one, and that it is not the duty of courts to defeat it, but to respect and enforce it."

Hence, at least until the trust conditions set out in the deeds first made to the National Women's Relief Corps by the seminary and by Gillett have been fulfilled, the state cannot deed said lands and defeat said trusts.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1634.

APPROVAL OF BOND OF STATE TREASURER.

COLUMBUS, OHIO, December 23, 1918.

HON. JAMES M. COX, *Governor of Ohio, Columbus, Ohio.*

DEAR SIR:—The State Treasurer-Elect, Hon. Rudolph W. Archer, has submitted to me for my opinion a bond signed by him as principal, and the Chicago Bonding and Insurance company as surety, in the sum of $600,000.00, for the faithful discharge of the duties imposed upon him by law as such state treasurer.

Section 297 G. C. provides in part as follows:

"Before entering upon the discharge of the duties of his office, the treasurer of state shall give a bond to the state in the sum of six hundred thousand dollars with twelve or more sureties approved by the governor, conditioned for the faithful discharge of the duties of his office. * * *."

Section 9571 G. C. provides in part as follows:

"When a bond, recognizance or undertaking is required or permitted by law, with one or more sureties, its execution or the guaranteeing thereof, as the case may be, as sole surety, by a company authorized to guarantee the fidelity of persons holding places of public or private trust, to guarantee the performance of contracts other than insurance policies, and to execute and guarantee bonds and undertakings in actions or proceedings or by law allowed is sufficient, * * *."

Attached to the bond is a certificate of the superintendent of insurance, Hon. W. H. Tomlinson, setting forth that the Chicago Bonding and Insurance company has qualified to transact business in the state of Ohio.

Hence, so far as I am able to see, this bond is correct in form and legal in all respects.

Inasmuch as the statute provides that the sureties must be approved by the governor, I am forwarding the bond to you with this opinion, for your consideration, and will forward a copy of the opinion to Mr. Archer.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1635.

APPROVAL OF BOND ISSUE OF THE VILLAGE OF BROOKVILLE. MONTGOMERY COUNTY, OHIO—$10,000.00.

COLUMBUS, OHIO, December 23, 1918.

The Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

In Re: Bonds of the village of Brookville, Montgomery county, Ohio, in the sum of $10,000, in anticipation of the collection of assessments for the improvement of Maple street from Hayes avenue to Perry street in said village.

I have carefully examined the corrected transcript of the proceedings of the council of the village of Brookville and of other officers relating to the above issue of bonds, and find said proceedings to be in conformity to the provisions of the General Code of Ohio relating to bond issues of this kind. I am therefore of the opinion that properly prepared bonds covering said issue will, when the same are executed and delivered, constitute valid and binding obligations of said village, to be paid in accordance with the terms thereof.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1636.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENTS IN KNOX COUNTY.

COLUMBUS, OHIO, December 23, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of December 20, in which you enclose, for my approval, final resolutions for the following named improvements:

Columbus-Wooster Road—I. C. H. No. 24, Section L, Knox county, type A, petition No. 3150.

Columbus-Wooster Road—I. C. H. No. 24, Section L, Knox county, type B, petition No. 3150.

I have carefully examined said resolutions, find them correct in form and legal and am therefore returning the same to you with my approval endorsed thereon in accordance with the provisions of Section 1218 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1637.

DISAPPROVAL OF BOND ISSUE OF THE VILLAGE OF COAL GROVE, OHIO—$5,000.00.

COLUMBUS, OHIO, December 23, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In Re: Bonds of the village of Coal Grove, Ohio, in the sum of $5,000.00, for the purpose of funding certain indebtedness of said village.

I have examined the transcript submitted of the proceedings of the council of the village of Coal Grove, Ohio, relating to the above issue of bonds, and as a result of such examination I find that I am compelled to disapprove said issue specifically for the reason that the ordinance of council providing for said issue of bonds was not passed in the manner required by law.

Section 4224 of the General Code provides, among other things, that no ordinance of a general nature shall be passed unless it has been fully and distinctly read on three different days and that with respect to such ordinance there shall be no authority to dispense with this rule except by a three-fourths' vote of all elected members of council.

The ordinance here in question, which is clearly one of a general nature, was not read on three different days but was passed on an attempted suspension of the rule requiring the ordinance to be read on three different days. Two of the six elected members of the council of the village were absent from the meeting at which this ordinance was passed, and the motion to suspend the rule requiring the ordinance to be read on three different days received the affirmative vote of but four members of council. It does not require any argument to show that the vote of four councilmen out of an elected membership of six does not meet the requirement of the section of the General Code above noted, that said rule may be suspended on the vote of three-fourths of the elected members of council. In other words, under the provisions of this section where the council has an elected membership of six it requires a vote of at least five members in order to suspend the rule requiring ordinances to be read on three different days.

It follows from what has been said above that the ordinance providing for this issue of bonds was not legally passed and that said issue for this reason should be and hereby is disapproved.

I hardly need say that I regret very much the situation here presented and the necessity that I am under of disapproving this bond issue. Some weeks ago I was required to disapprove the proceedings of the council of this village providing for an issue of bonds for the above stated purpose specifically for the reason that the ordinance providing for said issue of bonds did not make provision for an annual levy of taxes for interest and sinking fund purposes, as required by the state constitution. I am aware that these disapprovals of said bond issue for the above stated purpose, and the resultant delay to the village officials in obtaining the proceeds of the contemplated bond issue for the purpose of meeting the over-due indebtedness of the village, may be the cause of considerable embarrassment both to the village authorities and to those to whom the village is indebted. However, unless the members of the council of this village take interest enough in its proceedings to attend the meetings of council and see that its proceedings are conducted in substantial compliance with the provisions of statute, it can not be ex-

pected that a public official called upon to pass on such proceedings can do otherwise than disapprove the same.

I am sending you herewith the transcript of proceedings so that it may be returned to the village officials.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1638.

COLLATERAL INHERITANCE TAX—WHERE LAND WHICH TESTATOR HAD CONTRACTED TO SELL IS DEVISED—PASSES AS PERSONAL PROPERTY—AND TAX THEREON ORIGINATES WHERE TESTATOR DOMICILED AT TIME OF DEATH.

L. S. died testate a resident of the city of Circleville; shortly previous to his death he had by written contract sold to C. L. a farm situate in Washington township, Pickaway county; said contract was to be completed by the execution and delivery of a deed in 1919; *a small part of the consideration was paid at the time of the contract and the remainder was not due until after the testator's death:*

HELD: For collateral inheritance tax purposes the above transaction left in the testator as a subject of succession personal property, viz: the right to receive the purchase money of the real estate; and the collateral inheritance tax on succession to such property originated in the city of Circleville.

COLUMBUS, OHIO, December 23, 1918.

HON. E. A. BROWN, *Probate Judge, Circleville, Ohio.*

DEAR SIR:—I have previously acknowledged receipt of your letter of November 9 requesting my opinion upon the following questions:

"G. S. L. died June 24, 1918, testate, a resident of the city of Circleville. His will was probated, H. S. L. appointed executor, an inventory and appraisement of his estate was made and returned showing an estate valued at $39,023.97. On May 27, 1918, said G. S. L., by written contract, sold to C. F. and I. C. L. a farm containing 119.29 acres of land, situate in Washington township, Pickaway county, Ohio, for a consideration of $26,800.00, said contract to be completed by the execution and delivery of the deed on March 1, 1919, and the consideration money paid as follows: $1,000.00 in cash in hand, $9,000.00 on March 1, 1919, the remainder to be paid in two equal payments, one-half due in one year from March 1, 1919, and one-half due in two years from March 1, 1919, evidenced by two notes secured by mortgage on said premises.

Decedent died leaving no lineal descendants or adopted child; all property, subject to debts, subject to collateral inheritance tax.

Executor, H. S. L., is now ready to pay said tax.

Question 1: As to proceeds of farm, where does said tax originate as provided by Section 5331 G. C.?

Question 2: If tax originates in Washington township, is said fund proportionately liable for specific bequests, debts, costs of administration, etc.?

I am at a loss to know what kind of an order to make to the auditor of our county because there is a possibility that the purchaser, by reason of death or otherwise, may not be able to carry out his contract, and therefore, the title would remain in the estate."

You do not submit a copy of the last will and testament which gives rise to the questions; nor do you state whether or not the will was executed before the land was sold. However, I find it possible to answer your questions generally without the specific facts before me.

The supreme court of this state has repeatedly considered the nature of the equitable property rights resulting from the making of a specifically enforceable executory contract to convey real estate.

Manley vs. Hunt, 1 Ohio, 258. Butler vs. Brown, 5 O. S. 211. Jaeger vs. Rardy, 48 O. S. 335. Lefferson vs. Dallas, 20 O. S. 68. Ranney vs. Hardy, 43 O. S., 157. Bank vs. Logue, 89 O. S. 288.

Nowhere, however, is what might be termed the "Ohio doctrine" on this point more clearly stated than in *Coggshall* vs. *Marine Bank,* 63 O. S. 88. The following quotation from the syllabus in that case will show the legal principles therein laid down and the character of the question before the court:

"1. The interest of the vendee of land, before conveyance, is an equitable estate in the land, equal to the amount of the purchase money paid, and which, upon full payment, may ripen into a complete equity entitling him to a conveyance of the legal title according to the terms of the contract, and it is of these rights that notice is given to all the world by the possession of the vendee.

2. The interest of the vendor is not that of a mere naked trustee for the vendee, but he holds not only the legal title, but a beneficial estate in the lands to the extent of the unpaid purchase money.

3. Such interest of the vendor is subject to levy by attachment on the land, and it is not essential that garnishee process be served on the vendee."

In the opinion, per Spear, J., at pages 94 et seq., the following language is used:

"That, in such case, the vendee is the beneficial owner to the extent of the purchase money paid, and that the vendor holds the legal title in trust for the purchaser, subject to the duty of conveying the legal title on compliance with the terms of the contract by the vendee, is, we suppose, not disputed anywhere. The position of the vendor is sometimes described as that of a trustee, and it is declared, * * * that the lands of a *cestui que trust* cannot be taken for the debts of the trustee. * * * in a number of cases, * * * color is given to the conclusion that the rule applies in all cases of vendor and vendee. * * *

We are of the opinion that the broad language of the earlier cases, and of some text books, is not in accord with later holdings, nor with reason. The misapprehension arises, as we think, in assuming that the vendor is a mere naked trustee. Such in reality is not his position. * * The rule undoubtedly is that, while, in a general sense, the vendor holds the legal title in trust, yet so long as any purchase money remains unpaid, he still retains a personal right and interest in the land, and cannot be compelled to part with the title except upon full compliance by the pur-

chaser with the terms of the contract. * * * Every just right of the vendee is protected by the rule that his ownership extends to the amount of the purchase money paid, and the right to receive a deed upon payment of the balance of the purchase money in compliance with the contract. Possession by the purchaser gives notice of his right to all the world, and of nothing more. Record title being in the vendor, his creditors are justified in treating the land as his save only as to the rights of the vendee, and so long as the latter is protected in his rights under the contract and his possession, he cannot reasonably object to creditors of the vendor collecting their debts, * * *."

It would seem, therefore, that the situation in the case described by you as it existed prior to the death of the testator was such as that beneficial interests in the land itself were owned both by the testator and by the vendees. The Ohio cases which have been cited, however, deal only with such matters as executions and attachments and, in my opinion, the conclusions laid down by the court must be limited to the facts before it in such cases; for these principles will not serve to solve a case where the question as to who is the owner of the land as between the two must necessarily be solved. For example, suppose that after the making of an enforceable executory contract of this character, the buildings and improvements which were on the land at the time of the sale were destroyed and the value of the land itself were reduced to almost nothing by some disastrous flood or fire: in that case we would have to say that either the vendor or the vendee should bear the loss, or that they should share it in the proportions represented by the unpaid and the paid parts of the agreed purchase price, respectively.

However, even for purposes of attachment the Ohio rule is unsatisfactory, as the following quotation from *Jaeger* vs. *Hardy, supra,* made with approval in *Coggshall* vs. *Marine Bank, supra,* will upon reflection demonstrate:

"A vendor's interest, before conveyance, 'is the legal title, and a beneficial estate in the lands to the extent of the unpaid purchase money,' while that of the vendee is 'an equitable estate in the land equal to the amount of the purchase money paid by him.'"

But suppose the land is worth more than the agreed purchase price: this rule furnishes no solution to the question as to whether it is the creditors of the vendor or those of the vendee who can reach the excess; nor, conversely, does it answer the question, in case of attachments against the interests of both to the full extent of the unpaid purchase money in the one case and the paid purchase money in the other, and in the event that the land should sell for less than the agreed price, what the respective rights of the creditors of the vendor and those of the vendee might be.

A case somewhat remotely bearing upon the first of these above suggested problems is *Gilbert* vs. *Port,* 28 O. S. 276. I will not quote from this case, but it at least tends to establish the conclusion that the loss in case of destruction of property must fall upon the vendee. The opinion does quote with approval from Sugden on Venders, 8 Am. ed. (291), ch. 7, sec. 2, in part, as follows:

"A vendee, *being equitable owner of the estate from the time of the contract for sale,* must pay the consideration for it, although the estate itself be destroyed *between the agreement and the conveyance; and, on the other hand, he will be entitled to any benefit which may accrue to the estate in the interim.* * * *."

It seems to me that what our supreme court meant to say in these attachment and execution cases was that the vendor under the circumstances with which we are dealing, though he retains the legal title and therefore needs no affirmative relief for the enforcement of his equitable rights, does have such equitable rights in the nature of a vendor's lien to the extent of the unpaid purchase money. In other words, his equitable rights are no different than they would be if he had actually conveyed the estate, but the purchase money had not been paid. As between the parties he would have a lien on the premises which he might enforce by appropriate remedies; but he does not need such remedies when he retains the legal title. But *Coggshall* vs. *Marine Bank* is of service in this case because of the concessions made in the opinion as to the effect of such an executory contract of sale for purposes of inheritance and testamentary disposition. This part of the opinion, beginning at page 98 of the report, is as follows:

> "But it is insisted that the question here discussed is controlled by the consideration that the interest of the purchaser, in case of death, would descend to the heirs and not to the legal representative, while, in case of death of the vendor, his interest would pass to his legal representative and not to his heirs. It is true that, under our statutes, an equity in lands may be the subject of devise, and a perfect equity in lands held by an intestate, passes to his heirs by descent; and it is true, further, that by force of the statute, money due as purchase money passes to the personal representative, and he may, upon receipt of it, obtain authority to deed to the purchaser. So, too, the personal representative may, in case the personal property is insufficient to pay all debts, resort to all real estate in which the intestate had an interest in order to make up the deficiency. The authority given is to sell the real estate, and that is the interest one has in lands, tenements or hereditaments. This may, under the statute, be legal or equitable or both, although under our former practice the test was that if it be such an interest as could be enforced in a court of law, it was legal interest or estate, but if such as could be enforced only in a court of chancery, it was an equitable interest or estate. But the instances above given are only examples, of which many are found in the course of the law, where, for some purposes real estate is treated as personalty, and personalty as real estate. In general these rules are resorted to in order to the more easily work out the rights of the parties in respect to descents and distributions, and the more convenient administration of estates of intestates, but they cannot, we think, be regarded as changing the essential character of the different kinds of estates in land; nor do they, as we think, support the contention urged by counsel, that the interest of the vendor in this case is such as to be beyond the reach of levy by execution or attachment."

With these comments as to the nature of the vendor's interest while the transaction remains *inter vivos* and its character for purpose of succession at his death, it appears to me that we may safely say that the devisee of the land in the case about which you inquire took through the will the mere legal title thereof which was no more than security for the payment of the unpaid purchase money.

In short, the testator by his act *inter vivos* had divested himself, either completely or to a considerable extent, of the beneficial interest in the land, being entitled merely to hold the legal title until such time and upon the performance of such acts as under the contract would perfect the right of the vendees to call for a deed. It is obvious therefore that such interest in the land as of which the testator had

been originally possessed but of which he had divested himself prior to his death could not pass by his will to any one because he did not have it; yet the will, whether made before or after the contract of sale was executed, operates perfectly to pass what the testator did retain himself to such persons as he may have devised such interest.

See Sections 10556 and 10558 G. C. Kent vs. Mahaffey, 10 O. S. 204.

It follows from what has been said that the beneficial interests in the land to the extent existing at the death of the testator as determined by the terms of the contract of sale were then vested in the vendees, and, consequently, as interests in the land, they form no part of the vendor's estate, did not pass by the will (as previously stated) and could not be subject to any inheritance tax.

Instead of an interest in the land, as such, the vendor by his contract acquired the right to have the contract performed by the payment of money in installments. This right he could have enforced by suit for specific performance (assuming the contract to be so enforceable), which is essentially an action *in personam*. The vendee of a land contract might have under statutes which are found in this and other states a remedy substantially *in rem* as against a non-resident vendor; but it is both logically true and true in fact that the vendor, though entitled to specific performance, can not have the remedy without actual personal service on the vendee.

This right of the vendor to the money partakes of the character, then, of personal property; so that if the land had been devised to one person, and all the personal estate of the testator had been bequeathed to another and different person, the right to the proceeds of the land would have vested under such a will in the legatee of the personality, subject to the debts of the estate.

1 Jarman on Wills, 163: Citing: Farrar vs. Earl of Williston, 5 Beav. 1. Moor vs. Raisbeck, 12 Sin., 123. Knollys vs. Shepard, cited in Wall vs. Bright, 1 J. & W., 499.

These points being established, it would seem to follow without difficulty that the proceeds of the real estate, to which alone the inheritance tax could practically apply (the legal title of the land as passing to the devisee being presumably worthless as a subject of appraisement), would partake of the same character as other personal assets of the testator and would be taxable for general purposes at the testator's usual place of residence or domicile on the principle that movable things follow the person.

It is by no means clear, however, that this result does follow. The jural relations and rights established by the analysis above attempted have sometimes been put under the heading of "equitable conversion," although the process is not the same as the typical case of equitable conversion by will resulting from a devise to executors or others coupled with a direction to sell the land and convert it into personal property. If, however, the situation as developed is to be governed by principles which do apply in a typical case of equitable conversion, note must be taken of decisions in which it has been held that the principles of equitable conversion can not be employed in the application of the inheritance tax law. The leading case so holding is *In re Wolcott's Estate,* 157 N. Y. Supp. 268. I speak of this decision as the leading case because though that of a mere surrogate's court it is characterized by careful reasoning. In this case the decedent, who was a resident of New York, at the time of his death held the legal title to certain real estate in New Jersey which he had contracted to sell upon considrations payable in

installments, just as in the instant case, delivery of the deed being, however, postponed until the last installment of the purchase price should be paid. The inheritance tax appraiser having included the amount unpaid on the land contracts at the time of decedent's death in the taxable assets of the latter's estate, the executors appealed to the surrogate's court, where their contention was sustained upon the following reasoning:

> "When real estate situated in a foreign state is owned by a resident of this state at the time of his death it is not subject to a transfer tax in this state. Matter of Swift, 137 N. Y. 77, * *; Keeney vs. New York, 222 U. S. 525, * * *. The question presented by this appeal, therefore, is whether the contract of sale * * * modified or changed his title to the real estate, so as to make his interest personal property for the purpose of taxation in this state. No proof of the statute law of New Jersey in the application to real estate held under a contract of sale was submitted to the appraiser. In this state the vendor is deemed in equity to stand seized of the land for the benefit of the purchaser, * * * but it has been held that the question of the jurisdiction of this state to impose a tax is one of fact and cannot be made to depend upon theories or fictions (Matter of Swift, supra, * * *). The actual form or character of the property at the date of a decedent's death determines its liability to taxation under the provisions of the tax law. * * * It has been held that where there is an equitable conversion of testator's real estate because of directions contained in the will the property will be regarded as real estate for the purpose of the transfer tax. Matter of Sutton, 3 App. Div. 208. * * *
>
> * * * the state comptroller contends that (there has been overlooked) * * * that part of subdivison 9 of Section 2672 of the Code which provides that 'moneys unpaid on contracts for the sale of land' shall go to the executors or administrators, to be applied and distributed as part of the personal property of the testate or intestate. In the matter under consideration the testator specifically devised to his children the various parcels of land in * * N. J., which he had contracted to sell. As the legal title to the land was in the decedent at the time of his death, his will transferred that title to his children. Our statutes can have no application to real estate situated in a foreign state; they cannot prescribe that the interest of the owner of real estate in a foreign state shall be personal property after such owner has executed a contract for the sale of the real estate. The section above referred to has reference to the administration of estates in this state and is designed to assist the executor or administrator in determining what part of the property of the decedent may be applied in liquidation of his indebtedness or distributed to the legatees or next of kin. While it may govern the action of an executor or administrator in the course of his administration of an estate, it can have no effect upon the nature of a decedent's title to real estate in a foreign state. Matter of Swift, supra, * * *. As the decedent held the legal title to the real estate in New Jersey at the time of his death, and as real estate situated in a foreign state is not subject to the provisions of our tax law, the appeal is sustained. * * *"

The converse of this decision is found in *In re Stanton's Estate*, 142 Mich. 491. This was an appeal from an order of the probate court determining the amount of the inheritance tax due from the estate of a testatrix who died a resident of New York, owning the legal title at least to real estate in Michigan which she had sold by executory contract to various parties. The court held that the succession to

this real estate was taxable in Michigan and apparently subject to valuation at its full market value. The reasons for this decision are of peculiar interest. It appeared that the law of Michigan did not impose any inheritance tax upon the succession to real estate passing to direct relatives, and that all of the real estate did so pass under the will. It seems to be clear therefore—though not so specifically stated in the opinion—that the land which had been sold under contract was not subject, in respect of its succession, to the Michigan inheritance tax upon the theory that it was real estate located in Michigan. The following excerpt from the opinion seems to show this:

> "Counsel for the executor (claims that) * * * the precise character of the property owned by the vendor in a land contract may be said to be undetermined; that as real estate it passes in the case at bar to the children, and is not considered in levying the tax, while as personal estate it is valued. The point seems to be ruled, for this case, by the decision in *City of Marquette* vs. *Iron Co.*, 132 Mich. 130."

Turning to the case cited by the court it will be found that it is a decision to the effect, as stated in the head-note, that

> "A contract for the sale of land at a specified price, with the usual forfeiture clauses, and an agreement that the vendee shall pay all taxes assessed upon the land, should be assessed as personal property." (Apparently for general property tax purposes.)
>
> "Under such contracts the purchaser is the equitable owner of the property."

In the body of the opinion the following language is used:

> "Defendant's counsel insists that the obligations in question are not credits. He argues that they should be classed with obligations to pay future rent upon existing leases, * * * but, in our judgment, they are clearly distinguishable. * * * In none of these cases is a credit contemplated. On the other hand, by the contracts under consideration * * the equitable title to the property therein described is at once transferred to the vendee. From the time these contracts are made, the vendor holds the legal title only as trustee for the vendee. * * * The vendor has, in effect, exchanged his property for the unconditional obligation of the vendee, the performance of which is secured by the retention of the legal title. The fact that the vendee, in the case of the land contract, may, when making his final payment, demand a conveyance, does not distinguish the obligation from that of a credit secured by a mortgage, as the mortgagor may, when making his final payment, demand a discharge of the mortgage. The obligations under consideration, therefore, resemble, * * * credits secured by mortgages. * * * they differ only in this: That the vendor has a remedy to enforce his rights which is not given to the mortgagee, namely, he may take immediate possession of his security. Such an inconsequential difference affords no ground for a legal distinction. * *"

It thus clearly appears, as I have stated, that the Michigan inheritance tax was sustained in the first of the last two cases from which quotation has been made, not on the ground that the succession was to land in Michigan, but that it was to personal property subject to the taxing jurisdiction of Michigan. The ground is that expressed in the language of the court in the same opinion, as follows:

"The statute is adopted * * * from the state of New York. * * And, as interpreted by the courts of New York, the design of the legislature to tax the transfer of every thing which it has the power to tax is found in the act. * * * a policy of general taxation, which recognizes, to some extent at least, the rule of universal succession and the theory of taxation of personal property, generally, at the domicile of the owner, is not logically controlling of the interpretation of a statute imposing a tax upon a right of succession or upon a transfer of property which can only be tangible and enforceable—be made effective—in the jurisdiction, and by virtue of the laws and institutions, of the situs of the property. A third reason is that, as a tax upon succession or transfer, uniformity of operation and an equal measure of the tax to the property of residents and non-residents can be, with no other construction, secured. There is property situated within the state, belonging to non-residents, which the state does not tax, generally, * * * though it might tax it * * *. Property of the same class owned by residents is taxed, generally."

In other words, the personal property in question was taxed as to its succession, not because it was physically in the state of Michigan,—which it could not be, having no physical existence at all,—nor because according to the policy of the general property tax laws of Michigan its situs as a subject of property taxation could be said to be in Michigan; but because it represented an obligation which could only be enforced in Michigan by an administrator appointed in that state. Hence it was subject to the taxing jurisdiction of Michigan, should Michigan choose to exercise that jurisdiction; and as Michigan had chosen to embrace within her inheritance tax all successions within her taxing jurisdiction the tax applied.

It will thus be seen that while the New York case and the Michigan case appear on the surface to be merely opposite applications of the same principle, they really proceed upon entirely different principles. In the New York case the real estate sold by the testator in his lifetime was regarded as real estate still, and because not located in New York the succession to it was held to be not taxable; and this in the face even of the statutory declaration of the general principle of law that the credit represented by the contract of sale is personal property. In the Michigan case the thing taxed was the credit represented by the contract of sale and it was taxed because it was personal property; for if the legal title to the land had been regarded as the thing to which the tax had attached the opposite result would have been reached.

The two cases may, however, be reconciled upon the principle that after all it is the law of the state where the land is located and where the vendees presumably reside which must determine the nature and quality of their respective obligations and the extent to which the contract of sale qualifies or affects the beneficial interest of the vendor in the property; and when the vendor dies, either testate or intestate, the quality of the interest represented by inheritances from him is in turn to be decided by the law of the state where the real property is situated. If that law determines that the entire beneficial interest in the land has vested in the vendee and the vendor's interest is no longer in the land but consists of a personal obligation running to him, that law, whether or not efficacious to confer jurisdiction back upon the state of the domicile of the testator (a point not actually decided in the New York case because of lack of proof as to the New Jersey law), is at least enough to confer taxing jurisdiction over the inheritance in the state whose law determines the quality of the succession.

The supreme court of Nebraska reached a result opposite to that arrived at by the Michigan court in the case of *Dodge County* vs. *Burns,* 131 N. W. 922; ap-

parently upon the language of the statute which limited the incidence of the inheritance tax of that state to interests in property owned by non-residents "which property, or any part thereof, shall be within this state." Obviously, there is a difference between property which is in a state and property the succession to which is subject to the taxing jurisdiction of a state. It is very clear from a perusal of the decision of the Nebraska court, however, that it agrees with the Michigan court in regarding the right to the purchase money as personalty.

I say that a consideration of these cases has raised a doubt in my mind as to the answer to your first question because of their apparent holding to the effect that the doctrine of equitable conversion is not recognized in applying inheritance taxes, and because also where it is recognized, as it apparently is in the Michigan case, the resultant personal property is regarded as taxable, for inheritance tax purposes, at the place where the land is located. This difficulty, however, disappears upon reflection. All the cases which have been cited involved questions of conflict of laws and the jurisdiction of a state. No such question is presented by you. Unquestionably the law of Oho applies to the thing which is subject to inheritance taxation and which I have held to be the right to receive the proceeds of the sale of the land. There is therefore no question of conflict of law. The only question is as to the allocation of so much of the tax as represents this part of the estate for the purpose of our constitution and statute, which declare that a part of the proceeds of the tax shall go to the municipality or township "in which the tax originates." The exact meaning of this phrase remains unsettled by final judicial authority, and the question is in point of fact now pending in the courts. It has been the previous ruling of this department, however, that the test by which to determine the district in which a tax originates is furnished by applying principles of situs which are embodied in the statutes and the common law applicable to general property taxation. In other words, wherever the property the succession to which gives rise to the right of the state under the inheritance tax law to claim an exaction has its taxable situs for general property tax purposes, there the tax must be held to "originate." As pointed out by my predecessors who have considered this question, this rule, though open to criticism, is the only one which will afford any reasonable application to the statute.

Now I think it is clear that the credit for the unpaid purchase money has a taxable situs for general property tax purposes at the place where the testator was domiciled at his death. Rather, I should say that it had that situs at the death of the testator, that being the time as of which all legal relations which may be considered in applying the inheritance tax became fixed. I deem it unnecessary to cite statutes or authorities upon the elementary principle that in Ohio credits must be listed for taxation at the actual residence or domicile of the owner thereof.

Upon this reasoning, then, I arrive at the conclusion that the tax on the proceeds of the real estate originated in the city of Circleville, where the testator resided.

This statement answers your first question. From the form in which your second question is submitted I take it that the answer given to the first question makes it unnecessary for me to consider the second question.

In conclusion I note that you call attention to the possibility that the purchasers may not be able to carry out the contract. This possibility does not affect the legal aspect of the question. If the contract is legally enforceable it has the effect which I have described, though either or both parties by their subsequent acts may choose not to enforce it in the manner in which it might be enforced.

1 Jarman on Wills, 163, supra.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1639.

APPROVAL OF CONTRACT BETWEEN OHIO BOARD OF ADMINISTRATION AND THE FLEXSTONE CONSTRUCTION CO.

COLUMBUS, OHIO, December 24, 1918.

Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—You have submitted to me contract entered into by your board with the Flexstone Construction Co., an Ohio corporation with its principal place of business at Columbus, Ohio, said contract having been entered into on the 5th day of December, 1918, for the installation of approximately 21,723 square feet and 3,988 lineal feet of sanitary flooring at the State School for the Blind, for the sum of $8,644.00. At the same time you submitted bond securing same.

Having obtained from the Industrial Commission of Ohio a certificate that the said company has duly complied with the Workmen's Compensation Law and having received from the auditor of state a certificate to the effect that there is money available for this purpose, I have this day approved said contract and filed the same, together with the bond securing said contract, with the auditor of state.

I am herewith returning to you the balance of the papers submitted.

Very truly yours,
JOSEPH McGHEE,
Attorney-General.

1640.

TREASURER OF STATE—MAY TURN OVER TO SUBORDINATE AMOUNT RECEIVED AS COMPENSATION FROM CONSERVANCY DISTRICT.

The treasurer of state may lawfully turn over to one of his subordinates who has done the work compensation in connecton with payment of the bonds and interest coupons of a conservancy district.

COLUMBUS, OHIO, December 26, 1918.

HON. CHESTER E. BRYAN, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of December 13, requesting my opinion upon the following question:

> "I am today in receipt of check for $300.00 of the Miami Conservancy District, Dayton, Ohio, payable to my order as treasurer of state, same being for six months salary in connection with the paying of interest coupons of the district and keeping records incident thereto.
>
> Section 47, 104 O. L. 40, says in part:
>
> 'Any expenses incurred in paying said bonds and interest thereon and reasonable compensation to the state treasurer for registering and paying same, shall be paid out of the other funds in the hands of the district treasurer and collected for the purpose of meeting the expenses of administration.'

I would like your opinion as to whether it is proper for me to endorse the above described check to my cashier, W. J. Hiler, who has handled all of the work in connection with the paying of the coupons.

Mr. Hiler is the only employe of this department who is under bond to me. I have thought it best to give him exclusive charge of the Miami Conservancy District funds, the accounting of which is necessarily handled as separate from the regular and established routine of this office."

In answer thereto I beg to advise that, in my opinion, you may lawfully dispose of the proceeds of the check mentioned by you in the manner described. The work in connection with the payment of the bonds and interest of a conservancy district is no part of the official duties of the cashier in the office of the treasurer of state. The law allows the treasurer of state extra compensation for doing this work. It does not presume that he must do it in his own proper person. He might employ for this purpose a person other than a regular member of his official force as treasurer of state.

As to whether or not one of the employes or subordinates in the treasurer of state's office might do such work for the treasurer of state without conflicting with his duties as such employe or impairing his usefulness in that capacity, the treasurer of state is the sole judge. By asking Mr. Hiler to do this work you have evidenced your judgment that he could take care of it without bringing about any such result. The compensation paid to you is yours and is between you and the conservancy district or is between you and the state of Ohio; you may do with it as you see fit; Mr. Hiler's right to receive it could be questioned only upon some such reason as that which has already been disposed of.

I answer your question therefore in the affirmative.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1641.

COUNTY TREASURER—CANNOT EMPLOY DELINQUENT TAX COLLECTOR.

The county treasurer cannot employ a person to collect delinquent taxes under authority of Section 5696 *General Code. Opinion of Hon. Edward C. Turner, Attorney General, page* 2026 *of the Opinions of the Attorney General for* 1915, *followed and adhered to.*

COLUMBUS, OHIO, December 26, 1918

HON. CALVIN D. SPITLER, *Prosecuting Attorney, Tiffin, Ohio.*

DEAR SIR:—Under date of November 18, 1918, you submit the following inquiry:

"The question has arisen in this county as to whether under the provisions of Section 5696 G. C., if the county commissioners deem it necessary, they may authorize the treasurer to employ collectors to collect delinquent personal property taxes and whether such collector can be paid out of the county treasury, and I would like your opinion thereon.

It is my opinion that Section 5696 is broad enough to cover the employment of such collectors and the payment thereof out of the county treasury, but my attention has been called to Opinion No. 945 found at

page 2026 of Volume 3 of the Opinions of the Attorney General for 1915, which seems to hold to the contrary, although Section 5696 is not expressly mentioned in the said Opinion No. 945."

Section 5696 General Code, to which you refer, provides as follows:

"The county commissioners, at each September session, shall cause the list of persons delinquent in the payment on personal property to be publicly read. If they deem it necessary, they may authorize the treasurer to employ collectors to collect such taxes or part thereof, prescribing the compensation of such collectors which shall be paid out of the county treasury. All such allowances shall be apportioned ratably by the county auditor among all the funds entitled to share in the distribution of such taxes."

You also call attention to the opinion of Hon. Edward C. Turner, Attorney General, at page 2026 of the Opinions of the Attorney General for the year 1915, wherein the first branch of the syllabus reads:

"The county treasurer may not contract with an attorney to collect delinquent taxes on real estate, or employ a collector to collect delinquent personal taxes."

The fourth inquiry in this opinion was as follows:

"Under the provisions of Section 5696 of the General Code of Ohio, can a collector be appointed to collect personal taxes as therein provided?"

It is apparent from the above inquiry that Section 5696 General Code was under consideration when this opinion was written, although it is not otherwise referred to in the opinion.

It is my opinion that the conclusion of Mr. Turner should be adhered to.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1642.

SCHOOLS—BOARD OF EDUCATION—DRIVER OF SCHOOL WAGON NOT ENTITLED TO COMPENSATION DURING EPIDEMIC.

Where a driver of a transportation wagon used for the transportation of pupils to and from a centralized school is employed at a sum certain per day for "each school day for the period of time as the schools are in session," he cannot recover for the time the schools were closed on account of the epidemic of Spanish influenza.

COLUMBUS, OHIO, December 26, 1918.

HON. J. L. HEISE, *Prosecuting Attorney, Circleville, Ohio.*

DEAR SIR:—In your communication of November 19, you enclose a copy of a contract with a driver of one of your school wagons and you inquire if the board

of education is compelled to pay said driver during the time the schools were closed on account of the epidemic of Spanish influenza. The contract reads in part:

> "This agreement made and entered into this 26th day of August, 1918, by and between the board of education of the Muhlenberg township rural school district, Pickaway county, Ohio, and James Collins of Muhlenberg township, Pickaway county, Ohio, parties of the first part and second part, respectively.
>
> "That in consideration of the sum of two and fifteen one-hundredths dollars *per day*, payable monthly, the party of the second part agrees to furnish a suitable team and to convey pupils and teachers to and from the central school building in Muhlenberg township school district, *each school day for such period of time as the schools are in session*, from the 9th day of September, 1918, to the end of the school year. * * * Twenty days of *actual* driving including legal holidays shall constitute a school month. * * *"

In construing a contract the first thing to ascertain, if possible, is what was the intent of the parties thereto. That intent, as gathered from the language used by said parties to the above contract, seems to indicate but one thing and that is that the drivers should be paid for only those days upon which the services were actually rendered and for only each school day that the schools were in session. The contract says, in so many words, that the consideration shall be by the day. This of itself would not be sufficient to make the contract one from day to day, but the consideration is followed by words which show that the driver is to convey the pupils "each school day for such period of time as the schools are in session" and that 20 days of *actual* driving shall be considered a month.

Section 7689 G. C. provides that a school month shall consist of four weeks of five days each. So that it seems clear to have been the intention of the parties that the driver could only be paid for the actual days he furnished the transportation.

It is held in 9 Cyc, 628, that "where the party by his own contract creates a duty or charge upon himself, he is bound to make it good." This is true even though it is impossible for him to perform.

In School district No. 1 vs. Dauchy, 25 Conn., 530, the court commented upon the above rule and uses the following language:

> "It is said, however, that there is one real exception to the rule, viz., where the act of God intervenes to defeat performance of the contract; and that is the exception on which the defendant relies in this case. The defendant insists that where the thing contracted to be done becomes impossible by the act of God, the contract is discharged. *This is altogether a mistake.* The cases show no such exception."

While the closing of the schools by the board of health cannot be considered in exactly the same class as the exception above mentioned, yet the epidemic which caused the order to be made is of that class, and if no exception can be had to the terms of a contract on that ground, the parties are left to complete the terms entered into by them.

Holding these views, then, I must advise you that the driver can only recover for those days on which he actually performed the duties of transporting said pupils.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1643.

BOARD OF EDUCATION—CANNOT ISSUE BONDS SOLELY BECAUSE IT DETERMINES SUCH ISSUE TO BE FOR BEST INTERESTS.

The board of education of a school district is, under the provisions of Section 5656 General Code, only authorized to fund and thereby extend the time of payment of existing indebtedness of such school district by an issue of bonds when such indebtedness cannot be paid at maturity by reason of the limits of taxation of such school distrtict. Under said section such board of education is not authorized to fund existing indebtedness of the school district by an issue of bonds simply for the reason that the board of education may find and determine that it is to the best interests of the school district to do so.

COLUMBUS, OHIO, December 26, 1918.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In Re: Bonds of Milford Village School district in the sum of $12,000 to extend the time of payment of certain indebtedness represented by notes executed by the board of education of said school district to the Milford National bank of Milford, Ohio.

I have examined the transcript submitted of the proceedings of the board of education of Milford Village School district relating to the above issue of bonds. As stated above, this issue of bonds is for the purpose of extending the time of payment of certain indebtedness now due and payable, represented by certain notes executed by said board of education to the Milford National bank of Milford, Ohio.

The preamble to the formal part of the resolution of the board of education providing for this issue of bonds reads as follows:

"Whereas the board of education of the Milford Village School district, Clermont and Hamilton counties, Ohio, has by the properly drawn resolutions issued its notes for the sum of $12,000.00, to the Milford National bank of Milford, Ohio, and whereas all of said notes have been by said board deemed and declared to be legal, existing, valid and binding obligations of said school district, by formal resolutions passed before the issuing of each and every one of said notes aggregating in all the sum of twelve thousand dollars, and, whereas, said notes are now all due and payable and it is deemed by said board of education of the Milford Village School district to be for the best interest of said school district to extend the time of payment of said indebtedness by issuing the bonds of said school district for the periods of time and in the denominations hereinafter mentioned, and whereas said notes are all now again declared by this board to be the legal, existing, valid and binding obligations of the said Milford Village School district.

Now, therefore, be it resolved by the board of education of the Milford Village School district, Clermont and Hamilton counties, Ohio, at and during a regular meeting of said board of education," etc.

It is clear from the language of this resolution above quoted that the actuating reason of the board of education in providing for this issue of bonds is the finding

and determination by the board of education that it is for the best interests of said school district to extend the time of payment of this indebtedness to the bank by issuing bonds of said school district. The issue of these bonds is provided for under the assumed authority of Section 5656 General Code, and I am wholly unable to find anything in the provisons of said section authorizing the board of education of a school district to fund existing indebtedness of said school district by an issue of bonds simply for the reason that the board of education finds and determines that it will be to the best interests of the school district to do so. On the contrary, under the provisions of said section, the existing indebtedness of a school district can be funded by an issue of bonds by the board of education only when the school district, by reason of its limits of taxation, is unable to pay said indebtedness at maturity. This requirement of the statute naturally implies that before the board of education can issue bonds for such purpose, that it be without funds to pay such indebtedness, and this by reason of its limits of taxation.

With respect to the bond issue here under consideration, it may well be for aught that appears in the resolution of the board of education, that it has ample funds in the treasury of the school district out of which to pay this indebtedness, and that said bonds are to be issued for the purpose of paying said indebtedness simply for the reason that the board of education deems it for the best interest of the school district to pay such indebtedness in this way.

In this connection I note that under the provisions of Section 3916 General Code, a city or village may fund existing indebtedness by an issue of bonds when either such municipality by reason of its limits of taxation is not able to pay such indebtedness at maturity "or when it appears to the council for the best interests of the corporation." As before noted, Section 5656 General Code is more limited in its authority, and authorizes a board of education to fund or extend the time of payment of existing indebtedness only when from the school district's limits of taxation, such indebtedness cannot be paid at maturity.

It follows from what has been said above, that the resolution of the board of education of Milford Village School district providing for this issue wholly fails to show any legal authority for said issue, and for this reason the same is hereby disapproved.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1644.

JUVENILE COURT—JUVENILE UNDER FOURTEEN MAY NOT BE CONFINED IN CELL.

A juvenile under fourteen years of age may not, pending final disposition of his case, be confined in a cell in the upper part of the county jail even though such cell is separate and apart from the county jail proper.

COLUMBUS, OHIO, December 26, 1918.

HON. H. M. SUMMERS, *Probate Judge, Ottawa, Ohio.*

DEAR SIR:—I have your letter of December 11, 1918, as follows:

> "Complaint was filed in this court against a boy under fourteen years of age for having broken into several business places here in Ottawa within the last year. He carried away money and merchandise. Warrant

was issued and said boy arrested. Having no place within which to place him pending final disposition of the case, would the jail matron have been justified in keeping him in a cell in the upper part of the jail, separate and apart from the county jail proper. The probation officer had no place to take him and could not be with him personally during the pendency of the case, he having other cases to look after. Please advise."

Section 1657 of the General Code reads as follows:

"Pending final disposition of a case, the judge may commit any person arrested or cited to appear, except the minor under fourteen years of age, to the county jail until the case is disposed of, but such trial shall be commenced within four days of such commitment unless upon the request of the defendant. Pending final disposition, the judge may direct that the minor in question be left in the possession of the person having charge of him, or that he be kept in some suitable place provided by the county or city authorities."

In discussing the case of in re Januszewski, 10 O. L .R., p. 151, Sater, J., in discussing the purpose of the juvenile court statute, says:

"The purpose of the statute is to save minors under the age of seventeen years from prosecution and conviction on charges of misdemeanors and crimes, and to relieve them from the consequent stigma attaching thereto; * * * A consideration of the acts enumerated which respectively constitute delinquency precludes the thought that it was the legislative intent that they or any of them, when committed by infants within the specified age, should for correctional purposes be treated as a crime—such purposes, as regards such minors, being the only ones contemplated by the statute. The intent to disassociate juvenile from criminal cases is evidenced by the provision of Section 1649 that the former shall not be heard, if it can be avoided, in a room used for the trial of the latter, and by the prohibition against the detention of any delinquent child in the county jail pending the disposition of its case."

It will be seen from this and a thorough examination of the juvenile statutes that the purpose of the provision, to the effect that the juvenile may not be confined in the county jail pending the disposition of his case, is to save the minor from the stigma attaching to criminal charges.

You ask in your request whether the jail matron would have been justified in confining the minor in question in a "cell in the upper part of the jail, separate and apart from the county jail proper." It may be that this cell, as a matter of fact, would be considered apart from the jail proper, but it seems to me that the spirit of the juvenile court act would require the youth to be confined in some place separate and distinct from the county jail building. It is true the entire building may not be used for jail purposes, but I think it is to be viewed, so far as the juvenile court act is concerned, as the county jail.

It is therefore my opinion that the confinement of the youth in question in this cell would be in violation of the provisions of the juvenile law.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1645.

DISTRICT TUBERCULOSIS HOSPITAL—OFFICERS AND EMPLOYES NOT UNDER CIVIL SERVICE.

The officers and employes of a district tuberculosis hospital, created under Sections 3148 *et seq. G. C.* (107 *O. L.,* 497), *do not come within the provisions of the civil service act* (*Sections* 486-1 *to* 486-31 *inc. G. C.*)

COLUMBUS, OHIO, December 26, 1918.

Civil Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your communication which reads as follows:

> "Section 3148 et seq., General Code of Ohio, provides that the county commissioners of any two or more counties, not to exceed five, may form themselves into a joint board for the purpose of establishing and maintaining a district hospital for the care and treatment of persons suffering from tuberculosis, etc. Under the law the operation and management of such institutions is in the hands of a board of trustees, one member of which is selected by the board of county commissioners of each county concerned.
>
> Under this provision of the law, a number of district tuberculosis hospitals have been established throughout the state. In a communication from the board of trustees of one of these institutions, the following claims are made:
>
> 'It is our opinion that the civil service law of Ohio does not apply to employes of this hospital, as it is a district institution. Our employes are not in the service of the state, nor of any county or city, but in the service of a new political subdivision, as was held by the supreme court in the case of Brissel vs. State, 87 O. S. 154 to 163.'
>
> Your opinion is respectfullly requested as to whether the civil service law of Ohio applies to employes of such institutions."

In considering the question submitted by you, we will first turn to the act providing for establishments of districts for the purpose of erecting and maintaining tuberculosis hospitals therein. The basic section of the act is Section 3148 G. C. (107 O. L. 497), which reads as follows:

> "Section 3148.—The commissioners of any two or more counties not to exceed ten, may form themselves into a joint board for the purpose of establishing and maintaining a district hospital, provided there is no municipal tuberculosis hospital therein for care and treatment of persons suffering from tuberculosis, and may provide the necessary funds for the purchase of a site, which site shall be separate and apart from the infirmary boundaries in any county and also may provide for the erection of the necessary buildings thereon; and provided further that where any number of counties have already constructed and are operating a district tuberculosis hospital, counties may join such counties for enlargement and use of such hospital. Any new district or addition to a district shall be approved by the state board of health. Such necessary expenses as may be incurred by the county commissioners in meeting with the commissioners of other counties for consideration of the proposal to establish a district

tuberculosis hospital shall be paid from the general fund of the county. After the organization of the joint board such expenses shall be paid from the fund provided for the erection and maintenance of such hospital."

It will be seen that the district thus formed is not co-extensive with county or municipal lines, but is a distinct district formed from a number of counties not exceeding ten.

The remaining sections of this act provide for a board of trustees to be chosen by the county commissioners of the counties uniting in the project, which trustees are to have the general management and control of the hospital. They prepare the plans and specifications, erect the necessary buildings, appoint a suitable person as medical superintendent of the hospital and fix the compensation of said superintendent and the other employes. So that the entire control and management of the hospital are placed in the hands of a distinct set or body of officers who are not in any sense county or municipal officers.

I might suggest that it becomes the duty of the commissioners of the various counties joining in the project to levy a tax to provide the necessary funds for the establishment and maintenance of the hospital. Outside of this, county officers have nothing to do with the management of the hospital.

In Brissel, et al. vs. State, 87 O. S. 154, Johnson, J., in the opinion on p. 163, uses the following language in regard to such a hospital:

"In the first place, it is plain that Section 3148 provides for the creation of a complete legal entity, a political subdivision, for the specific purpose of 'establishing and maintaining' a district hospital, for the care and treatment of persons suffering from tuberculosis.

The enactment is, the commissioners of *two* or *more* counties * * * may form the joint board and may provide the necessary funds.

It is the board, as a board, which shall determine what buildings are necessary for its purpose, and shall provide the funds for the 'purchase of the site' and erection of the 'necessary buildings' thereon."

With the nature of such an institution in mind, we will consider the provisions of the civil service act in reference to the officers included in the act.

Section 486-1 G. C. provides in part as follows:

"The term 'civil service' includes all offices and positions of trust or employment in the service of the state and the counties, cities and city school districts thereof.

The 'state service' shall include all such offices and positions in the service of the state or the counties thereof, except the cities and city school districts.

The term 'classified service' signifies the competitive classified civil service of the state, the several counties, cities and city school districts thereof."

Section 486-2 G. C. provides:

"On and after the taking effect of this act, appointments to and promotions in the civil service of the state, the several counties, cities and city school districts thereof, shall be made only according to merit and fitness * * *."

The language of the whole act, in so far as it applies to the particular question under consideration, is very similar to the language which we have quoted therefrom. The act applies to the state, the several counties of the state, cities and city school districts thereof. It nowhere mentions the districts created from the subdivisions of the state and for that reason it would seem that the act could not be made to apply to a district such as that about which you inquire. The only theory upon which the act could be made to apply to such a district would be to place such a construction upon the language used in Section 486-1 G. C. as to make it read that the term "civil service" includes all offices and positions of trust or employment which may be created within the state, whether said offices have reference strictly to the state or to counties, cities, city school districts or any other kind of districts; that is, to make the word "state" include everything within the state. I do not think this was the intention of the legislature, for if it had been, there would have been no need of adding the language the "counties, cities and city school districts thereof."

In other words, if the term "state" were meant to include all officers and positions within the state, irrespective of the nature of the offices and positions, there would have been no necessity of adding "counties, cities and city school districts thereof." Hence it is my opinion that when the legislature used the term "offices and positions of the state" it meant to include therein state offices and state positions only, and not those which might be termed district offices and positions. If this interpretation be correct, then it is readily seen that the positions and offices connected with a district tuberculosis hospital would not come within the provisions of the civil service act.

My predecessor, Hon. Edward C. Turner, in an opinion rendered on July 11, 1916 and found in Volume II, Opinions of the Attorney-General for 1916, p. 1186, passed upon a question which throws some light upon the question we are considering. The syllabus reads as follows:

> "Offices, positions and employments in villages and village school districts are not included in the operation of the civil service law of this state."

Mr. Turner reasoned as follows in said opinion (p. 1187):

> "This paragraph specifies what offices, positions and employments are included in the civil service law of the state and it is exclusive. It will be observed that it does not include offices or positions in villages, or village school districts. It follows, therefore, that the position held by the janitor named in your inquiry is not within the operation of the civil service law, and said janitor is not entitled to its protection or to hold his position under any of its provisions, including the provision of Section 486-31 G. C., as amended 106 O. L. 418, referred to in your inquiry and commonly known as the seven-year service clause."

This reasoning would not permit our placing such a construction upon the term "offices and positions of the state" as I assumed above. That is, it would not permit us to say that the term "state" was meant to include the various subdivisions of the state; for if such a construction could be placed upon the word "state," then villages could be included in said term. I think Mr. Turner is right in his reasoning and that the civil service act is limited to state, county, city and city school district offices and positions.

In People ex rel. vs. Haywood, et al., 19 App. Div. (N. Y.) 46, the court was passing upon a question somewhat similar to the one before us. The syllabus is as follows:

"A union free school is not, within the meaning of chapter 312 of the laws of 1884, as finally amended by chapter 821 of the laws of 1896, a public department of the state or of a village in it, and the board of education of the district, to which is committed, by the Consolidated School Act, the care of the school building, is not subject to the direction or control of the village or state authorities in the exercise of such duties, and cannot be compelled to give preferential employment, as a janitor of the school building, to a veteran of the late war under the statute entitling such veteran to preferential employment in the public service in every public department of the state, counties, cities and villages, and upon all public works of the state, counties, cities and villages."

In the opinion the court uses the following language (p. 47):

"The question here is whether the union free school is, within the meaning of the statute, a public department of the state or village. I do not think it is. The respondent is a school district organized, existing and supported by taxation levied upon the taxable inhabitants of the district, which may or may not be co-extensive with the corporate limits of the village; and when organized by force of the statute, becomes a district having a distinct classification in the civil divisions of the state. The care of the school building is committed, by the Consolidated School Act, to the board of education, and the board is in no way subject to the direction or control of the village or state authorities in the execution of such duties, and, in my judgment, under no legal requirement to prefer the relator as janitor. A privilege of this character must have its foundation in express provision of the statute. The demurrer should be sustained."

In this case the court was passing upon whether a "public department of the state" would include a school district which is made up of a part of another subdivision of the state, and as to whether the appointees under the act creating such district would come within the civil service provisions of the laws of the state. The court held they would not come under said provisions and that the term "public department of the state" could not be made to include such a school district. And it is my view that the term "state," as used in our civil service act, could not be made to include a district created from other subdivisions of the state.

Hence answering your question specifically it is my opinion that the officers and appointees about which you inquire do not come within the civil service laws of the state.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1646.

CHILDREN'S HOME—ADMISSION TO—REMOVAL FROM—CONSENT TO ADOPTION.

1. *The mere fact that a juvenile court does not accompany its order to the superintendent of the children's home, to admit a certain minor thereto, with a statement of facts as set forth in Section* 3090 *G. C., does not warrant the superintendent in refusing to admit the child.*

2. *When a juvenile court removes, from a children's home, a child theretofore committed to the home by it, all duties and obligations of the home in reference to said child thereby cease.*

3. *When a child is so removed from a children's home by the juvenile court, the trustees of the home are no longer under obligation to make the visitations provided for in Sections* 3098 *and* 3099 *G. C.*

4. *The board of trustees of a children's home is the proper body to decide whether or not a child is suitable for the home. The power of the juvenile court to commit to the home is merely incidental to its duties under the juvenile act. An exception to this general rule is found in Section* 3091 *G. C.*

5. *An orphan asylum or children's home organized under the laws of this state may give consent to the adoption of an inmate thereon, provided it was voluntarily surrendered to the institution or was previously abandoned by its parents. In no case does a private institution for the care and support of minor children become the legal guardian of the inmates of the institution, and therefore has no authority to grant consent to the adoption of the inmates of the institution, excepting under the order of the juvenile court as set out in Section* 1672 *G. C.*

COLUMBUS, OHIO, December 26, 1918.

Board of State Charities, Columbus, Ohio.

GENTLEMEN:—I have your letter in which you request my opinion on the following questions:

"1. Children are occasionally sent out to county children's homes by judges of juvenile courts without any papers whatever. Pursuant to Section 3097 of the General Code, a uniform family history blank has been prepared and furnished each juvenile court judge for use in the commitment of children, but in some instances the use of this blank or any other is entirely ignored. Section 3090 requires the judge to set forth certain particulars relative to a committed child. Is the superintendent of a county children's home required to accept a child committed by the juvenile court, unaccompanied by statement of facts required in Section 3090?

2. The judge of a juvenile court commits to a county children's home a dependent child. Pursuant to the provisions of Section 1643, the judge subsequently recalls the child and places it in a private family home. While in this home the child dies. Is the children's home or the juvenile court responsible for the payment of expenses incident to the care and burial of such child?

3. When a child, regularly committed to a children's home, is subsequently recalled by the committing judge of the juvenile court and placed by him in a family home, does the obligation of the trustees of such children's home cease at the time of the withdrawal, or do the provisions of Sections 3098 and 3099 relative to visitation of children placed in foster homes apply to a child under the circumstances stated above?

4. We have contended that under the provisions of Section 3090 the trustees of a county children's home may accept the legal guardianship and custody of the dependent children by means of release or surrender from each parent, if living, or from the legal guardian, and that all other cases, including those of abandoned children, should be taken into a juvenile court for judicial action. Is our interpretation of said section correct? It is found that in some instances trustees of county children's homes and some other child-caring institutions are accepting the guardianship of chil-

dren from the mother solely, although the father is living, or from grandparents or other near relatives when parents are dead; and that so-called abandoned infants are taken to public and private institutions without any formal commitment by a juvenile court and accepted by the officers of these institutions who thereupon consider themselves legal guardians of such children and competent to give legal consent later to adoption."

Your first question is as to whether the superintendent of a children's home would be warranted in refusing admission to a child whom the juvenile court had ordered to be placed in the home, if said court fails to accompany the order with the data set out in Section 3090 G. C. Said section reads as follows:

"Section 3090.—They shall be admitted by the superintndent on the order of the juvenile court or of a majority of such trustees, accompanied by a statement of facts signed by the court or trustees, setting forth name, age, birthplace, and present condition of the child named in such order, which statement of facts contained in the order, together with any additional facts connected with the history and condition of such children shall be, by the superintendent, recorded in a record provided for that purpose, which shall be confidential and only open for inspection at the discretion of the trustees."

In this connection it might also be well to quote Section 3097 G .C., which reads as follows:

"Section 3097.—Full and complete records of the inmates shall be kept in the children's home and they shall be uniform throughout the state. It shall be the duty of the board of state charities to secure uniformity by providing a standard form of blanks and records for the guidance of such institutions, wherein shall be recorded the full name, age, place of residence, name of parent or other relatives, so far as obtainable, and other information as the board of state charities requires, which records shall not be open to inspection unless on special permission of the trustees. The name and place of residence of the person with whom a child is placed or by whom adopted shall be recorded together with the terms of the agreement in a separate record, which shall not be open to inspection except by special permission of the trustees, having regard at all times to the well-being of the child, except that duly authorized representatives of the board of state charities, may see such record at any time."

Said section provides that the data therein mentioned, "so far as obtainable," shall be recorded by the superintendent of the home, but shall not be open for public inspection. The section is silent as to the person upon whom the duty or obligation rests to get the data mentioned in said section, but it is fairly evident, from a reading of the section, that this duty devolves primarily upon the superintendent of the children's home.

It is true Section 3090 G. C. provides that when the juvenile court or the trustees of a home make an order for the admission of a child to the home, this order shall be accompanied by a statement setting forth the name, age, birthplace and present condition of the child. This information of course is furnished for the use of the superintendent.

The question now is as to whether this statement must accompany the order before the superintendent is warranted in admitting the child into the home. I do

not think such a construction should be placed upon this language. The main and important thing is the order, and if a superintendent of a home should receive an order from the juvenile court, to admit a certain child to the home, it is my opinion that the superintendent should admit it, notwithstanding said statement might not accompany the order. The statute does not state that the superintendent shall admit the child upon the order of the juvenile court, if said order is accompanied by said statement of facts, but does provide that a child shall be admitted by the superintendent on the order of the juvenile court.

If the construction should be placed upon this section that a superintendent of a children's home shall not receive a child upon the order of the juvenile court, unless said order is accompanied by such a statement of facts, the same interpretation would have to be given to an order made by the board of trustees of a home; that is, if a board of trustees should order a child admitted to the home and the order was not accompanied by said statement of facts, the superintendent would be warranted in refusing to admit the child. I do not think this was the intent of the legislature in making this provision. To be sure,for the advantage of the superintendent, said statement should accompany the order, whether made by a juvenile court or by the trustees of the home; but if they should fail to perform their duty in this respect, it would not be sufficient to warrant the superintendent of the home in refusing admission to the child.

Your second question pertains to the jurisdiction of a children's home over a child who has been committed to the home by the juvenile court, but has afterwards been taken from the home by the court and placed elsewhere.

Section 1643 G. C. reads as follows:

> "When a child under the age of eighteen years comes into the custody of the court under the provisions of this chapter, such child shall continue for all necessary purposes of discipline and protection, a ward of the court, until he or she attain the age of twenty-one years. The power of the court over such child shall continue until the child attains such age."

Under this section the jurisdiction of a juvenile court over a child, when once assumed, is continuing and it can make any order, from time to time, in reference to the child, until it becomes twenty-one years of age, which may seem to the court to be for the best interests of the child. Hence when a juvenile court commits a child to the children's home, it is merely temporarily and the order committing the child may be modified at any time. From the provisions of this section it is my opinion that when a juvenile court modifies its order committing a child to a children's home and orders it to be placed elsewhere, the duties, obligations and responsibilities of the officers of the home cease and the home is not responsible for the payment of expenses incident to the care and burial of such child.

I might further say, in respect to this question, that the juvenile court would not be responsible for the payment of said expenses. A careful study of the juvenile act will develop the fact that said court has no funds from which it could make an expenditure such as you suggest. However, I will not go into this matter further, as your question relates to whether the home is responsible for the payment of said expenses.

Your third question is similar to the second and is in regard to whether the obligations of the trustees of the children's home cease at the time of a withdrawal of a child from the home by the juvenile court, or whether the provisions of Sections 3098 and 3099 G. C., relative to visitation of children placed in foster homes, apply to a child under such circumstances.

I think the observation made in answer to your second question will apply to

this question, and that the trustees of the home are no longer under obligation to visit a child when it is taken from the home by the juvenile court and placed in a private home. In this connection I will quote Section 3098 G. C. which is as follows:

> "Section 3098.—The trustees shall visit, or cause to be visited, each child placed out by them, at least once in each year, and as much oftener as the welfare of the child requires. The trustees may at any time vacate any agreement when the welfare of the child may demand it, and replace it in another family home or return it to the institution."

In this section the visitation is in reference to a child "placed out by them"; that is, by the trustees, and therefore would not apply to a child who is placed in a private home by the juvenile court.

Your fourth question relates to the jurisdiction of the juvenile court in committing minors to a children's home. As I understand it, the question is as to whether in certain cases minors ought to be taken before the juvenile court to have it determine whether or not they should be committed to the children's home. This is the theory upon which I will attempt to answer the same.

Section 3089 G. C. reads as follows:

> "The home shall be an asylum for children under the age of eighteen years, of sound mind and not morally vicious and free from infectious or contagious diseases, who have resided in the county not less than one year, and for such other children under such age from other counties in the state where there is no home, as the trustees of such home and the persons or authority having the custody and control of such children, by contract agree upon, who are, in the opinion of the trustees, suitable children for admission by reason of orphanage, abandonment or neglect by parents, or inability of parents to provide for them. In no event shall a delinquent or incorrigible child be committed to or be accepted by such home. If an inmate of such home is found to be incorrigible, he or she shall be brought before the juvenile court for further disposition. Parents or guardians of such children shall in all cases where able to do so, pay reasonable board for their children received in such children's home."

Under this section the board of trustees of the home is the proper body to determine whether a child is suitable for admission because of *"orphanage, abandonment* or *neglect* by parents, or *inability* of parents to provide for them." There is nothing said in this section as to a juvenile court's having jurisdiction to pass upon the question as to whether or not a child is suitable to be admitted to the home.

It is true Section 3090 G. C., above quoted, provides that the superintendent of a home shall admit a child upon the order of a juvenile court, but to understand this provision it will be necessary for us to turn to the act having to do particularly with the jurisdiction of the juvenile court. Section 1642 G. C., in this act, gives the juvenile court jurisdiction over and with respect to delinquent, neglected and dependent minors under eighteen years of age.

Section 1644 G. C. defines with great particularity the term "delinquent child," as does Section 1645 G. C. "dependent child" and Section 1646 G. C. "neglected child." One can not study these sections carefully without reaching the conclusion that the object of this act is not so much to take care of the bodily, mental or moral wants of the child, as it is to get the child away from conditions and circumstances which have a tendency to make of him a bad and dangerous citizen.

The act provides for the filing of a complaint, the issuing of a citation by the court and the apprehension or arrest of the minor. It provides for serving a notice, either actual or constructive, upon the parent, and also for a hearing upon the complaint so filed. This proceeding sounds very much in crime, either upon the part of the minor himself or of some one connected with the minor.

The children's home and the statutes pertaining to the same do not bear such a construction as do the statutes pertaining to the juvenile court, set out above. It is true the juvenile court may commit minors to the children's home, if they are brought before said court under the juvenile act and if the judge thereof deems it to be for the best interests of the minor, but this is merely incidental.

In other words the juvenile court is not given exclusive jurisdiction over placing children in children's homes. The judge thereof is merely given authority to commit children to the home in his carrying out the provisions of the juvenile act. His jurisdiction is to determine whether any child brought before him is dependent, delinquent or neglected. If he finds such a condition exists, he may, for the best interest of the child, commit it to the children's home.

If this theory be correct, the trustees of a children's home have in all cases the authority to admit a minor to the home, provided they find any of the conditions set out in Section 3090 G. C. to exist. Further, a minor would never be taken before the juvenile court merely for the purpose of having the court decide whether or not it should be admitted to a children's home. The committing of a minor to the home by a juvenile court, as said before, is merely a matter incident to enable said court to perform the duties as contemplated in the juvenile act, and the juvenile court is not given the jurisdiction to determine whether a child shall be admitted to a children's home. This is the function of the trustees of the home. In all cases they, and they alone, have the authority to decide, when the mere question is as to whether or not a child should be admitted to the home.

As hereinbefore stated, the provisions of Section 1643 G. C. provide a continuing jurisdiction of the juvenile court over a minor, when it finds that the child is delinquent, dependent or neglected, and in exercising this continuing jurisdiction said court may commit the minor to the children's home, as it might commit it to a private home or to the Board of State Charities or some training or industrial school, or to the care of some association willing to receive it.

From all the above I think it is clear that in no case would a minor be taken before the juvenile court merely for the purpose of determining whether or not it should be admitted to a children's home. In all cases this is a function of the trustees of the home.

I am aware there is one exception to this broad statement and that is found in Section 3091 G. C., which provides that—

> "* * * When the children are found by township trustees to be proper subjects for the care of the county, said trustees shall file their complaint with the juvenile court, and if said court orders such children to be committed to a children's home, they shall be conveyed to such home by the township trustees, and the expenses thereof paid from the township poor fund. * * *."

This is the only exception to the above general rule, with which I am familiar.

In studying the language which you have used in setting forth your fourth proposition, I am wondering whether you are not laboring under the impression that the trustees of the children's home would have authority to admit a child to the home and thus accept the legal guardianship and control of the same only in those cases in which the child is surrendered or released by its parents, or guardian

if no parent be living. It is my opinion this theory is not correct. Section 3093 G. C. clearly indicates otherwise. It makes it clear that a child may be admitted to the home either voluntarily upon the part of the parents or guardian, or against their will if the trustees of the home should decide that it would be for the best interests of the child. It provides that—

> "All inmates of such home who (1) by reason of abandonment, neglect, or dependence have been admitted, or (2) who have been by the parent or guardian voluntarily surrendered to the trustees, shall be under the sole and exclusive guardianship and control of the trustees * * *."

Here we find two conditions existing, viz., voluntarily admitted and involuntarily admitted. In other words, if the trustees of the home should find that a child is abandoned, neglected or dependent, said child may be admitted to the home, notwithstanding the parents or guardian of the child should take no action in regard to admitting the child.

Then on the other hand the trustees may admit a child to the home if it be voluntarily surrendered by the parent, or guardian if no parent be living. This is clearly borne out by Section 3094 G. C., which provides that—

> "* * * The trustees may discharge any inmates of such home and may return them to their parents or guardians *when they believe them capable of providing for themselves or their parents or guardians for them.*"

From this language I gather that the question as to whether a child shall be admitted into the children's home and how long it shall remain there does not rest entirely or primarily with the parents or the guardians of the children, but the sole question is, what is for the best interests of the child? This is also clearly indicated by Section 3089 G. C., wherein it is provided that—

> "The home shall be an asylum for children under the age of eighteen years * * * who are, in the opinion of the trustees, suitable children for admission by reason of orphanage, abandonment or neglect by parents or inability of parents to provide for them. * * *."

I might say in passing that I believe the word "parent" in Section 3093 G. C. should be interpreted as if it were "parents"; that is, the trustees of the home would have no authority to admit a child into the home on the theory that it has been voluntarily surrendered, unless both parents, if living, should surrender the child for the purpose of having it admitted to the home.

But suppose one parent, or, as you suggest, the grandparents, should bring the matter to the attention of the trustees of the home in reference to a certain child, and the trustees should find that the child is neglected or is dependent, then the trustees of the home could admit the child to the home, not upon the theory that it has been voluntarily surrendered to them, but because it would be for the best interests of the child to be admitted to the home, even though it may be against the will of one or both of its parents, or the guardian of the child in case there are no parents.

In connection with this question it might be well for us to consider Section 3092 G. C., which reads as follows:

> "In any county where such home has not already been provided, the board of commissioners shall make temporary provisions for destitute

children by transferring them to the nearest children's home where they can be received and kept at the expense of the county, or by leasing suitable premises for that purpose, which shall be furnished, provided and managed in all respects as provided by law for the support and management of children's homes, but if such child be not abandoned or surrendered by its parents, a complaint must first be filed with the juvenile court setting forth the facts as to such children, and if such court commits such children to an institution or agency for the care of children, then said commissioners may pay reasonable board for such child, whether placed in an institution or with a private family. But the commissioners may provide for the care and support of such children within their respective counties, in the manner deemed best for the interest of such children, which may include the payment of board for such children in a private home, when placed therein by an institution or society certified by the board of state charities as provided by Section 1352-1 of the General Code, and they shall levy an additional tax, which shall be used for that purpose only."

The language to which especial attention must be paid is:

"* * * but if such child be not abandoned or surrendered by its parents, a complaint must first be filed with the juvenile court setting forth the facts as to such child * * *."

However it must be remembered that this section does not deal with children's homes. It covers those cases in which there are no children's homes in the county, and the board of county commissioners is given jurisdiction over the care of the destitute children of the county. This is evident from a reading of the section, which states:

"* * * if such court commits such children to an institution or agency for the care of children, then said commissioners may pay reasonable board for such child, whether placed in an institution or with a private family. * * *."

The question of committing the child to the children's home is not raised and this language was evidently used advisedly by the general assembly. The general assembly was not dealing with children's homes in this section. It therefore used the language "institution or agency for the care of children."

Hence I will repeat what I have heretofore said in this opinion, namely, that with the exception of the provision made in Section 3091 G. C., above quoted, the trustees of the home are the proper authority to decide in all cases whether or not a child should be admitted to a children's home, and that the committing of a child to the children's home, by the juvenile court, is merely incidental to its duties as set forth in the juvenile act itself.

There is another matter connected with question No. 4, and that is that both public and private institutions without any formal commitment by a juvenile court accept children into said institutions and thereupon the institutions consider themselves legal guardians of the child so accepted, and consider themselves competent to give legal consent later to adoption.

The question is whether these institutions can give their consent to adoption when they are admitted under the above procedure. In reference to this matter, let me say that the question as to whether a child is placed in a public or private institution by a juvenile court or not, has nothing whatever to do with the question

as to whether these institutions may give consent to adoption or not. This matter is governed by a statutory principle which is not at all based upon the question as to how the child was admitted into the home. Section 8024 G. C. reads as follows:

> "When such child is an inmate of an orphan asylum, or children's home, organized under the laws of this state, and has been previously abandoned by its parents or guardians, or voluntarily surrendered by its parents or guardians to the trustees or directors of such asylum, or children's home, then the written consent of the president, or in his absence or disability, the vice-president, of the board of trustees or directors of such asylum, or children's home, shall be received by the probate court in place of the consent of the parents or guardians."

It is to be noted from the provisions of this section that even the authorities of a children's home cannot give consent to adoption unless the child so adopted has been voluntarily surrendered by its parents or guardians to the trustees of such home. Hence, even though a child were committed to a home by the juvenile court, unless possibly when the court would make an order as set out in Section 1672 G. C., the authorities of the home would have no authority to give consent to the adoption of the child. This section further provides that an orphan asylum or children's home organized under the laws of this state may give their consent to adoption if the child has been previously abandoned by its parents or guardians. The basic section which has to do with the matter of giving consent to the adoption of a minor child is Section 8025 G. C., and reads as follows:

> "Any proper person not married, or a husband and wife jointly, may petition the probate court of their proper county, or the probate court of the county in which the child resides, for leave to adopt a minor child not theirs by birth, and for a change of the name of such child. A written consent must be given to such adoption by the child, if of the age of fourteen years, and by each of his or her living parents who is not hopelessly insane, intemperate, or has not abandoned such child, or if there are no such parents, or if the parents are unknown, or have abandoned the child, or if they are hopelessly insane or intemperate, then by the legal guardian, or if there is no such guardian, then by a suitable person appointed by the court to act in the proceedings as the next friend of the child."

Let us note carefully what this section says. It provides that a written consent to adoption must be given by the child if it be of the age of fourteen years, and by each of his or her living parents who is not hopelessly insane, intemperate or has not abandoned such child. If there are no parents, or if they are unknown, or if they have abandoned the child, then the legal guardian must give its consent. A legal guardian would be a person or institution which had been made a guardian of the child under and by virtue of some provision of law, and hence in no case could the children's home or orphans' asylum, under Section 8024 G. C., give consent to the adoption of a child unless as is provided in Section 8024 G. C. it has been voluntarily surrendered "by its parents or guardians, to the trustees of such asylum or children's home," or unless, as suggested above, the parents have abandoned the child.

I know of no provision of law that would prevent a private institution from accepting a child and providing for its wants in a home established for the purpose or otherwise, just as there is no provision of law which would prevent any one taking a child and caring for the same provided no question was raised by the

parents or legal guardian of such child. But in no event could a private institution in any way get the legal guardianship over a child and then give its consent to the adoption of the child, excepting as it provided in Section 1672 G. C. The provisions of Section 8024 go only to those institutions which "are organized under the laws of this state" for the purpose of taking care of children. Hence, from the provisions of both Section 8024 and 8025 G. C. it is very clear that no private institution, even though it accepts a child for the purpose of giving it care and support, gets the legal guardianship of the child and has authority under said legal guardianship to give its consent to its adoption, except as provided in Section 1672 G. C.

This, if I understand your communication correctly, answers what you have in mind.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

1647.

STATE HIGHWAY COMMISSIONER—ON FAILURE OF CONTRACTOR TO COMPLETE HIGHWAY IMPROVEMENT—APPORTIONS WHOLE COST OF IMPROVEMENT INCLUDING ENGINEERING COST.

(1) *Where the state highway commissioner takes over a contract under the provisions of Section* 1209 *G. C. and completes the same at a cost greater than the contract price, and is not able to recover from the contractor and his surety the difference, then, in that event, he apportions the total cost and expense of the improvement among the state, county, township and property owners, and not merely the contract price.*

(2) *If the state highway commissioner incurs engineering and inspection fees during the time he is completing it under a force account, then this amount must be added to the total cost and expense of the improvement and is collectible as against the contractor and his surety.*

COLUMBUS, OHIO, December 26, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of December 2, 1918, which reads as follows:

> "In the apportionment of cost and expense of road improvements under the supervision of this department, same is made under the provisions of Section 1211 of the General Code of Ohio, upon the completion of the improvement.
>
> We now have ready for such apportionment a number of jobs on which the contract was forfeited and the work completed under "force account" by the department and in a number of cases the final cost of the work exceeded the contract price under the original contract. Several jobs thus completed carry the Illinois Surety company as surety for the original contractor and we will no doubt be unable to recover some of the excess cost from either the surety or the original contractor.
>
> Under the above statement I respectfully ask for your opinion on the following two questions:
>
> *First*—If the contract price is exceeded and collection can not be made

from the original contractor or the surety, shall the state pay all of the excess cost, or must we assess the county, townships and property owners one-half of the excess cost?

Second—In making the apportionment of cost must we include in the amount to be collected from the original contractor and the surety, any or all of the cost of engineering and inspection incurred after the date of forfeiture of the contract?"

I will answer your questions in the order in which they are set out in your communication.

In answering your first question it will be well for us to keep in mind that the proportion of the cost and expense of any road improvement to be borne by the state, county, township and property owners is fixed by statute as is shown by Sections 1213 and 1214 General Code. Section 1213 reads as follows:

"Whenever there are one or more improvements to be made in a county, and the cost and expense thereof does not exceed twice the amount apportioned by the state to a county, then the state shall pay fifty per cent. of such cost and expense.

Whenever there are one or more improvements to be made in a county and the cost and expense thereof exceeds twice the amount apportioned by the state to a county, then the state shall pay such proportion of the cost of said improvement or improvements as may be agreed upon by the state highway commissioner and the county commissioners or township trustees."

Section 1214 reads in part as follows:

"Except as otherwise provided in this chapter, the county shall pay twenty-five per cent of all cost and expense of the improvement. Fifteen per cent. of the cost and expense of such improvement, except the cost and expenses of bridges and culverts, shall be apportioned to the township or townships in which such road is located. If the improvement lies in two or more townships the amount to be paid by each shall be apportioned according to the number of lineal feet of the improvement lying in each township. Ten per cent. of the cost and expense of the improvement, excepting therefrom the cost and expense of bridges and culverts, shall be a charge upon the property abutting on the improvement, provided the total amount assessed against any owner of abutting property shall not exceed thirty-three per cent. of the valuation of such abutting property for the purposes of taxation."

In connection with these two sections, I desire to call attention to two things: First, that the statute itself fixes the proportion, as said above, that is to be borne by the state, county, township and property owners; and secondly, that the proportion which each of these different parties is to pay is based upon the cost and expense of the improvement.

In Section 1214 we find the language "all cost and expense of the improvement," and the following: "Fifteen per cent. of the cost and expense of such improvement," and "ten per cent. of the cost and expense of the improvement"; while in Section 1213 we find it just as clearly indicated that the state bears a certain portion of the cost and expense of the improvement. For example, we find the following language: "Then the state shall pay such proportion of the cost of said improvement or improvements as may be agreed upon."

So that the statute itself fixes the proportion that must be paid by the different parties interested, and is not particularly based upon any agreement or contract.

With this in mind, let us notice some further provisions of the General Code. Section 1218 General Code provides as follows:

> "* * * No contract shall be let by the state highway commissioner in a case where the county commissioners or township trustees are to contribute a part of the cost of said improvement, unless the county commissioners of the county in which the improvement is located shall have made a written agreement to assume in the first instance that part of the cost and expense of said improvement over and above the amount to be paid by the state. Where the application for said improvement has been made by township trustees, then such agreement shall be entered into between the state highway commissioner and the township trustees. * * *."

It is to be noted first in connection with this section that the agreement entered into by the county commissioners is based merely upon the estimated cost of the improvement, and this for the reason that the contract has not yet been entered into, and the actual cost and expense of the improvement is not known.

Secondly, in connection with this section it is to be remembered that the primary purpose of the agreement entered into by the county commissioners is to the effect that they will assume *"in the first instance* that part of the cost and expense of said improvement over and above the amount to be paid by the state." The object of this is not particularly to bind the county commissioners to the payment of a definite and specified amount, but simply to bind them to pay that part of the cost and expense of the improvement which will ultimately have to be paid by the township and the property owners as well as to pay the share which the county will have to pay. In other words, it makes such a provision that the state has no subdivision to deal with except the county.

Further, before the contract for any improvement can be entered into by the state highway commissioner, he must require a bond as is provided in Section 1208 General Code. This section reads in part as follows:

> "The state highway commissioner may reject all bids. Before entering into a contract the commissioner shall require a bond with sufficient sureties, conditioned that the contractor will perform the work upon the terms proposed within the time prescribed, and in accordance with the plans and specifications thereof, and that the contractor will indemnify the state, county or township against any damage that may result by reason of the negligence of the contractor in making said improvement."

With these matters noticed, let us turn to the provisions of Section 1209, which has to do with the matter of the state highway commissioner completing a contract after the failure of the contractor himself so to do. This section reads in part as follows:

> "If, in the opinion of the state highway commissioner, the contractor has not commenced his work within a reasonable time, or does not carry the same forward with reasonable progress, or is improperly performing his work, or has abandoned, or fails or refuses to complete a contract entered into under the provisions of this chapter, the state highway commissioner shall have full power and authority to enter upon and complete said improvement either by contract, force account or in such manner as he

may deem for the best interest of the public, paying the full costs and expense thereof from the balance of the contract price unpaid to said contractor, and in case there is not sufficient balance to pay for said work, the state highway commissioner shall require the contractor or the surety on his bond to pay the cost of completing said work. It shall be the duty of the attorney-general or the prosecuting attorney of the county in which said improvement or some part thereof is situated, upon request of the state highway commissioner, to collect the same from the contractor, and the surety on his bond."

There are several matters in connection with this section to which I desire to call attention:

(1) The state highway commissioner completes the improvement either by contract, force account, or in such manner as he may deem for the best interest of the public.

(2) He pays the *full cost and expense thereof* from the balance of the contract price unpaid to said contractor.

(3) In case there is not sufficient balance to pay for said work, the state highway commissioner shall require the contractor or the surety on his bond to pay the cost of completing said work.

(4) It becomes the duty of the attorney-general or the prosecuting attorney of the proper county to collect the excess cost from the contractor and the surety on his bond.

In reference to the third and fourth suggestions I desire to call attention to an opinion rendered by me to Hon. R. A. Kerr, prosecuting attorney, as of date August 10, 1918, being No. 1393. In this opinion I held that neither the attorney-general nor the prosecuting attorney could collect any amount from the contractor and his surety until the improvement was fully completed, and that up to that time the same is fully completed, the state highway commissioner must pay the same over and above that which the county obligated itself to pay in the final resolutions entered into by it.

Hence, in the first instance, the state must pay all over and above the contract price which it may cost to complete said improvement. The question now arises as to whether the state will be compelled to bear this excess cost; that is, supposing the contract price of an improvement was $20,000 and the contractor failed to complete the same, and the state highway commissioner completed it at a cost of $25,000. The $5,000 in the first instance would have to be paid by the state highway commissioner out of state funds in accordance with the provisions of Section 1209 General Code. Under the provisions of said section the contractor and his surety would be liable for the difference, namely, $5,000; but supposing the state cannot recover from the contractor and his surety, due to insolvency or to some other reason. Then, in that event, who would pay this added cost of $5,000?

In answering this let us turn to Section 1211, which reads as follows:

"Upon completion of the improvement, the state highway commissioner shall immediately ascertain the cost and expense thereof, and apportion the same to the state, county, township or townships and abutting property. He shall certify the total cost and expense of the improvement and his apportionment thereof either to the county commissioners or to the trustees of the township upon whose application the improvement was made."

Here we find the provision that as soon as an improvement is completed, the state highway commissioner shall immediately ascertain the cost and expense

thereof, and apportion the same to the state, county, township or townships and abutting property owners.

This section further provides that he shall certify the total cost and expense of the improvement and his apportionment thereof either to the county commissioners or to the trustees of the township. It seems to me that this section clearly indicates that the total amount of, say, $25,000 in the case used for illustration, would be apportioned among the state, the county, the township and the property owners in accordance with the provisions of the statutes and in accordance with the agreement of the county commissioners with the state highway commissioner. It isn't the $20,000, the original contract price that is to be apportioned, because that isn't the total cost and expense of the improvement; neither is it the estimated cost and expense of the improvement which is to be apportioned, but it is the total cost and expense of the improvement.

If this were not the theory upon which the General Assembly enacted this law, why did it provide that the apportionment should not be made until the contract was fully completed? If the estimated cost was to be used as a basis of apportionment the apportionment could be made as soon as the plans, specifications and estimates of the improvement were made. If the contract price of the improvement were to be used as the basis of the apportionment, then the apportionment could be made as soon as the contract was entered into; but such is not the provision of the statute. The apportionment is to be made when the contract is fully completed, and then whatever the cost may be to the state, the amount is apportioned among the different parties according to law, and according to the agreement entered into by and between the county commissioners and the state of Ohio.

I might call attention to the provisions of the White-Mulcahy law, which is found in Section 1214 General Code, and reads as follows:

> "The county commissioners or township trustees upon whose application the improvement is made shall cause the county surveyor to make a tentative apportionment of the amount to be paid by the owners of the property specially assessed which apportionment shall be made according to the benefits accruing to the land so located. The county surveyor shall file such apportionment with the county commissioners or township trustees for the inspection of the persons interested. Before adopting the estimate so made and reported the commissioners or trustees shall publish once each week for two consecutive weeks in some newspaper published in the county and of general circulation in the township where the improvement is located notice that such estimated assessment has been made and that the same is on file in the office of the county commissioners or with the township trustees and the date when objection, if any, will be heard to such assessment."

Here we find a provision for an apportionment among the property owners before the completion of the improvement, but this provision clearly indicates that the apportionment so made is merely a provisional or conjectural apportionment and not a final apportionment, and this because the word "tentative" is used.

So that I do not think this provision in any wise modifies the conclusion to which I have come, and which I have indicated above. Let us then in concluding the answer to your first question take again the illustrative example set out above.

The state highway commissioner has paid out $5,000 more than the contract price in order to complete the road under the provisions of Section 1209. The next step he would be compelled to take would be to endeavor to recover on the bond. If he succeeded in recovering the full amount of $5,000, then he would apportion

the $20,000 among the parties in interest. If he fails in recovering any amount from the contractor and his surety, then he would apportion the full amount of $25,000 among the parties in interest. If he recover any part of the $5,000 from the contractor and his surety, then he would reduce the $25,000 by the amount so recovered and apportion the balance among the parties interested, namely, the state, the county, the township and the property owners.

The answer I have given to your first question makes the answer to your second comparatively simple. The contractor and his surety under the bond is liable for the difference between the contract price and the total cost and expense of the improvement to the state. Hence, if the state highway commissioner pays out engineering and inspection fees after he has taken the same over under the provisions of Section 1209 General Code, the amount so paid would be a part of the total cost and expense of the improvement, and would be collectible as against the contractor and his surety. To be sure, this would include only money actually paid out. Services rendered by the county surveyor himself or by the engineering department connected with the state highway commissioner's office would be rendered the same after the contract was taken over by the state as before it was taken over, and no charge could be included for services so rendered.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

1648.

COUNTY TREASURER—MAY BE MANDAMUSED TO PUBLISH TAX RATE.

The county treasurer may be compelled by mandamus to make the publication of the tax rate in two newspapers as provided in Section 2648 and 6252 G. C.

COLUMBUS, OHIO, December 26, 1918.

HON C. M. CALDWELL, *Prosecuting Attorney, Waverly, Ohio.*

DEAR SIR:—I have your letter of November 28, 1918, as follows:

> "Referring to Section 2648 and 6252 G. C. Section 2648 specifically commands the county treasurer to publish the rates of taxation in 'a newspaper having general circulation, etc.'
>
> Section 6252 provides that such notices shall be inserted in *two newspapers,* but does not state *who* shall cause the publication to be made.
>
> Suppose the county treasurer inserts such notice in one newspaper, as provided by Section 2648, and declines to insert in two papers. Can he be compelled by mandamus, or otherwise, to cause it to be published in two papers?
>
> I am familiar with the decisions holding the two sections mentioned to be in *pari materia;* also, that Section 6252 is supplemental to Section 2648.
>
> So it is not necessary to go into these. Your Opinion No. 1024, given February 20, 1918, also covers the two statutes mentioned thoroughly, but does not answer the question as to whether mandamus would lie. It is this one question on which I now wish your opinion, and would like to have any authorities you may care to cite.

I might state the question a little differently, thus:

Where a statute provides generally that a thing shall be done, but does not state who shall do it, and another statute specifically commands an officer to do a certain thing (as in Section 2648), will not the specific provisions govern as against the general provisions? And would not mandamus lie under Section 2648, and fail under Section 6252?"

Sections 2648 and 6252 of the General Code read:

Section 2648.—"Upon receiving from the county auditor a duplicate of taxes assessed upon the property of the county, the county treasurer shall immediately cause notice thereof to be posted in three places in each township of the county, one of which shall be at the place of holding elections in such township, and also be inserted for six successive weeks in a newspaper having a general circulation in the county. Such notice shall specify particularly the amount of taxes levied on the duplicate for the support of the state government, the payment of interest and principal of the public debt, the support of state common schools, defraying county expenses, repairing of roads, keeping the poor, building of bridges, township expenses and for each other object for which taxes may be levied on each dollar valuation."

Section 6252.—"A proclamation for an election, an order fixing the times of holding court, notice of the rates of taxation, bridge and pike notices, notice to contractors and such other advertisements of general interest to the taxpayers as the auditor, treasurer, probate judge or commissioners may deem proper, shall be published in two newspapers of opposition politics at the county seat, if there be such newspapers published thereat. In counties having cities of eight thousand inhabitants or more, not the county seat of such counties, additional publication of such notices shall be made in two newspapers of opposite politics in such city. This chapter shall not apply to the publication of notices of delinquent tax and forfeited land sales."

In an opinion rendered to you under date of February 20, 1918, various cases and opinions relative to the relations of the two foregoing sections are discussed, and it was held that "the publication of the rates of taxation shall be made in two newspapers of opposite politics at the county seat, if there was such newspaper published thereat, as provided in Section 6252 G. C., and that such publication shall be made for six successive weeks as provided in Section 2648 G. C." It will be seen from a reading of these decisions and opinions that Section 6252 is supplemental to Section 2648 and that the two sections are in *pari materia,* and are to be read and construed together. This being so, a mandamus proceeding to compel the county treasurer to publish the tax rate would not be brought under either one of the sections separately, but by virtue of the provisions of both sections, since the two sections must be read and construed together to determine the treasurer's duty.

In the case of State of Ohio ex rel. vs. Board of County Commissioners of Preble county, 4 O. N. P., p. 180, application was made by the owners of a newspaper for a peremptory writ of mandamus against the board of county commissioners to compel the commissioners to deliver to the newspaper for publication in their paper the commissioners' financial statement, together with a report of the examiners, as was required by Section 917 R. S. The relators set out in their petition that they were proprietors of the Eaton Weekly Democrat; that there were

but two different political parties in the county having a paper published therein and that the paper of the relators was the only Democratic paper printed in the county. The relators further set out that they were taxpayers in the county, both as a firm and individuals. The commissioners maintain that the relators had no capacity to sue or maintain the action and the court said on this point:

> "Clearly, the object and purpose of Section 917 is to provide a way through which the public generally shall be informed as to the manner the commissioners have conducted the business of the county. In the performance of this duty of furnishing this information as to the receipts and expenditures of the county, each citizen and taxpayer is interested, but not differently from any other citizen.
>
> While the performance of this duty may incidentally result to the material benefit and profit of the printers of weekly newspapers, the law does not and could not give to the printers of newspapers any contractual right in the printing.
>
> The duty imposed upon the commissioners is to cause the report to be printed. The purpose of the printing is information to the public, and not to furnish employment for the printer.
>
> The purpose of the law being to give information to the public, each member of the public is alike interested in it and the duty to furnish the information; and hence, the duty of the commissioners to cause the report to be printed, is purely a public duty. The interest of publishers of newspapers is purely incidental.
>
> The relators aver that there are only two political parties in Preble county having a paper published therein; that the paper printed by them is the recognized organ of the Democratic party, and is the only Democratic paper printed and published in the county, and for this reason they have such a special interest in the publication of the report as to enable them to maintain this suit.
>
> This allegation, in substance, admits that if there were two Democratic organs printed in the county, that they, the relators, by reason of their being publishers of one, would have no special and forcible right to the report. And we do not think that the accident in not having more than one organ in the county adds anything to their rights.
>
> The question must be determined by the primary object of the duty enjoined by the statute, and being of the opinion that the duty enjoined upon the commissioners by this statute is purely a public duty, the relators are not the proper parties to invoke the aid of mandamus, and the demurrer must be sustained."

This case followed the view expressed by Judge Shauck in State ex rel. vs. Murphy, 3 C. C., 332, in which case Judge Shauck, quoting from Bobbett vs. State, 10 Kas., 9, said:

> "All citizens are in a certain sense interested in a proper discharge of their duties by public officers, but it is not such an interest as will enable each citizen to describe himself as 'the party beneficially interested.' The party beneficially interested in the discharge of a purely public duty is the public. These considerations all point to the conclusion that a private citizen may not invoke the aid of mandamus to compel the performance of a purely public duty."

Practically the same view was taken in a comparatively recent case of State ex rel. vs. Branson, county treasurer, 12 O. N .P. (n. s.) 590, in which it was held:

> "Mandamus to compel public officials to perform duties required by law can be instituted only by a public officer whose duty it is to enforce the performance of official duty by other officers and by other relators having a direct beneficial interest, or where the public injury will be serious if the duty be not performed, or the proper public officer refuses to bring such proceedings; and hence a mandatory order to compel publication by the county treasurer of the rates of taxation, does not lie upon application of a publisher having no contract to publish the same, notwithstanding relator may own the only newspaper printed in the German language in the county able to qualify under General Code, 2648, 6253."

In that case the court said:

> "In the present case the relator has no right to publish the commissioners' report until the proper contract has been made. It has no interest in this matter except as a taxpayer, and as such can not bring this action to compel the officials in question to do their duty. Such an action must be brought by a public official whose duty it is to enforce official duty on other officials.
>
> To allow any taxpayer to bring proceedings in mandamus against an official whom he judges is not following his legal duty, would open a fruitful field for annoyance of public officials, and unwise and unnecessary multiplicity of suits. The more orderly way is to leave the instituting of these extraordinary proceedings to the officers clothed by law with the authority to determine when the writ of mandamus should be invoked and to institute the proper proceedings to secure its aid in enforcing official duty."

In the case of State ex rel. Carpenter vs. Fayette county, 22 O. C. C., 433, it was held:

> "Mandamus will lie to compel county commissioners to make the necessary itemized and detailed report of their financial transactions of the preceding year as required by Section 917 R. S., as amended 94 O. L., 400, on the application of publishers of newspapers having the necessary circulation to entitle them to such publication and as taxpayers. It need not be by a public officer. The publishers of newspapers have an individual interest, independent of the public, viz., the right to publish the report, and the benefits derived from the increase of the report in that it increases their fees for publication, upon which they are entitled to maintain the action."

It will be seen from these decisions that there is a conflict of authority in Ohio as to whether an action in mandamus could be brought, in such case as you present, by a taxpayer or the publisher of a newspaper entitled to make the publication. However, all the authorities are agreed that mandamus will lie to compel the publication and that the action can be brought by the proper public officer.

In the case of State ex rel. Monnett, Attorney-General vs. Board of County Commissioners of Preble county, 4 O. N. P., p. 177, it was held that in an action compelling the county commissioners to make a detailed report in writing

of their financial transactions, as was required by Sections 917 R. S., the state being the party financially interested, the attorney-general or prosecuting attorney are proper officers to prosecute the action. The court, after stating that the "party beneficially interested," where the duty sought to be enforced is a purely public duty, is the public, concludes that a suit invoking the aid of mandamus to compel the performance of the duty, must be prosecuted in the name of some public officer charged with the duty of seeing that the laws are executed. The court then concludes:

> "The attorney-general of the state, as well as the prosecuting attorney of the county, are such officers charged with the duty of seeing that the laws of the state are executed."

The court adds that it is sustained in its view by numerous reported cases where mandamus proceedings have been prosecuted in the name of these officials, which long continued practice has been acquiesced in both by the bar and the courts.

In view of the above quoted authorities, it is my conclusion that in the case you present mandamus will lie to compel the county treasurer to make the second publication and that such mandamus proceeding would properly be instituted by the prosecuting attorney.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1649.

APPROVAL OF BOND ISSUE OF DELAWARE COUNTY, OHIO—$21,750.00.

COLUMBUS, OHIO, December 26, 1918.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

> In Re: Bonds of Delaware county, Ohio, in the sum of $21,750.00, in anticipation of the collection of assessments for the improvement of certain designated single county ditches therein.

I have carefully examined the transcript submitted of the proceedings of the board of county commissioners and of other officers of Delaware county, Ohio, relating to the above issue of bonds and find said proceedings to be in conformity to the provisions of the General Code of Ohio relative to bond issues of this kind.

I am therefore of the opinion that properly prepared bonds covering said issue will, when the same are properly executed and delivered, constitute valid and binding obligations of said county, to be paid in accordance with the terms thereof.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1650.

APPROVAL OF BOND ISSUE OF BEDFORD VILLAGE SCHOOL DISTRICT—$40,000.00.

COLUMBUS, OHIO, December 27, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In Re: Bonds of Bedford Village School district in the sum of $40,000.00 for the purpose of completing and equipping and repairing school building in said school district.

I have carefully examined the corrected transcript of th proceedings of the board of education of Bedford Village School district relating to the above issue of bonds, and find said proceedings to be in conformity to the provisions of the General Code of Ohio relating to bond issues of this kind.

I am therefore of the opinion that properly prepared bonds covering said issue will, when the same are executed and delivered, constitute valid and binding obligations of said school district, to be paid in accordance with the terms thereof.

Yours very truly,

JOSEPH MCGHEE,

Attorney-General.

1651.

APPROVAL OF LEASES OF CANAL LANDS TO THE NORFOLK & WESTERN RAILWAY COMPANY, JENNIE FRAHM AND W. H. HAYDEN.

COLUMBUS, OHIO, December 28, 1918.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of December 21, 1918, in which you enclose for my approval three leases of canal lands, in triplicate, as follows:

	Valuation.
To Norfolk & Western Railway company, Portsmouth, Ohio, crossing over the Ohio canal at Lockbourne, Ohio	$400 00
To Jennie Frahm, Celina, Ohio, a small tract of land on the south shore of Lake St. Marys, for agricultural purposes	250 00
To W. H. Hayden, Columbus, Ohio, small tract of land on the south shore of Buckeye lake, for landing and agricultural purposes	100 00

I have carefully examined said leases and find them correct in form and legal, and am therefore returning the same to you with my approval endorsed thereon.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1652.

APPROVAL OF ABSTRACT OF TITLE TO LOTS NOS. 61, 64, 74 AND 76 OF WOOD BROWN PLACE ADDITION, COLUMBUS, OHIO.

COLUMBUS, OHIO, December 28, 1918.

HON. CARL E. STEEB, *Secretary Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—I am in receipt of abstract of title covering lots of lands located in the city of Columbus, county of Franklin, State of Ohio, and described as follows:

> "Being lots number sixty-one (61), sixty-four (64), seventy-four (74) and seventy-six (76) of Wood Brown Place addition as the same are numbered and delineated upon the recorded plat thereof, of record in plat book 5, page 196, recorder's office, Franklin county, Ohio."

I have examined said abstract and find no material defects in chain of title to said premises as disclosed thereby.

In reference to said lots said abstract does not show any liens or encumbrances on said property, except the taxes for the year 1918 which are small in amount and still unpaid.

I am, therefore, of the opinion that said abstract discloses on December 21, 1918, a good title in said lots sixty-one (61), sixty-four (64), seventy-four (74) and seventy-six (76) in George H. R. Tyler.

While I have passed favorably on the title to these lots I desire to call attention to one matter connected with the title to lots seventy-four (74) and seventy-six (76). On December 17, 1898, Theo. E. Ebright began action in attachment against Daniel W. Brown, trustee, who was at that time owner of lots seventy-four (74) and seventy-six (76). On December 17, 1898, an affidavit for attachment was filed to the effect that the defendant was a non-resident of the state of Ohio. On December 17, 1898, an affidavit was filed for service by publication upon the defendant stating that he resided in the state of Arizona and that his residence was not known and could not with reasonable diligence be ascertained. This affidavit for service by publication was sufficient under the statute, but the affidavit for attachment was not sufficient in that it merely alleged that defendant was a non-resident of the state of Ohio; so that on December 24th, 1898, an additional affidavit for attachment was filed setting out that the defendant was not only not a resident of the state of Ohio, but that he absconded to defraud his creditors. This brought it within the statute providing for attachment. On the same day an additional affidavit for service by publication was made containing the same allegations as the first affidavit for publication, but those affidavits were filed after the first insertion of the notice was made in a newspaper. The question might arise as to whether this would be good service upon the defendant, but inasmuch as the first affidavit insofar as it applied to service by publication was good, and only the affidavit for attachment was defective, it is my opinion that the above irregularity would not in any way vitiate the service by publication and that due service was had upon the defendant and that all proceedings in reference to said suit were regular. Hence, I conclude as above set out.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1653.

APPROVAL OF BOND ISSUE OF VILLAGE OF CORTLAND, OHIO—$3,500.

COLUMBUS, OHIO, December 31, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In Re: Bonds of the village of Cortland, Ohio, in the sum of $3,500 for the purpose of providing a fund for the purchase of certain fire apparatus.

Under date of December 7, 1918, I addressed an opinion to you disapproving the above issue of bonds for the reason that the amount of said bonds exceeded the amount of bonds which the council of the village was authorized to issue during the current fiscal year without a vote of the electors, on the tax duplicate valuation of taxable real and personal property in the village, which was stated in the transcript as being $674,560.00.

After this opinion was addressed to you I received a communication from the solicitor of the village advising that the statement in the transcript with respect to the tax duplicate valuation of the taxable real and personal property in the village was a mistake and I am now in receipt of an affidavit of the deputy auditor of Trumbull county advising that as a matter of fact such tax duplicate valuation is $961,950.00. This new statement of fact, which is made a part of the transcript, obviates the objection voiced in the opinion above referred to, and inasmuch as no other objections to the validity of the proceedings relating to this bond issue appear on a consideration of the transcript, I am of the opinion that said proceedings are in conformity to the provisions of the General Code of Ohio relating to bond issues of this kind and that properly prepared bonds covering said issue will, when the same are executed and delivered, constitute valid and binding obligations of said village to be paid in accordance with the terms thereof.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1654.

WORKMEN'S COMPENSATION ACT—RULE 14 OF INDUSTRIAL COMMISSION NOT WARRANTED.

Rule 14 of the Industrial Commission of Ohio, relating to self-insuring employers, which in effect provides for an ex-parte investigation of each industrial accident occurring in the establishment of such non-insuring employer and the issuance of orders compelling such non-insuring employer to pay the proper compensation to the injured workman or his dependents in case of death, is not warranted by the Workmen's Compensation act; the only way in which the Industrial Commission can properly acquire jurisdiction directly to order the payment of compensation in case of industrial accidents occurring in the establishment of non-insuring employers is upon complaint or application filed by the workman or his dependents under what is known as Section 27 of the Workmen's Compensation act.

But the commission does have continuing supervision over non-insuring employers and their conduct under the law for the purpose of periodically determining their fitness to continue to carry their own insurance, and for this purpose the commission may make such investigation as it sees fit to determine whether or not a particular self-insuring employer is complying with the law in the payment of compensation.

COLUMBUS, OHIO, December 31, 1918.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In Re: Claim No. 20,690, Section 22, Dan O'Brien, deceased.

I am in receipt of your letter of recent date with respect to the above entitled claim, which raises a question of general importance as shown by the following quotation from your letter:

"The facts in this case are that one Dan O'Brien was killed while in the course of his employment with the Warren City Tank and Boiler company, January 26, 1916. At the time of his death he was earning a weekly wage of $13.50. He was 25 years of age and unmarried. The employer had elected to carry its own insurance under the provisions of Section 22 of the Compensation law.

The employing company filed a first notice of death , our form C-51, February 9, 1916. Deceased's mother as administratrix of his estate filed a civil action for damages in the court of common pleas of Trumbull county, Ohio, April 8, 1916, alleging that the deceased's death had been caused by the *negligence* of the employing company, and that she and deceased's father had been damaged in the sum of $20,000.00. The employer filed a motion to require plaintiff to make the petition more definite and certain.

The motion was overruled by the court and the employer given leave to answer, but no answer was filed.

The commission received from the employer a final report of accident, our Form C-61, February 28, 1918, the only statement being:

'The widow (apparently meaning the mother) of the deceased refused to accept compensation and brought suit against the employer.'

The employer further provided the information that the civil action for damages above mentioned was terminated by the jury returning a verdict against the employer in the sum of $1,050.00. This amount, we may assume, was paid by the employer.

The 'Final Report of Accident and Payment,' our Form C-61, was presented to the commission for its approval under the practice prescribed by rule 14 of the rules of the commission applicable to claims arising under the provisions of Section 22 of the Compensation law, which is as follows:

'Upon receipt of Final Report, as provided for in rule 13 hereof, the same shall be examined and if found to provide for the payment of compensation, etc., in accordance with the provisions of the Compensation act, the award shown therein shall be approved by the commission.

In the event the award shown on said Final Report is not in accord with the provisions of said act, notice of such fact shall be given to the employer forthwith, and it shall be the duty of such employer to immediately pay such award as may be indicated by said notice and to file corrected Final Report.'

During the commission's consideration of the final report, it is apparent that no means had been provided for determining whether deceased's dependents had received compensation equal to that provided by the terms of the Compensation act, and the question arose whether the commission, in view of the civil action for damages, had jurisdiction to investigate and determine whether the proper amount of compensation had been paid, and whether it could lawfully make an order requiring payment of the proper amount of compensation. It was upon this question that your opinion was requested.

You may assume that the civil action above mentioned was founded merely upon negligence, and did not involve the violation of a lawful requirement pertaining to the safety of employes; also, that there was no allegation that deceased's injury was occassioned by the wilful act of the employer or any of its agents.

Your opinion will be of assistance to the commission not only in the above entitled case, but also in several others involving the same question."

You really ask two questions: First, as to whether the commission has jurisdiction to investigate and determine whether or not in the case mentioned a proper amount of compensation had been paid; and, second, whether the commission could lawfully make an order requiring payment of the proper amount of compensation. In my opinion the commission is without jurisdiction on its own motion to inquire into the payments made by a self-insurer to his injured and the dependents of his killed employes, or to make an effective order compelling the payment of the proper compensation in such cases except for the purpose of determining whether or not the self-insurer should be allowed the privilege of self-insurance for the next premium paying period, and perhaps as a condition of his being allowed such privilege.

It is true that under Section 1465-72 General Code it is the plain duty of such self-insurer to "pay to such injured employes, or to the dependents of employes who have been killed in the course of their employment, * * * the compensation * * * as would have been paid and furnished by virtue of this act under a similar state of facts, by the state liability board of awards out of the state insurance fund, in case said employer had paid the premium * * * into said fund." But while the duty exists, it does not therefore follow that the Industrial Commission, as the State Liability Board of Awards, has any right or power to see that it is discharged. The law might provide other means of securing the performance of this duty than through agency of the Industrial Commission. Therefore we must look elsewhere in the act to find just what function is to be performed by the commission in case this duty is not properly discharged. I find full provision on this subject in Section 1465-74 of the General Code, which provides in part as follows:

"* * * any employe whose employer has elected to pay compensation to his injured, or to the dependents of his killed employes in accordance with the provisions of Section twenty-two hereof (Section 1465-69 G. C., supra), may, in the event of the failure of his employer to so pay such compensation or furnish such medical, surgical, nursing and hospital services and attention or funeral expenses, file his application with the state liability board of awards for the purpose of having the amount of such compensation and such medical, surgical, nursing and hospital services and attention or funeral expenses determined; and thereupon like proceedings shall be had before the board and with like effect as hereinbefore provided" (with respect to the case of employers who fail to comply in any respect with the provisions of the Workmen's Compensation act and elections by their employes to secure compensation in lieu of damages.)

> And the state liability board of awards shall adopt and publish rules and regulations governing the procedure before the board provided in this section, and shall prescribe forms of notices and the mode and manner of serving the same in all claims for compensation arising under this section. * * *."

This provision makes it reasonably clear that the relation, so to speak, of the Industrial Commission to the self-insuring employer is exactly the same with respect to the enforcement of the payment of proper compensation as is its relation to the non-insuring employer; that is to say, in a single section—popularly called Section 27—the Industrial Commission is authorized to proceed in exactly the same way in the case of an employe of a non-insuring employer who has elected to claim compensation instead of damages and in the case of an employe of a self-insuring employer who complains that such employer has not paid the proper compensation.

If it were the duty or the power of the Industrial Commission to act on its own motion in such cases upon receipt of the accident reports and final reports prescribed by its rules, there would be no necessity for any such provision as that last above quoted. The fact that there is such a provision in the statute is evidence enough to satisfy me that the legislature did not intend that the Industrial Commission should have any such power as your question seems to assume that it has. In fact, we are dealing with a statute which confers a species of administrative jurisdiction upon the Industrial Commission, which is the creature of statute; that is to say, we have in the latter part of Section 27 a grant of power to the Industrial Commission to make an order which shall affect the legal rights and pecuniary interests of a citizen. Statutes containing such grants of power are peculiarly subject to the operation of the rule of construction to the effect that the expression of one thing is the exclusion of all others. Hence I am clearly of the opinion that the only way in which the Industrial Commission can directly enforce the payment of the proper compensation by a self-insuring employer is upon application of the injured employe or his dependents. So that if the self-insuring employer should make a settlement with the injured employe or his dependents whereby they were to receive a lesser amount than the proper compensation which it is the duty of the employer to pay in such case, and the employe or his dependents, as the case might be, should be satisfied with such settlement and take no steps to complain thereof by application to the Industrial Commission, that would be the end of the matter so far as the payment of compensation in that case were concerned. It would simply be no concern of the Industrial Commission that due compensation had not been paid.

In arriving at this conclusion I have not been unmindful of the broad power of the Industrial Commission to adopt rules to govern it in the administration of the Workmen's Compensation act. For example, I have noted Section 1465-44 giving to the commission the authority, among other things, to adopt rules governing the nature and extent of the proofs and evidence, etc., to establish the right to benefits from the state insurance fund and the forms of application of those claiming to be entitled to benefits or compensation from the state insurance fund. Admitting that the phrase "the state insurance fund" is broad enough to include the bond liability of self-insurers—a conclusion apparently reached by the supreme court in a recent case involving the interpretation of a like phrase which occurs in Section 1465-90 of the General Code—yet the authority to adopt rules found in Section 1465-44 extends only to the regulation of the nature and extent of proof to establish the right to benefits and the regulation of the forms of application, etc. It does not extend to the adoption of a rule by which the Industrial Commission might confer upon itself power to intervene in a matter which under the statutes might be no concern of its.

So also with respect to Section 1465-55 which gives to the state liability board of awards the power to

> "adopt rules and regulations with respect to the collection, maintenance and disbursement of the state insurance fund."

I find it impossible to accept the principle of the decision of the supreme court to which I have referred as applicable to the interpretation of this section. Obviously the phrase "state insurance fund" here used is a thing that is to be collected, maintained and disbursed. It must refer to the fund that is to be in the custody of the treasurer of state subject to disbursement on voucher, etc.—something that is to be collected before it is to be disbursed. Especially in view of the express provision of Section 27 and the operation of the principle of statutory interpretation which I have mentioned in connection with that express provision, I can reach no other conclusion than that Section 1465-55 does not confer upon the commission authority to take any active steps directly to force a self-insuring employer to pay the proper compensation to his employe.

I do not find in the statute any other provision authorizing the adoption of rules such as your rule 14 as you have quoted it, excepting the specific one which you apparently cite as authority for the adoption of the rule, viz: Section 1465-69 G. C. (Section 22 of the act). That section provides, in part, as follows:

> "* * * such employers who will abide by the rules of the State Liability Board of Awards and as may be of sufficient financial ability or credit to render certain the payment of compensation to injured employes or to the dependents of killed employes, and the furnishing of medical, surgical, nursing and hospital attention and services and medicines, and funeral expenses equal to or greater than is provided for in this act. * * * may, upon a finding of such facts by the State Liability Board of Awards elect to pay individually * * * such compensation, and furnish such medical, surgical, nursing and hospital services and attention and funeral expenses directly to such injured or the dependents of such killed employes; * * and said board shall make and publish rules and regulations governing the mode and manner of making application and the nature and extent of the proof required to justify such finding of facts by the board as to permit such election * * * one of which rules shall provide that all employers electing directly to compensate their injured and the dependents of their killed employes as hereinbefore provided, shall pay into the state insurance fund such amount or amounts as are required to be credited to the surplus * * *."

In connection with this section it is to be observed that the rules and regulations which the board is to make are to govern the mode and manner of making application for permission to carry one's own insurance and the nature and extent of the proof required to justify a finding of facts by the board so as to permit such election. Your rule 14, if it is to be justified at all, can only be supported as a means of advising the commission as to the degree to which self-insurers are following the law. The only action the commission can take under Section 22 is to refuse to the employer the privilege of electing to carry his own insurance.

In view of the conclusions which I have previously expressed, I have not gone into the interesting question respecting the situation of the dependents of the killed employe in the case inquired about should they decide to apply to the Industrial Commission under Section 27; nor have I considered the question as to

whether such conduct on the part of the employer and the dependents as is described in your letter would amount to such a violation of the spirit of the law as to enable the commission to find as a fact that the employer in question is not of "sufficient financial ability or credit to render certain the payment of compensation to injured employes, etc.", or is not one who "will abide by the rules of the state liability board of awards." I may say, however, that I interpret the phrase last quoted rather liberally and, as previously intimated, I have no hesitancy in advising the Industrial Commission that any employer who by any scheme of overreaching might evince a disposition to avoid the payment of proper compensation might lawfully be denied the privilege of carrying his own insurance for the succeeding premium paying period.

If the commission wishes further advice on this feature of the question I should be glad to give it. I stop here, however, because I desire to make it clear that in my opinion rule 14 of the commission governing self-insuring employers, if intended to enable the commission directly to compel a self-insuring employer to pay the proper amount of compensation in each case without any application being made to the commission under Section 27 by the employe or his dependents, is illegal and void under the statutes as they now exist. This conclusion leads to the following answers to your specific questions:

(1) The commission may investigate and determine whether the proper amount of compensation was paid in this case for the purpose only of making up its mind whether or not the employer has complied with the rules of the commission, as bearing upon its fitness to continue as a self-insurer.

(2) The commission may not in any real sense determine the amount of compensation in this case, nor may it make any order requiring the payment of any amount of compensation unless the dependents of the killed employe file an application under Section 27 of the Workmen's Compensation act for this purpose; but the commission may, in my opinion, require the payment of proper compensation in any given case in which no application has been made under Section 27 as a guarantee of trustworthiness under Section 22 of the act, and hence as a condition of being allowed to continue as a self-insurer under the terms of that section. As to whether or not such an order ought to be made in the case inquired about I express no opinion, but shall be glad to consider this point if advised that the commission would make such an order for such a purpose.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1655.

STATE HIGHWAY COMMISSIONER—CANNOT ACCEPT PART OF ROAD IMPROVED.

Under the provisions of Section 1212 *G. C.* (106 *O. L.* 636), *the state highway commissioner can not accept a part of a road included in a contract, pay the full contract price for the particular part completed and relieve the contractor from all obligations in connection therewith.*

COLUMBUS, OHIO, December 31, 1918.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication in reference to the contract for the construction of Section M, I. C. H. No. 3, Cleveland-Sandusky road, Lorain county, which reads in part as follows:

"I am quoting hereunder entry upon the journal of the Highway Advisory board as of September 24, 1918:

'Lorain County—Section "M", I. C. H. No. 3, Cleveland-Sandusky road—contractor requests that state accept west half of improvement.

Mr. Hahn, representing Mr. Sigmund Korach, together with Mr. Korach, and Mr. Donnelly of The Utilities Contracting Co., were present, and Mr. Hahn narrated the incidents relating to the improvement of Section "M", Inter-county highway No. 3, Cleveland-Sandusky road, Lorain county, from the date of contract with The Public Contracting Co., in May, 1916, to the present. Mr. Hahn dwelt upon the fact that Mr. Sigmund Korach was persuaded by Mr. Nathan Siegel, practically the sole owner of The Public Contracting Co., to reindemnify the surety on the bond of The Public Contracting Co. for the above mentioned improvement and that Mr. Korach's losses as a result of said reindemnification and owing to conditions disadvantageous to the contractor, were about $75,000.00.

Mr. Hahn stated that the contract for the above mentioned improvement consists of a nine mile stretch beginning at the city limits of Lorain and extending easterly to the Cuyahoga county line, and stated further that the road practically divides itself into two lengths of almost equal size, that the work on the westerly half of the road has practically been completed with the exception of the bermes and ditches.

Mr. Hahn requested that the State Highway department accept the westerly section of the road lying between the Steve-Moore road on the east and the Lorain city limits on the west, subject to the requirements that the contractor complete the bermes and ditches. Such action on the part of the state, Mr. Hahn stated, would release a considerable sum of money which is needed to help complete the eastern section of the road and would release the contractor from responsibility owing to the traffic which now passes over the westerly half of the road. * * *.'"

You ask me to advise you what action may be taken by your department in response to the request of the above mentioned contractor.

Briefly stated, the facts are as follows:

1. The Public Contracting Co. entered into a contract with the state highway commissioner in May, 1916, for the construction of the above designated road. The National Surety Co. signed the bond which is required by law, in favor of The Public Contracting Co., but before so doing a friend of the principal stockholder of The Public Contracting Co. signed an indemnity bond in favor of the National Surety Co.

The improvement of this road did not progress as well as the parties interested had hoped, due mainly to a rise in the price of material and in the cost of labor, and up to the present time Mr. Sigmund Korach, who signed the indemnity bond for the National Surety Co., has already paid $86,000.00 on the improvement and to keep the same moving.

2. The road to be improved is about nine miles in length and naturally divides itself into two parts of almost equal length, each part being about four and one-half miles long. The one part is practically complete and is being used by the public for travel. Furthermore, the part that is complete connects with another road which gives easy access to the city of Cleveland by making a little detour.

The contractor is in need of more funds with which to prosecute the work yet to be done upon this improvement and Mr. Korach asks if it would be possible for the state to pay to the contractor the full half of the contract price and ac-

cept the half of the road as fully completed and thus relieve the contractor from further responsibility, and what is more, give him funds with which he might be able to complete the road without further loss to the contractor and especially to Mr. Korach himself.

The facts in this case are so much in favor of Mr. Korach, when viewed from an equitable standpoint, that I have withheld an answer, hoping that the highway department might be able to work out a plan by which in equity it could pay the contractor the full contract price for the half of the road completed.

When viewed under strictly legal principles, it seems impossible for me to advise that the law will permit the carrying out of the above request. This contract was let under the Cass Highway act and so the provisions of that act apply. The particular provision of that act which applies is found in Section 1212 G. C., which reads as follows: (106 O. L. 636)

> "Section 1212.—* * * The payment of the cost of the construction of such improvement shall be made as the work progresses upon estimates made by the engineer in charge of such improvement, and upon approval of the state highway commissioner. No payment by the state, county or township, on account of a contract for any improvement under this chapter shall, before the completion of said contract, exceed eighty-five per cent. of the value of the work performed to the date of such payment. Fifteen per cent. of the value of the work performed shall be held until the final completion of the contract in accordance with the plans and specifications."

This section clearly provides that no payment by the state, on account of a contract for any improvement, shall, before the completion of said contract, exceed eighty-five per cent. of the value of the work performed to the date of such payment, and to make it absolutely clear what the legislature had in mind, it further provided that fifteen per cent. of the value of the work performed shall be held *"until the final completion of the contract* in accordance with the plans and specifications."

It goes without argument that the construction of said nine miles of road was let in one contract. It was not two contracts, each one providing for the construction of four and one half miles of road; neither is it one contract for two sections of road of four and one-half miles each; but it is a contract for the construction of nine miles of road as a whole.

The statute provides that no more than eighty-five per cent of an estimate made at any time shall be paid to the contractor before the work is fully completed and that fifteen per cent. of the value of the work must be retained until the final completion of the contract. The meaning of these provisions is so evident that one would have to ignore them entirely to arrive at a conclusion that the state may pay one-half of the contract price to the contractor upon his having completed half the mileage involved in the contract, thus paying him the fifteen per cent. as well as the eighty-five per cent. which the statute provides must be retained until the final completion of the work.

There is another matter to which I will direct your attention. However, I do not consider this suggestion as vital as the one above referred to. The contract contained the following provision:

> "Until final acceptance by the commissioner, the work shall be under the contractor's charge and care, and he shall take every necessary precaution against accident or injury to the improvement or any part thereof, by the action of the elements or from any other cause whatsoever, whether

arising from the execution or non-execution of the work. The contractor shall rebuild, repair, restore and make good, at his own expense, all injuries, or damages to any portions of the work occasioned by accidental causes, or by the action of the elements or from any causes whatsoever, before the final acceptance of the work by the commissioner. The contractor shall hold the state and county harmless from any claims for injuries to structures or from any damage to persons or property occasioned by any neglect, default, want of proper care, or misconduct on the part of the contractor or any one in his employ, during the continuance of this contract."

This provision was evidently inserted with the intention that the contractor would be responsible as therein set out, until the state accepted the work as being fully completed. However, one might with a fairly liberal construction be able to construe this provision in favor of the contractor and the indemnitor of the surety company, but as said before, it is not possible to construe the provisions of the above section of the General Code in favor of the contractor and his indemnitor.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1656.

OFFICES COMPATIBLE—CONTRACTOR WITH STATE HIGHWAY DEPARTMENT AND LEGISLATOR.

A person holding a contract with the state of Ohio for the construction of a highway may qualify as a member of the General Assembly and hold office therein and still retain the benefits of his contract with the state. Neither Section 4 of Article II of the Constitution nor Section 15 G. C. would prohibit this.

COLUMBUS, OHIO, December 31, 1918.

HON. GEORGE S. YORK, *Member of the General Assembly, Greenville, Ohio.*

DEAR SIR:—I have your communication which reads as follows:

"I have been elected to the General Assembly, as a member from Darke county, Ohio, having been elected at the general election in November, 1918.

I wish to have your opinion whether there is anything in my occupation or work which will in any way conflict with any of the laws of the state, or which will in any way affect my status as a member of the new General Assembly. The situation is as follows:

In partnership with one E. E. Studabaker, under the firm name of York and Studebaker, in October, 1917, we bid for and were awarded a contract for building a section of state highway, under the state highway department. This work is still uncompleted, there being three or four weeks work yet to perform.

Kindly inform me whether there is anything arising from this contractual relation with one branch of the state work, which would affect

my status as a member of the assembly, or which would in any way conflict with any laws of the state."

We will first consider the constitutional provision which pertains to the office of member of the general assembly in reference to the matter about which you inquire. Section 4 of Article II of the Constitution reads as follows:

"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."

It will be seen that in so far as the provisions of the constitution are concerned, there is no inhibition upon your holding the office of member of the General Assembly and at the same time being under contract with the state highway department for the building of a certain highway.

We will next turn to the provisions of our statutes in regard to the inhibitions placed upon members of the General Assembly to hold other positions and employments. Section 15 G. C. reads as follows:

"No member of either house of the General Assembly except in compliance with the provisions of this act shall:

1. Be appointed as trustee or manager of a benevolent, educational, penal or reformatory institution of the state, supported in whole or in part by funds from the state treasury.

2. Serve on any committee or commission authorized or created by the General Assembly, which provides other compensation than actual and necessary expenses;

3. Accept any appointment, employment or office from any committee or commision authorized or created by the General Assembly, or from any executive, or administrative branch or department of the state, which provides other compensation than actual and necessary expenses.

Any such appointee, officer or employee who accepts a certificate of election to either house shall forthwith resign as such appointee, officer or employee and in case he fails or refuses to do so, his seat in the General Assembly shall be deemed vacant. Any member of the General Assembly who accepts any such appointment, office or employment, shall forthwith resign from the General Assembly and in case he fails or refuses to do so, his seat in the General Assembly shall be deemed vacant. But the provisions of this section shall not apply to school teachers, township officers, justices of the peace, notaries public or officers of the militia."

Your being a contractor with the state could come under neither subdivision 1 nor 2 of this section, and it remains to be determined whether it comes under subdivision 3. You are not holding any appointment, but are you holding an employment with an administrative branch or department of the state? My view is that you are not. I do not think the term "employment" in this section was intended to embrace such a relationship as that of contractor and contractee, which seems clear from the following language:

"* * * which provides other compensation than actual and necessary expenses * * *."

This language could hardly be said to be used in reference to a contractor with a department of the state. There is a difference, recognized by the courts, between mere employment and contractual rights.

In Farmer vs. St. Croix Power Co., 117 Wis. 76, the court on p. 87, after quoting various definitions given by lexicographers, reached the following conclusion from said definitions:

> "Thus it will be seen, without any extended analysis of the various lexical definitions, that the significant element in the relation of an employe and his employer, specifically considered, is personal service; while the significant element in such relation between a contractor and his principal is the work as an entirety to be performed by him."

In Lang vs. Simmons, 64 Wis. 525, on p. 530 in the opinion the court uses the following language:

> "We think it very clear that servants, laborers or employes, who can be said to earn wages of an employer must hold such a relation to the employer that he can direct and control them in and about the work which they are doing for him."

In Campfield vs. Lang, 25 Fed. 128, 131 (Wis.), the court uses the following language:

> "A servant is one who is engaged not merely in doing work or services for another, but who *is in his service,* usually upon or about the premises or property of his employer, and subject to his direction and control therein, and who is generally liable to be dismissed. If a person is engaged under a contract in an independent operation, not subject to the direction and control of his employer, the relation is not regarded as that of master and servant, but is said, in modern phrase, to be that of contractor and contractee."

Hence in view of what evidently was the intent and purpose of the General Assembly in enacting this section and in view of the meaning which courts ordinarily give the terms "employee" and "contractor," it is my opinion that a person holding a contract with the state highway commissioner for the construction of a highway could qualify as a member of the General Assembly and still retain the contract which he has with the state.

I might also call attention to Sections 12910 and 12911 G. C. and say that I do not feel that either of said sections apply. They apply merely to "the purchase of property, supplies for fire insurance for the county, township, city, village, board of education or a public institution" with which he is connected, or with which he is not connected. Hence I do not feel that either of said sections apply to a state of facts such as you submit.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

1657.

COUNTY COMMISSIONERS—TOWNSHIP TRUSTEES—OWNER OF HORSE BITTEN BY DOG CANNOT RECOVER—PERSON BITTEN BY OWN DOG ENTITLED TO PROVISIONS OF SECTION 5851.

1. *Under the law a person is not entitled to recover, either from the township trustees or the county commissioners, for an injury to a horse bitten by a dog, when the owner of the horse is also the owner of the dog.*

2. *Under Section* 5851 *G. C. a person is entitled to recover from the county commissioners the amount he spends for medical or surgical treatment and the expenditures incident thereto, as a result of being bitten by a dog afflicted with rabies, even though he be the owner of the dog so afflicted.*

COLUMBUS, OHIO, December 31, 1918.

HON. FLOYD E. STINE, *Prosecuting Attorney, Medina, Ohio.*

DEAR SIR:—I have your communication of December 14, 1918, in which you request my opinion as follows:

> "A man living in this county has presented a bill to the county commissioners for injury to himself and to his horse on account of being bitten by a dog affiicted with rabies. The dog was owned by the injured man. Will you kindly advise whether or not in that case the county commissioners should pay for his Pasteur treatment?"

Your inquiry contains two questions: (1) In reference to injuries to the horse and (2) relative to injuries sustained by the owner of the horse. We will first consider whether the owner of the horse, which was bitten by a dog afflicted with rabies, is entitled to compensation from the county commissioners for injury to the horse.

There are only two provisions of the General Code which would authorize your county commissioners in allowing compensation to the owner of the horse for its injury. The one is Section 5851 G. C., which reads as follows:

> "A person bitten or injured by a dog, cat or other animal afflicted with rabies, if such injury has caused him to employ medical or surgical treatment or required the expenditure of money, within four months after such injury and at a regular meeting of the county commissioners of the county where such injury was received, may present an itemized account of the expenses incurred and amount paid by him for medical and surgical attendance, verified by his own affidavit or that of his attending physician; or the administrator or executor of a deceased person may present such claim and make such affidavit. If the person so bitten or injured is a minor such affidavit may be made by his parent or guardian."

It is clearly evident that the owner of the horse could not recover under this section. It begins with this language:

> "*A person* bitten or injured by a dog, cat or other animal afflicted with rabies."

This could not be made to apply to a horse bitten or injured by such animals.

The other provision of law is that found in Sections 5840 and 5841 G. C. (107 O. L., 537), which reads as follows:

> "Section 5840.—Any owner of horses, sheep, cattle, swine, mules and goats which have been injured or killed by a dog not belonging to him or harboured on his premises, may present to the township trustees of the township in which such loss or injury occurred, at a regular meeting of said trustees, within six months after such occurrence, a detailed statement of such loss or injury done, supported by his affidavit; that it is a true account of such loss or injury. Such statement shall set forth the kind, grade, quality and value of the horses, sheep, cattle, swine, mules and goats so killed or injured, and the nature and amount of the loss or injury complained of, and shall be supported by the testimony of at least two freeholders who viewed the results of the killing or injury and who can testify thereto."
>
> "Section 5841.—The owner of such killed or injured horses, sheep, cattle, swine, mules and goats, or the person having charge thereof, must make it clear to the trustees that the loss or injury complained of was not caused in whole or in part by a dog or dogs kept or harboured upon the owner's premises and that the owner of the dog or dogs which caused the loss or injury, is to him unknown; or, if owner is known, he must make it clear to the trustees that a judgment for the damages complained of could not be collected on execution."

These sections clearly evidence the fact that a person can not recover for an injury to a horse, if the dog belongs to the owner of the horse injured, or if the owner of said horse harbors the dog on his premises. The language is "injured or killed by a dog *not belonging to him* or harboured on his premises, may present to the township trustees," etc.

Section 5841 G. C. provides:

> "The owner * * * or the person having charge thereof, must make it clear to the trustees that the loss or injury complained of was not caused in whole or in part by a dog or dogs *kept or harboured* upon the owner's premises."

Hence under these two sections, and according to the facts before us, the owner of the horse is not entitled to recover from the county for his loss. Under said sections, the claim must be presented to the township trustees and not to the county commissioners.

In view of all the above, I think it clear that neither the county commissioners nor the township trustees are warranted in law in allowing the claim of the owner of the horse which was injured by a dog belonging to the owner of the horse.

Your next question is whether the owner of said horse and dog can recover for injuries suffered by him from the bite of the dog which was afflicted with rabies. The provision controlling in this matter is Section 5851 G. C., above quoted, which provides:

> "A person bitten or injured by a dog, cat or other animal afflicted with rabies, * * * may present an itemized account," etc.

I can see nothing in this language indicating that the mere fact that a person bitten was the owner of the dog which bit him precludes his recovering under said section. When we consider the nature of the disease known as rabies, I can see no reason why a man should not recover merely because he was bitten by his own dog. Rabies comes upon animals quickly and is the result, usually, of being bitten by some other animal affected with the same disease. So I can see no reason why the person referred to should not recover. But it must be remembered that under this section the only amount that a person is entitled to receive from the county under any event is the expense which he incurs by virtue of employing medical or surgical treatment which required the expenditure of money. It is the amount which the person spends that becomes a claim against the county, and not damages in general which he may have suffered by virtue of being injured by a dog or other animal afflicted with rabies.

Therefore it is my opinion that the person referred to by you may present a claim to the county commissioners for expenses incurred and amount paid by him for medical and surgical attendance, and that the county commissioners would be justified in law in allowing him, what he actually spent for such medical or surgical treatment and the expenditures incident thereto.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1658.

APPROVAL OF BOND ISSUE OF SUMMIT COUNTY, OHIO—$30,000.

COLUMBUS, OHIO, January 2, 1919.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In Re: Bonds of Summit county, Ohio, in the sum of $30,000 for the purpose of improving the infirmary building by the erection of a disposal plant and erection of electric transmission line on infirmary grounds.

I have carefully examined the corrected transcript of the proceedings of the board of county commissioners of Summit county and of other officers relative to the above issue of bonds, and find same to be in substantial conformity to the provisions of the General Code of Ohio relative to bond issues of this kind.

I am therefore of the opinion that bonds covering said issue will, when properly executed and delivered, constitute valid and binding obligations of said county, to be paid in accordance with the terms thereof.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

1659.

COLLATERAL INHERITANCE TAX—COMPUTED ON INTEREST OF EACH INHERITOR.

The exemptions under the collateral inheritance tax law are to be computed on the interests of each inheritor and not upon the estate of the deceased as a whole.

COLUMBUS, OHIO, January 2, 1919.

HON. DONALD F. MELHORN, *Prosecuting Attorney, Kenton, Ohio.*

DEAR SIR:—I have previously acknowledged your letter of December 20th, in which you request my opinion upon the following facts:

> "X, a resident of Ohio, dies, leaving property within the jurisdiction of this state, worth $5,000.00. Said property passes, in five equal shares, to A, B, C. D, and E. None of such persons sustain to the decedent the relation of father, mother, husband, wife, lineal descendant or adopted child.
>
> For this reason, said property is subject to the collateral inheritance tax provided for by Section 5331 G. C., namely, 'five per cent, of its value above the sum of five hundred dollars.'
>
> *Query*: Is the statutory exemption of $500.00 to be taken only once, and then from the sum total of the whole estate; or, does said exemption apply to the interests of each heir, legatee, or beneficiary?"

You are advised that, in my opinion, the statutory exemption applies to the interests of each beneficiary. This question has been frequently passed upon by this office and by the lower courts of this state, and the rulings are uniform to the effect stated.

> In re: Hooper, 4 N. P. 186; in re: Thomson, 48 Bull. 212; in re: Inheritance Tax, 7 N. P. 547.

In fact no other conclusion is possible under the language of Section 5331 G. C., which fastens the tax upon

> "All property * * which pass by will, etc., * * to a *person*";

and under Section 5331, which provides that

> "When a person bequeaths or devises property to or for the use of (an exempt person) * * *, and the remainder to a collateral heir, or to a stranger to the blood, the value of the prior estate shall be appraised, * * * and deducted, together with the sum of five hundred dollars, from the appraised value of such property."

Again, Section 5336 provides that

> "An administrator * * * shall not deliver any specific *legacy or property subject to such tax* to any person until he has collected the tax thereon."

Section 5337 provides that

"When a *legacy subject to such tax* is charged upon or payable out of real estate, the heir or devisee, * * * shall deduct the tax therefrom * * *."

In short, every bit of internal evidence available on the face of the statute supports the view which I have expressed.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1660.

FOOD AND DRUGS—VINEGAR COMPOUND OF SUGAR VINEGAR AND VINEGAR MADE IN PART FROM DISTILLED LIQUOR MAY NOT BE MANUFACTURED OR SOLD IN THIS STATE.

Certain compound vinegar on the market is made by mixing sugar vinegar with distilled vinegar and then diluting the compound. The distilled vinegar is made from distilled liquor produced from grain. This vinegar compound has a brown color and is for that reason more marketable than distilled vinegar, which is practically colorless.

HELD: Such vinegar compound may not be manufactured for sale, sold, delivered, offered or exposed for sale in this state, nor made or had in possession with intent to sell or deliver.

COLUMBUS, OHIO, January 6, 1919.

The State Board of Agriculture, Dairy and Food Division, Columbus, Ohio.

GENTLEMEN:—I have your request for my opinion as follows:

"A certain vinegar company in this state has put upon the market a vinegar which is being sold as a 'compound of distilled and sugar vinegar.' This vinegar is made by mixing sugar vinegar with distilled vinegar and then diluting the compound. The distilled vinegar is made from distilled alcohol produced from grain. This vinegar compound has a brown color and for that reason is more marketable than the distilled vinegar, which is practically colorless.

Kindly advise me whether this vinegar compound may be placed on the market for sale in this state?"

Section 5786 of the General Code reads in part as follows:

"No person shall manufacture, offer or expose for sale, sell or deliver, or have in possession with intent to sell or deliver vinegar not in compliance with the provisions of this chapter. * * *."

Section 5787 G. C. governs the process by which cider or apple vinegar may be made. Section 5788 G. C. lays down similar provisions relative to wine or grape vinegar, and Section 5789 regulates the manufacture of malt vinegar.

Section 5790 G. C., which relates to distilled vinegar, reads as follows:

> "Vinegar manufactured, offered or exposed for sale, sold or delivered or in the possession of a person with intent to sell or deliver, under the name of distilled vinegar, shall be the product made wholly or in part by the acetous fermentation of dilute distilled alcohol and shall contain in one hundred cubic centimeters, at a temperature of twenty degrees centigrade, not less than four grams of acetic acid, and shall be free from coloring matter, added during, or after distillation and from coloring other than that imparted to it by distillation. Vinegar made wholly or in part from distilled liquor shall be branded 'distilled vinegar,' and free from coloring matter, added during or after distillation, and from color—other than that imparted to it by distillation."

It will be noted that this section provides that vinegar made wholly or in part from distilled liquor shall be branded "distilled vinegar" and shall be free from coloring matter added during or after distillation, and from "color other than that imparted to it by distillation."

The first question that confronts us is whether the vinegar which you refer to is "'vinegar made wholly or in part from distilled liquor." You advise us that this vinegar partly consists of distilled vinegar made from alcohol and it becomes necessary to decide whether "distilled alcohol" is "distilled liquor."

It might be urged that because the legislature used the words "distilled alcohol" in the first part of this section, and the words "distilled liquor" in the latter part, it was drawing a distinction between alcohol and liquor. However, a great deal of whatever force this argument has is overcome by an examination of the original act.

Section 5790 is composed of parts or Section 1 and 2 of an act passed February 28, 1908, entitled "an act to amend Sections 1 and 2 of an act entitled an act to prevent the adulteration of vinegar, passed April 14, 1888, as amended March 30, 1896," found in 99 O. L., p. 28. Subdivision 4 of Section 1 of that act read:

> "(4) Any vinegar manufactured for sale, offered for sale, exposed for sale, sold or delivered or in the possession of any person with intent to sell or deliver, under the name of distilled vinegar, shall be the product made wholly or in part by the acetous fermentation of dilute distilled alcohol, and shall contain in one hundred (100) cubic centimeters (at a temperature of twenty (20) degrees centigrade), not less than four (4) grams of acetic acid, and shall be free from coloring matter, added during, or after distillation, and from coloring other than that imparted to it by distillation."

Section 2 of that act read:

> "All vinegar made by fermentation and oxidation without the intervention of distillation shall be branded 'fermented vinegar'; with the name of the fruit or substance from which the same is made. And all vinegar made wholly or in part from distilled liquor shall be branded 'distilled vinegar,' and all such distilled vinegar shall be free from coloring matter added during or after distillation and from color other than that imparted to it by distillation. * * *."

It will be seen from this that the words "distilled alcohol" and "distilled liquor"

were used not in the same section but in different sections of the original act, and therefore if it is found that the word "liquor" is frequently used as referring to alcohol, it would seem that the words "distilled alcohol," appearing in the first part of Section 5790, and the words "distilled liquor," in the latter part, do not necessarily indicate a legislative reference to different products.

Webster defines the word "liquor" as follows:

> "Any liquid or fluid substance, as water, milk, blood, sap, juice and the like.
>
> "2. Especially alcoholic or spirituous fluid, either distilled or fermented; a decoction, solution or tincture."

The New Standard Dictionary gives the following definition:

> "Any alcoholic or intoxicating liquid, specif., one of a spirituous character, as distinguished from beer, wine, etc."

In Houser vs. State, 18 Ind., 106, 107, it is stated:

> "Liquor is said by Webster to be a liquid or fluid substance, a word extending in its general signification to water, milk, blood, sap, juice, etc., but its most common application is to spirituous fluids, whether distilled or fermented."

It would seem from these definitions that it would not be at all unusual to refer to alcohol as liquor, and when I take into consideration other provisions of the act, I feel satisfied that it was in this sense that the legislature used the word liquor in this act. For instance, Section 5790 provides that vinegar manufactured or sold "under the name of distilled vinegar" shall be "the product made wholly or in part by the acetuous fermentation of dilute distilled alcohol." Now if the word "liquor," as used in the latter part of the section, does not mean the same as alcohol. as used in the first part of the section, there would here be an irreconcilable conflict in the two provisions. Give, however, alcohol and liquor the same meaning, the conflict disappears and the different provisions of the act are in perfect accord.

Because of these authorities and different provisions of the act referred to, I am convinced that the words "distilled liquor," as used in Section 5790 G. C., are used synonymously with "distilled alcohol," as used in that section. The vinegar compound, to which you refer, being made, then, from sugar vinegar and vinegar made in part from distilled liquor, it follows that the provisions in the last sentence of Section 5790 apply to this vinegar compound. The distilled vinegar used in making this compound being such distilled vinegar as is made from "distilled liquor," I fail to see how it could be successfully urged that the compound vinegar is not a "vinegar made wholly or in part from distilled liquor."

It being settled, then, that the provisions of the latter part of Section 5790 G. C., apply to this vinegar compound, let us see which, if any of them, are being violated in the manufacture and sale of such vinegar compound. The provisions of this section applying to this compound are, first, such vinegar shall be branded as distilled vinegar; second, such vinegar shall be free from coloring matter added during or after distillation; and, third, such vinegar shall be free from coloring other than that imparted to it by distillation.

It will be noticed that the first provision requires this product to be labeled as

"distilled vinegar." The product is, however, labeled as "compound of distilled and sugar vinegar." I understand that it is the opinion of those who are manufacturing this compound because the words "distilled vinegar" appear on the label, this provision is complied with notwithstanding that these words appear in conjunction with other words. I am not inclined to believe this contention sound. It seems to me that when the legislature said such vinegar should be branded "distilled vinegar" it meant it should be branded "distilled vinegar" and nothing else. In other words, where vinegar was made wholly or in part from distilled liquor, the legislature wanted it sold as "distilled vinegar." However, I do not believe it necessary to finally pass here upon this question, since I think that we may reach a conclusion independently of this provision.

The second provision is that the vinegar compound must be free from coloring matter added during or after distillation. In the case you submit the color is given to this compound vinegar by the sugar vinegar which it contains. While it might be that the real purpose of the addition of this sugar vinegar is to give color to the distilled vinegar, I am not unmindful of a certain line of authorities that hold that the words "coloring matter" extend only to coloring substances used merely or chiefly for coloring purposes, and the words "coloring matter" cannot always be interpreted to include materials employed chiefly to make up the substance of the compound which imparts some color only as a necessary incident of their use. The purpose of using this sugar vinegar is a question of fact, and in the absence of more detailed information concerning this product, I am not inclined to hold its sale a violation of this second provision referred to.

The third provision of Section 5790, applying to this vinegar compound, is that it shall be free from color other than that imparted to it by distillation. Distilled vinegar is white or about the color of alcohol. The vinegar compound which is being sold is brown. Nothing can be clearer than that this vinegar compound, although it may possibly be free from coloring matter, is certainly not free "from color other than that imparted to it by distillation." To my mind this third provision of Section 5790, referred to above, is clearly violated by the manufacture and sale of this vinegar. It being violative of Section 5790 it is also violative of Section 5786, which provides in part:

> "No person shall manufacture, offer or expose for sale, sell or deliver, or have in possession with intent to sell or deliver vinegar not in compliance with the provisions of this chapter. Vinegar shall be made wholly from the fruit or grain from which it purports, or is represented, to be made and shall not contain a foreign substance or less than four per cent, by weight, of absolute acetic acid."

and of Section 12774, which reads:

> "Whoever manufactures for sale, sells, delivers, offers or exposes for sale, or has in possession with intent to sell or deliver, vinegar not made in compliance with law, or contained in packages not branded in compliance with law, or violates any provision of law relating to vinegar, adulterated vinegar, or 'fermented' or 'distilled' vinegar, shall be fined not less than fifty dollars nor more than one hundred dollars or imprisoned not less than thirty days nor more than one hundred days, or both, and pay all necessary costs and expenses incurred in inspecting and analyzing such vinegar."

I am therefore of the opinion that the vinegar compound to which you refer

in your communication may not be manufactured for sale, sold, delivered, offered or exposed for sale in this state, nor may it be had in possession with intent to sell or deliver.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1661.

APPROVAL OF BOND ISSUE OF OLD FORT RURAL SCHOOL DISTRICT, SENECA AND SANDUSKY COUNTIES—$5,500.00.

COLUMBUS, OHIO, January 6, 1919.

The Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

In Re: Bonds of Old Fort Rural School district, Seneca and Sandusky counties, Ohio, in the sum of $5,500 for the purpose of making certain improvements in the public school property of said school district.

I have carefully examined the corrected transcript of the proceedings of the board of education of Old Fort Rural School district relating to the above issue of bonds, and find same to be in conformity to the provisions of the General Code of Ohio relating to bond issues of this kind.

I am therefore of the opinion that properly prepared bonds covering said issue will, when the same are properly executed and delivered, constitute valid and binding obligations of said school district to be paid in accordance with the terms thereof.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

1662.

DISAPPROVAL OF BOND ISSUE OF WOOSTER CITY SCHOOL DISTRICT—$20,000.00.

COLUMBUS, OHIO, January 6, 1919.

The Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

In Re: Bonds of Wooster City School district in the sum of $20,000.00 for the stated purpose of extending the time of certain indebtedness incurred by said school district for the salary of teachers, making needed improvements and current expenses, which indebtedness said school district is unable to pay at maturity by reason of its limits of taxation.

I have examined the transcript submitted of the proceedings of the board of education of Wooster City School district relating to the above issue of bonds, and find that I am required to disapprove said issue specifically for the reason that the provision for interest and sinking fund levies in the resolution authorizing this issue of bonds does not conform to the requirements of Section 11, Article XII of the State Constitution.

The resolution of the board of education provides that the bonds covering this issue shall be forty in number, of the denomination of $500.00 each; that they shall bear interest at the rate of 5½ per cent per annum, payable semi-annually and be dated January 15, 1919. With respect to the maturity of said bonds, said resolution provides as follows:

> "Two bonds shall be payable each year from January 15, 1926, to and including January 15, 1931.
>
> Four bonds shall be payable each year from January 15, 1932, to and including January 15, 1938."

The provisions of the resolution with respect to levies for interest and sinking fund purposes to pay the interest on these bonds and to retire the same at maturity requires that for the years 1919 to 1925 inclusive there shall be levied the sum of $1,100 annually for the purpose of paying the interest on the bonds. For the years 1926 to 1931 inclusive, provision is made for the levy of $1,000 annually for the purpose of paying the principal of said bonds and also for the levy of certain specified amount for interest purposes in each of said years. For the years 1932 to 1938 inclusive, provision is made for the levy of $2,000 annually for the purpose of paying principal, and likewise provides for the levy of certain specified amounts during each of said years for the purpose of paying accruing interest on said bonds.

It is apparent from the resolution that no provision is therein made for the levy of taxes for sinking fund purposes during the years 1919 to 1925 inclusive, and in view of the fact that the plain language of Section 11 of Article XII of the State Constitution required provision to be made in this resolution for an annual levy of taxes for both interest and sinking fund purposes, this resolution is defective for want of conformity to the provisions of said section of the Constitution.

In view of the fact that I have just addressed to you an opinion disapproving the bonds of another taxing district in this state for the reason that the provisions made for interest and sinking fund levies in the legislation authorizing the bonds did not conform to the constitutional provisions above noted, I do not deem it necessary to pursue the argument further in this opinion, further than to say that this issue of bonds is invalid by reason of the failure of the resolution here in question to conform to the constitutional provisions in the respect above noted.

I note a number of other defects in the proceedings which may properly be noted at this time. As above stated, this issue of bonds is for the purpose of funding certain indebtedness of the school district incurred as stated in the resolution "in paying teachers' salaries, making needed improvements and current expenses." That the salaries of teachers when due are an indebtedness that may properly be funded under the provisions of Section 5656 General Code is a proposition that is not questioned. Neither do I question the right of the board of education to fund by an issue of bonds an indebtedness created by the borrowing of money for the purpose of paying teachers' salaries when such money is borrowed in conformity to the provisions of Section 5656 and 5658 General Code. However, it appears from this resolution that one of the purposes of the proposed bond issue is to fund certain indebtedness incurred by the board of education of the school district in making needed improvements. Notwithstanding the fact that the resolution recites that

all of the indebtedness sought to be funded is an existing, binding and valid obligation of the school district, it is not apparent to me on the transcript submitted how an indebtedness created for making improvements can be a valid, legal obligation of the school district in view of the provisions of Section 5660 General Code which requires that before any contract is entered into by the board of education, a certificate must be filed with such board showing that the money necessary to pay the contract is in fund and unappropriated for any other purpose, and in view of the provisions of Section 5661 General Code, which makes void all contracts and agreements other than those specified therein, which are not entered into in conformity with the provisions of Section 5660 General Code. In other words, as I see it, if this indebtedness for making needed improvements does not represent simply wages due to some employe or employes of the board in making such improvement, and said improvements were made on contract or contracts, it was the duty of the board of education to have the money to pay such contract or contracts in fund at the time such contracts were entered into, and if such was not the case, and no certificate or certificates were filed by the clerk that the money needed for said purposes was in the treasury, said contracts are invalid and no legal indebtedness arises by reason of the performance of the same.

It is obvious that the observations just made will apply to some of the items making up the indebtedness for current expenses sought to be funded by this issue of bonds.

No financial statement is appended to or made a part of the transcript as required by the provisions of Section 2295-3 General Code. Such financial statement would in any event be required before this department could approve the bond issue.

In this connection, although for want of such financial statement, I do not know affirmatively that this school district now has an existing and outstanding indebtedness, it may be safely assumed that such is the case, and if such be the case the transcript is further defective for the reason that same does not show that this proposed bond issue has been offered to and rejected by the board of commissioners of the sinking fund of the school district.

Under the provisions of Section 7619 General Code, a board of education issuing bonds is required to offer said bonds to the board of commisioners of the school district before otherwise disposing of same, and under the provisions of Section 1465-58 General Code, you have authority to purchase only such school bonds as shall have first been offered to and rejected by such board of commissioners of the sinking fund of the school district.

It follows from what has been said above that I am required to disapprove this issue of bonds and to advise you not to purchase same on the present resolution of the board of education.

The transcript submitted is herewith enclosed for return to the authorities of the school district.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

1663.

MUNICIPAL CORPORATIONS—ISSUING SERIAL BONDS MUST PROVIDE FOR ANNUAL SINKING FUND.

Where a political subdivision of the state issues bonds for any purpose Section 11 *of Article* XII *of the State Constitution requires provision to be made in the legislation authorizing such issue of bonds for an annual levy of taxes for both*

interest and sinking fund purposes with respect to such bonds; and where the ordinance of a village authorizing the issue of serial bonds for a municipal purpose provides that the first of said series of bonds shall mature fifteen years from the the date of their issue, and further provides for an annual levy of taxes for interest purposes only during the first fifteen years after the issue of such bonds, and provides for an annual levy of taxes thereafter for both interest and sinking fund purposes until the maturity of said bonds, said provision in the ordinance with respect to tax levies for interest and sinking fund purposes is not a compliance with the provisions of Section 11 *of Article* XII *of the State Constitution.*

COLUMBUS, OHIO, January 6, 1919.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In Re: Bonds of the village of Batavia, Clermont county, Ohio, for the sum of $6,000.00, for the purpose of supplying a deficiency in the funds of said village.

The above issue of bonds is one provided by ordinance of the council of the village of Batavia, Ohio, pursuant to the authority of a two-thirds vote of the electors of said village for the above stated purpose, under the authority of Section 3931 of the General Code. The transcript submitted discloses a number of defects in the proceedings relating to this issue of bonds, one of which, in my view, is absolutely fatal to the validity of the issue.

The ordinance providing for the above issue of bonds provides that said bonds shall be in the denomination of $500.00 each, numbered from one (1) to twelve (12) inclusive, and that they shall bear interest at the rate of five and one-half per cent per annum, payable semi-annually. With respect to the matter of said bonds the ordinance provides that bond No. 1 shall mature in fifteen years from the date of the sale thereof and that one bond shall become due and payable each year thereafter, bond No. 12 being due and payable twenty-six years from the date of the sale thereof. Section 5 of said ordinance making provision for interest and sinking fund levies with respect to said bonds reads, in part, as follows:

"For the purpose of paying the interest on said bonds and to create a sinking fund sufficient to pay the principal thereof at maturity, there shall be and there is hereby assessed upon all the taxable property of the village of Batavia, Clermont county, Ohio, an annual tax sufficient to raise in the years 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, and 1933 the sum of three hundred and thirty dollars ($330.00), being the interest accruing on said bonds in each of said years, and in years and each of them from 1933 to 1944, both inclusive, the principal sum of five hundred dollars ($500.00), and sufficient also to pay the interest accruing on all bonds remaining unpaid in any year."

In my opinion, the provision thus made for interest and sinking fund levies is not a compliance with the provisions of Section 11 of Article XII of the State Constitution, which reads as follows:

"No bonded indebtedness of the state, or any political subdivision thereof, shall be incurred or renewed, unless, in the legislation under which such indebtedness is incurred or renewed, provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds, and to provide a sinking fund for their final redemption at maturity."

My predecessor, Hon. Timothy S. Hogan, in considering the provisions of the section of the constitution above quoted in an opinion by him under date of September 12, 1914, (Attorney General's Report 1914, Volume II, page 1224) held that where serial bonds are issued by a political subdivision the issuing authority is required by the above noted section of the State Constitution to make provision for an annual levy of taxes for the retirement of the indebtedness so incurred considered as a unit, the levies being substantially equal in amount and distributed over the entire number of years between the incurring of the indebtedness and the date of the last of the series. Mr. Hogan in this opinion says:

"The fundamental and underlying idea of a sinking fund is the equalization of the burden of the indebtedness among the years, or other periods of time between the date of its incurring and that of its maturity. This idea of equality of burden is the ruling and determining factor. For instance, no calculation as to the amount required to be set aside in a given year can be made, except upon the basis or assumption of equality.

In short, then, that is a 'sinking fund' which is accumulated by the periodical setting aside of approximately the same amount, and its investment with a view to accumulating a fund equal to the principal of the indebtedness, when the latter matures.

This is the public policy that is embodied in the constitutional amendment under discussion. * * * The framers of the constitution undoubtedly had in mind the temptation of public officers in common with all human beings to provide for present needs and to let the future take care of itself. Posterity not possessing the immediate and effective privilege of political suffrage, the line of least resistance suggests to the public officer the expediency of ignoring their just rights and catering to the seemingly more pressing desires of present constituents. This tendency when allowed to operate unchecked undoubtedly constitutes one of the greatest evils to which popular governments are subject, and has in it the elements of self-destruction. For if a bonded indebtedness is permitted to be incurred without any obligation to commence accumulation of a redemption fund, or otherwise to provide for its retirement; and if the evil day of making such provision is put off from time to time by officers who will have retired before the bonds become due, then when the date of maturity arrives and the public treasury contains no funds available for payment of the debt, the officials then in office will face the alternative of refunding or repudiation, unless the tax limits permit the production of revenue in a single year sufficient in amount to discharge the indebtedness.

Any one of the three possible consequences of such a course is a great public evil. Repudiation wipes out credit, halts further public improvements, and thus, as I have stated, is destructive of the commonwealth itself.

Refunding casts upon future generations the obligation to pay for an improvement which has been enjoyed in the past and to which the people

who have enjoyed it have not contributed, save by way of payment of interest—a tremendous injustice; while discharging the loan out of the proceeds of a single tax levy makes the taxpayers of a given year pay for the improvement of which they have no greater benefit than those of preceding and possibly succeeding years.

So it is that the only sound public policy is that which decrees that the cost of an improvement for the making of which a debt must be created, shall be shared in as equally as possible by the tax paying public which will enjoy the improvement during the life of the indebtedness.

These fundamental considerations then clearly disclose the evil intended to be remedied by Article XII, Section 11, and indicate with accuracy that the requirement respecting provision for a sinking fund is designed to secure equality of the burdens of taxation during the life of an indebtedness; which indeed is the primary purpose of any sinking fund.

This, then, is the intent which in my opinion, must be given effect under Article XII, Section 11, of the constitution. I am of the opinion that serial bonds may be issued as well under this section, as under the former constitution, but I am further of the opinion that in any issue of serial bonds, provision must be made and carried into effect, whereby during the life of the whole indebtedness considered as a unit, the burden of taxation will be equalized and the indebtedness ultimately retired. That being the case, if the series are so arrangd as to fall due at intervals of years; such as every five years, until the last series matures, I would be of the opinion that substantially equal annual levies must be made during the life of the whole indebtedness. That is, during the period between the date of issuance and the date of maturity of the last series. This could be done, and the series could be paid as they fall due."

In other words, as I see it, the plain language of this constitutional provision requires provision to be made in the legislation authorizing the issue for an annual levy of taxes for both interest and sinking fund purposes, and though said constitutional provision is not effective to require that bonds issued should be redeemable in annual installments, the intent thereof "is that a certain sum shall be raised annually in anticipation of payment; and whether paid out in redemption of the bonds annually, or into a sinking fund for their payment at the expiration of a term of years, it is a sufficient compliance with the requirement."

Dillon Municipal Corporations (5th ed.) Volume II, Section 211. Wilkins vs. Waynesboro, 116 Ga. 359. Bruce vs. Pittsburgh, 166 Pa. St., 152.

In this case it may be observed that the constitutional provisions here under consideration did not require the council of the village of Batavia to specify in said ordinance the specific amounts of money to be levied for interest and sinking fund purposes in the years intervening between the issuance of the bonds and the maturity of the last of the series; such provision for interest and sinking fund levies could have been made by council in general terms in keeping with the language of the constitutional provision itself. Inasmuch, however, as council saw fit to specify in said ordinance the particular amounts which should be thereafter levied for said respective purposes in each of the years during the life of these bonds, it was equally necessary that the amounts so specified for levy should be

such as to show compliance with the provisions of said section of the State Constitution, which, as above noted, requires an annual levy for both interest and sinking fund purposes. Inasmuch as the provision for such levies does not do this, I do not feel that I have any discretion to do otherwise than to disapprove the bonds.

In addition to the foregoing I note a number of other objections to the proceedings which are of such a nature as to prevent my approval of this issue of bonds without further information correcting the objections which I have in mind.

Tested by the case of *Gas and Water Co.* vs. *City of Elyria*, 57 O. S. 374, the resolution of the village council under date of June 24, 1918, providing for the submission of the bond issue proposition to a vote of the electors, seems to be one of a general nature within the provisions of Section 4224 General Code, and, as such, required to be passed in conformity to the provisions of said section; that is, by being fully and distinctly read on three different days or on suspension of this rule by a three-fourth's vote of all elected members of council. It does not appear that this resolution was passed in conformity to the provisions of this section.

The transcript does not show how the returns of the vote cast at the election on the bond issue proposition were canvassed. Section 3931 General Code, providing authority for the issue of deficiency bonds, does not prescribe the machinery with respect to the election on the bond issue proposition required by said section, but I take it that the returns of the vote on the election provided for in this section should be made in the manner required with respct to bond issue elections under the Longworth Law (Section 3945 General Code); that is, in the manner required as to regular elections in the municipal corporation for the election of officers thereof (see Section 5114 G. C.).

There is nothing in the transcript to indicate the legal character of the meeting of council under date of August 19, at which was adopted the ordinance providing for the issue of the above bonds. The transcript recites that said meeting was an adjourned meeting. This being so, it is evident that the legal character of the meeting of August 19, 1918, in turn depends upon the legal character of the meeting from which the adjournment was made. The question of the legality of this meeting becomes one of vital importance for the reason that one of the members of council was absent.

The same observation may be made with respect to the meeting of council under date of June 24, 1918, at which was adopted the resolution providing for the submission of the bond issue question to the vote of the electors of the village. However, any defect in the legal character of this meeting is probably cured by the fact that, apparently, said meeting was attended by all the members of council.

The transcript shows that the ordinance providing for this issue of bonds was so passed on a suspension of the rule requiring ordinances of a general nature to be read on three different days. It does not affirmatively appear, however, that the vote on the suspension of said rule was taken by yeas and nays and entered on the records of council.

The objections last before considered herein can probably be cured by further information, but, in my opinion, the defect in the ordinance with respect to the provision therein made for interest and sinking fund levies is so defective as to require me to disapprove this issue of bonds and to advise you not to purchase th same on the present legislation of the council of said village.

I am enclosing herewith the transcript for return to the village officials.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1664.

APPROVAL OF BOND ISSUE OF SCOTT TOWNSHIP RURAL SCHOOL DISTRICT, MARION COUNTY—$30,000.00.

COLUMBUS, OHIO, January 6, 1919.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In Re: Bonds of Scott Township Rural School district, Marion county, Ohio, in the sum of $30,000.00, for the purpose of purchasing a site for, erecting and equipping a centralized school building in said school district.

I have carefully examined the corrected transcript of the proceedings of the board of education of Scott Township Rural School district, Marion county, Ohio, relating to the above issue of bonds and find said proceedings to be in conformity to the provisions of the General Code of Ohio relative to bond issues of this kind.

I am therefore of the opinion that properly prepared bonds covering the above issue will, when the same are properly executed and delivered, constitute valid and subsisting obligations of said school district, to be paid according to the terms thereof.

No bond form of the bonds to be printed covering said issue was submitted with the transcript, and I am therefore retaining said transcript until proper bond form is submitted and approved.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1665.

APPROVAL OF BOND ISSUE OF THE CITY OF ST. MARYS, AUGLAIZE COUNTY, OHIO—$20,000.00.

COLUMBUS, OHIO, January 6, 1919.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In Re: Bonds of the city of St. Marys, Auglaize county, Ohio, in the sum of $20,000.00, for the purpose of extending, enlarging and improving the combined electric light and waterworks plant of said city.

I have carefully examined the corrected transcript of the proceedings of the council and other officers of the city of St. Marys, Ohio, relating to the above issue of bonds, and find the same to be in conformity to the provisions of the General Code of Ohio relative to bond issues of this kind.

I am therefore of the opinion that properly prepared bonds covering the above issue will, when the same are properly executed and delivered, constitute valid and binding obligations of said city, to be paid in accordance with the terms thereof.

No bond form of the bonds to be printed covering said issue was submitted with the transcript, and I am therefore holding the transcript until proper bond form is submitted and approved.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1666.

APPROVAL OF BOND ISSUE OF DELAWARE CITY SCHOOL DISTRICT, DELAWARE COUNTY, OHIO—$17,426.40.

COLUMBUS, OHIO, January 6, 1919.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

In Re: Bonds of Delaware City School district, Delaware county, Ohio, in the sum of $17,426.40, for the purpose of funding and thereby extending the time of payment of certain legal indebtedness of said school district which from its limits of taxation it is unable to pay at maturity.

I have carefully examined the transcript submitted of the proceedings of the board of education of Delaware City School district, relating to the above issue of bonds, and find the same to be in conformity to the provisions of the General Code of Ohio relative to bond issues of this kind.

I am therefore of the opinion that properly prepared bonds covering the above issue will, when the same are properly executed and delivered, constitute valid and binding obligations of said school district, to be paid in accordance with the terms thereof.

No bond form of the bonds to be printed covering said issue was submitted with the transcript, and I am therefore holding the transcript until proper bond form is submitted and approved .

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1667.

MUNICIPAL CORPORATIONS—COUNCIL OF CITY AUTHORIZED TO EMPLOY PERSON TO OBTAIN WAIVERS.

Council of a city has authority to employ a person to obtain waivers of the special assessment limitations from owners of property abutting upon the improvement and may fix the compensation of such person at so much per hour.

COLUMBUS, OHIO, January 6, 1919.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Under favor of November 22, 1918, you submit the following question:

"The council of the city of Barberton, Ohio, has passed an ordinance providing for the employment of a person to obtain waivers of the special assessment limitations from property owners abutting upon certain proposed sewer improvements, and fixed his compensation at 40 cents per hour for time actually employed in obtaining these waivers. Council has further elected a man to this position.

Question: Is such procedure legal?"

Section 4210 General Code provides as follows:

"Within ten days from the commencement of their term, the members of council shall elect a president pro tem, a clerk, and such other employes of council as may be necessary, and fix their duties, bonds and compensation. The officers and employes of council shall serve for two years, but may be removed at any time for cause, at a regular meeting by a vote of two-thirds of the members elected to council."

Under the provisions of this section, council has authority to provide for such other employes " as may be necessary, and fix their duties, bonds and compensation."

The question arises, as to whether or not the person employed, as stated in your inquiry, is to be considered as an employee of council and whether the duties which he wants to perform are for the purposes of legislation.

The first sentence of Section 4211 General Code reads:

"The powers of council shall be legislative only, and it shall perform no administrative duties whatever and it shall neither appoint nor confirm any officer or employe in the city government except those of its own body, except as is otherwise provided in this title. * * *."

From this section the powers of council are legislative only. Section 3818 General Code provides in part as follows:

"A notice of the passage of such resolution shall be served by the clerk of council, or an assistant, upon the owner of each piece of property to be assessed, in the manner provided by law for the service of summons in civil actions. * * *."

This section makes it the duty of the clerk of council to serve notices of the passage of resolution by council, declaring the necessity of making a public improvement to be paid for in whole or in part by special assessments.

Section 3819 General Code limits the amount of assessments which may be placed against abutting property. This section reads:

"The council shall limit all assessments to the special benefits conferred upon the property assessed, and in no case shall there be levied upon any lot or parcel of land in the corporation any assessment or assessments for any or all purposes, within a period of five years, to exceed thirty-three and one-third per cent of the actual value thereof after improvement is made. Assessments levied for the construction of main sewers shall not exceed the sum that in the opinion of council would be required to construct an ordinary street sewer or drain of sufficient capacity to drain or sewer the lots of lands to be assessed for such improvement, nor shall any lots or lands be assessed that do not need local drainage or which are provided therewith."

The question then arises as to whether or not abutting property owners may waive by contract or otherwise, the limitations provided for in Section 3819 General Code.

In the case of Thornton vs. City of Cincinnati, 4 C .C. N. S., 31, the first branch of the syllabus reads:

> "The constitutional limitations as to the amount of an assessment for a street improvement may be waived by contract or by the conduct of the parties *in pais.*"

It appears, therefore, that an abutting property owner may waive by contract, the limitations placed by statutes upon the amount which council may levy against property by way of special assessments for improvement. The purpose therefore of securing waivers of the special assessment limitations was to lay the foundation for legislation seeking to make the improvement in question and to make an assessment in excess of the amount limited by statute. This is a legislative function and it is proper for council to employ a person to obtain such waivers and it may fix a compensation of such person at so much per hour.

It is my opinion, therefore, that the procedure as stated by you is legal.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1668.

BOARD OF ADMINISTRATION—METHOD OF TRANSFER OF CATTLE TO OHIO SOLDIERS' AND SAILORS' ORPHANS' HOME.

Cattle may be transferred from board of administration to Ohio Soldiers' and Sailors' Orphans' Home by appraisement and purchase.

COLUMBUS, OHIO, January 6, 1919.

HON. A. V. DONAHEY, *Auditor of State, Coolumbus, Ohio.*

DEAR SIR:—You have handed me a letter addressed to you by Governor Cox, under date of December 19, wherein he states:

> "I am very anxious to establish a better herd of cattle at Xenia. The output of milk is very low—in fact it hardly justifies the feed, but that is because the grade of stock is very inferior. I am anxious to transfer fifteen or twenty head of registered Holsteins from the state farm to Xenia. In view of the divided responsibility in the conduct of the Xenia Home, I would like to have you advise how the transfer can be legally made by the board of administration."

The Ohio Soldiers' and Sailors' Orphans' Home is, as you know, under the jurisdiction of a board of trustees, the same not having been placed in charge of the Ohio Board of Administration when the various institutions of the state, benevolent and penal, were placed in charge of said board of administration.

While it has been the policy of the state that each department is entirely separate and there has been no way until the enactment of the state purchasing

department act, 107 O. L., 422, for the transfer of property in charge of one department to that of another, except by agreement between the parties, nevertheless, I believe that it would be perfectly legal to proceed in conformity with the provisions of Section 196-12 et seq., 107 O. L., 425, and permit the state purchasing agent to inventory and appraise the cattle in question and turn the same over at the appraised value to the Xenia home.

While it is true that the Ohio Board of Administration and the educational institutions of the state are expressly exempted from the provisions of the state purchasing agent's department act, nevertheless, and in order that the transfer may be properly evidenced and the responsibility of the Ohio Board of Administration in regard to the cattle may terminate, it would seem to me that the plan outlined would be satisfactory, or if the Xenia Home and the Ohio Board of Administration can themselves agree upon a price for the cattle and there are funds available to the Xenia home for the purchase of said cattle, the Ohio Board of Administration could sell said cattle to the Xenia home, receiving in return a state warrant for the purchase price thereof.

Either of the above suggestions if followed would, as I see it, legally transfer the custody of the cattle from the Ohio Board of Administration to the Xenia home.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1669.

PROSECUTING ATTORNEY—METHOD OF PAYMENT OF ASSISTANTS, CLERKS AND STENOGRAPHERS DEPENDS ON.

Whether or not the assistants, clerks and stenographers in the office of the prosecuting attorney are entitled to compensation on the strict time basis as distinguished from the basis of the official year of the prosecuting attorneys, depends upon the manner in which he has fixed their compensation.

COLUMBUS, OHIO, January 6, 1919.

HON. JOHN V. CAMPBELL, *Prosecuting Attorney, Cincinnati, Ohio.*

DEAR SIR:—Under date of December 28, 1918, Hon. Walter M. Locke, assistant prosecuting attorney of Hamilton county, requested my opinion upon a question which I may state as follows:

The official year of the prosecuting attorney begins and ends on the first Monday in January. As a result of this fact, the term of office which commenced in 1917 will be five days longer than two calendar years.

Should the assistants, clerks and stenographers appointed by the prosecuting attorney, under Section 2915 of the General Code, receive compensation for such service as they may render during these five days in 1919?

I have phrased the question substantially as Mr. Locke has asked it. One way of answering it would be to say that of course the assistants, clerks and stenographers are to receive compensation for these five days the same as for any other days. I apprehend, however, that what Mr. Locke desires to know is whether or not compensation for these five days should be paid to these persons in addition to the compensation which by this time has been paid to them, or their predecessors in position during the two years, and amounting to twenty-four

full months' salary. In other words, assuming that a given assistant prosecuting attorney served during the entire official term, would he be entitled to twenty-four months salary only, on the theory that he was employed by the official year, or to salary for twenty-four months and five days as a fractional part of another month?

Sections 2914 and 2915 of the General Code are as follows:

> Section 2914.—"On or before the first Monday in January of each year in each county, the judge of the court of common pleas, or if there be more than one judge, the judges of such court in joint session, may fix an aggregate sum to be expended for the incoming year, for the compensation of assistants, clerks and stenographers of the prosecuting attorney's office."
>
> Section 2915.—"The prosecuting attorney may appoint such assistants, clerks and stenographers as he deems necessary for the proper performance of the duties of his office, and fix their compensation, not to exceed in the aggregate the amount fixed by the judge or judges of the court of common pleas. Such compensation after being so fixed shall be paid to such assistants, clerks and stenographers monthly from the general fund of the county treasury upon the warrant of the county auditor."

It is reasonably clear that the allowance made by the common pleas judge, or judges, covers the official year, and not the calendar year. In this respect it differs from the allowance made by the county commissioners for clerk hire in other offices of the county under Section 2980 of the General Code. That allowance is, "for the year beginning January first next thereafter"; while the allowance to be made under Section 2914 is "for the incoming year," and must be granted "on or before the first Monday in January of each year."

But it by no means follows that because the prosecuting attorney is limited to a certain allowance as the aggregate sum which he may pay out to assistants, clerks and stenographers for their compensation during an official year of his term beginning and ending on the first Monday in January, he must fix their compensation with reference to such official year. On the other hand, he is given complete liberty by Section 2915 with respect to their appointment and the compensation which they shall have. They hold their positions at his pleasure, subject to civil service regulations, and they are to receive such compensation as he prescribes. It need not be by way of annual salary; it may indeed be on the per diem basis, or in proportion to the services rendered, if he so fixes it. To be sure, such compensation is to be paid "monthly * * * upon the warrant of the county auditor." But this payment is to be made only upon some sort of voucher drawn by the prosecuting attorney, for the section does not provide that the action of the prosecuting attorney shall be certified to the county auditor in any way; so that the county auditor would not know what compensation was due at any time to any particular assistant, clerk or stenographer, unless he would have the prosecuting attorney's voucher to show it. Moreover, the section does not say that the compensation which is to be paid "monthly," shall be in equal installments, as some statutes dealing with similar matters expressly provide.

These considerations lead me to the conclusion that Mr. Locke's question cannot be answered by any general statement; whether or not the assistants, clerks and stenographers appointed by a given prosecuting attorney are to receive annual salaries based upon the official year, depends upon the manner in which the prosecuting attorney has fixed their respective compensations. It is possible for him to fix such compensation in that manner, in which event the persons entitled to such

compensation would receive twenty-four months' salary for performing services during the entire official term, though that might be five days more than two calendar years. On the other hand, he might fix the salaries at so much per month. The proper interpretation of such an act on his part would seem to be such as to require payment on a strict time basis, and to entitle the persons whose compensation might be so fixed to salary for twenty-four months and five days who have served throughout the official term mentioned by Mr. Locke.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

1670 .

BOARD OF AGRICULTURE—SECRETARY OF AGRICULTURE AUTHORIZED TO APPOINT EXPERT.

Under the provisions of the act creating the board of agriculture, the secretary of agriculture has the authority to appoint a person skilled in matters pertaining to game birds and game preserves and pay him his compensation out of the fund created from license fees, after being duly appropriated by the general assembly.

COLUMBUS, OHIO, January 6, 1919.

HON. N. E. SHAW, *Secretary of Agriculture, Columbus, Ohio.*

DEAR SIR:—I have your communication of December 16, 1918, as follows:

> "The Board of Agriculture of Ohio desires, if lawful, in exercising its general control in all matters pertaining to the protection, preservation and propagation of game birds, game animals and fish within the state, as provided in Section 1390 General Code, to employ some skilled individual who shall devote his exclusive time in connection with the exercise of such control. It is designed particularly to establish many new game preserves throughout the state, and to exercise more care and study over game preserves already established. The duties of such individual, as proposed, would be largely as manager thereof. The board has funds accumulated under Section 1423.
>
> The board desires to know whether it would have jurisdiction to employ such person and pay his salary out of funds arising by virtue of Section 1423 General Code. These duties are to be separate from the administrative duties under the direction of the chief warden."

The answer to your question must be derived from a construction placed upon two or three sections of the General Code as they are found in 107 O. L.

Section 1087 G. C., 107 O. L., 461, makes this provision:

> "He (the secretary of agriculture) shall appoint all heads of bureaus, experts, inspectors, wardens, clerks, stenographers and all other assistants and employes and shall fix their compensation within the limits prescribed by law."

This provision is somewhat peculiar in that it does not state that he shall ap-

point "all other assistants and employes" that may be necessary to enable him to perform the duties placed upon him under the act. Neither does the act anywhere else make such a provision. The act provides in other places for heads of bureaus, experts, inspectors and wardens, but it does not provide for clerks, stenographers and all other assistants and employes. But, it is my opinion that the intention of the legislature, in enacting this provision was that the secretary of agriculture should have the authority to appoint all the clerks, stenographers and all other assistants and employes that might be necessary to enable him to perform the duties which devolve upon him under the law, that is, provided he keeps their compensation within the limits prescribed by law. Of course, it must be kept in mind, in reference to this matter, that Section 1087-2 provides that all his appointments made under and by virtue of this act shall be made with the approval of the Board of Agriculture.

With this general power in mind, let us turn to the provisions of Section 1390 G. C., 107 O. L., 486. This section reads in part:

> "The secretary of agriculture shall have authority and control in all matters pertaining to the protection, preservation and propagation of song and insectivorous birds, game birds, game animals and fish within the state and in and upon the waters thereof. * * * and so far as funds are provided therefor, shall adopt and carry into effect such measures as he deems necessary in the performance of his duties."

Here we find language that is very broad in its terms. The secretary of agriculture has full authority and control in reference to the matter of the preservation and propagation of game birds and in performing this duty he shall adopt and carry into effect such measures as he deems necessary in the performance of his duties. Now it is quite evident that the secretary of agriculture personally cannot perform all the duties which devolve upon him under and by virtue of this act, and therefore Section 1087, above quoted, provides that he may appoint all necessary assistants and employes to enable him to carry out and perform the duties which devolve upon him under the law. These two sections taken altogether would seem clearly to authorize the secretary of agriculture to appoint or employ some skilled individual who shall devote his whole time in connection with the protection, preservation and propagation of game birds, and game preserves which may be established over the state for the purpose of preserving, protecting and propagating said birds.

The question is raised as to how this appointee could be paid. As quoted above, the secretary of agriculture has the power to appoint and fix the salary, subject to the approval of the board of agriculture, of all his appointees. The salary so fixed, of course, would have to be kept within the appropriation made by the general assembly for the uses and purposes of the secretary of agriculture and the board of agriculture.

Section 1423 G. C., 107 O. L., 488, provides for the license fees to be paid for the granting of consent to hunt and fish within the state and then further provides:

> "The moneys received as license fees, other than the amounts paid to clerks as their fees, shall be paid into the state treasury to the credit of a fund which is hereby appropriated for the use of the secretary in the preservation and protection of birds, game birds, game animals and fish."

The section proceeds further to the effect that at least fifty per cent of the money arising from all such licenses shall be expended by the secretary for the

purchase and propagation of game birds and game animals. Now if it is necessary, to enable the secretary of agriculture to preserve and protect game birds, that he appoint some one skilled along this line to assist him, then I know of no provision of law which would prevent his appointing such a person and fixing his salary, subject to the appropriation made by the legislature, and subject to the approval of the board of agriculture, and paying for the same out of moneys derived from license fees and appropriated by the general assembly. It is to be noted in Section 1423 G. C. that this money is already appropriated, but an appropriation cannot last for a period longer than two years, and hence if this section is not re-enacted at the coming session of the General Assembly, it would be necessary for the legislature to appropriate the money in said fund for the uses and purposes of your department.

Of course, in making said appointment you will have to take into consideration the question as to whether the civil service laws of the state apply to the same or not.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1671.

BOARD OF EDUCATION—CITY—REMOVAL OF MEMBER FROM DISTRICT CREATES VACANCY.

If a member of the board of education of a city school district removes from the district a vacancy is thereby caused in the board and is filled under the provisions of Section 4748 *G. C.*

COLUMBUS, OHIO, January 6, 1919.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—You request my opinion on the following matter:

> "If a member of the board of education of a city school district removes from the district, does it cause a vacancy as provided in Section 4748 of the General Code of Ohio?"

The said Section 4748 G. C. reads in part as follows:

> "A vacancy in *any* board of education may be caused by * * * *non-residence*, * * * *removal from the district*, * * *. Any such vacancy shall be filled by the board at its next regular or special meeting, or as soon thereafter as possible, by election for the unexpired term. A majority vote of all the remaining members of the board may fill any such vacancy."

The above section is general and applies to all boards of education and the language is so clear and explicit that to attempt a construction of same would simply mean a repetition of the words used in said section.

Upon inquiry, however, I find that the doubt as to its applicability arose from the fact that Section 4704 G. C., formerly provided that:

> "Members elected at large must be electors of the city school district and members elected from sub-districts must be electors of the said sub-

districts from which they are chosen, or of the territory attached to the sub-district for school purposes. A removal of a member of the board from such sub-district, territory or city district shall vacate his office."

The above quoted section was repealed in 1913 and an entirely new section was enacted in its place and which new section referred to matters other than the residence of members of boards of education.

Section 4748 was a part of the General Code at the same time Section 4704 read as above quoted, and the fact that in the two sections of the code it was provided that a removal of a member of the board from the district should vacate the office of such member would not of itself add anything to or take anything from the force of the language in either section. The best that can be said is that at the time both sections were a part of the code, boards of education in city districts would be governed by Section 4704 and boards of education in other than city districts would be governed by Section 4748. Section 4748 being a general section, applies to city boards of education just the same as to village boards and others, so that the repealing of the former Section 4704 does not in my opinion change the law in relation to a vacancy being created when a member removes from the school district.

Answering your question specifically, then, I advise you that if a member of a board of education of a city school district removes from the district, a vacancy is thereby created in the city board of education, and the same must be filled as is provided by Section 4748 of the General Code of Ohio.

Yours very truly,
JOSEPH MCGHEE,
Attorney-General.

1672.

COUNTY COMMISSIONERS—PROCEEDS OF BONDS SOLD UNDER SECTION 6929 CANNOT BE USED FOR COUNTY'S SHARE STATE HIGHWAY IMPROVEMENT, BUT MUST PASS TO SINKING FUND.

When bonds are sold under the provisions of Section 6929 G. C. by the county commissioners, the proceeds of such sale cannot be used to take care of the county's proportion of the cost and expense of said improvement, if the same be constructed under the jurisdiction of the state highway commissioner. The proceeds of said bonds issued not used for the purposes for which the bonds were sold would pass into the sinking fund, or debt fund, of the county.

COLUMBUS, OHIO, January 6, 1919.

HON. J. H. MUSSER, *Prosecuting Attorney, Wapakoneta, Ohio.*

DEAR SIR:—I have your communication of December 18, 1918, which reads as follows:

"Some time ago our county commissioners, under proceedings to improve a county road, provided for the improvement of a road in our county, the costs being assessed on the lands within one mile of either side of the said improvement, bonds were sold, a contract for the improvement let, and the assessments are now being collected, about three payments having been made. The contractor did not complete his contract, or do any work thereunder, and the time for the completion of the con-

tract has not expired. Since the contract was let this particular road has been designated by the State Highway Commissioner as an inter-county highway.

The commissioners desire to know if there is any manner in which they can take the funds arising from the sale of bonds, which are now in the county treasury, which bonds were issued under proceedings to improve a county road, and use the same in cooperation with the state, county and townships through which this road passes, and have the road improved as a state road, by the State Highway Commissioner.

The commissioners feel that if they must proceed and improve the road as a county road, that it will be a waste of money, as the improvement was not to be one of lasting quality, and that in the course of a very few years this road will necessarily be improved under the State Highway laws."

I presume that this improvement was begun under the Cass Act, and therefore I desire to call your attention to Section 6929 of said act.

This section provides for the issuing of bonds by the county commissioners for a road improvement, and then concludes:

"The proceeds of such bonds shall be used exclusively for the payment of the costs and expenses of the improvement for which they are issued."

In an opinion rendered by me to Hon. G. O. McGonagle, prosecuting attorney, McConnelsville, Ohio, as of date June 3, 1918, I passed upon language exactly similar to that above quoted, and passed upon a state of facts which are so nearly similar to the facts which you submit that I deem it not necessary to reason at length in reference to the law which should be applied to the state of facts you submit.

I enclose you a copy of said opinion for your consideration.

From the provisions of Section 6929 G. C. just quoted, and from the opinion enclosed, it is my opinion that the county commissioners could not use the proceeds realized from the sale of said bonds to pay the proportion of the cost and expense of the road improvement under the jurisdiction of the State Highway commissioner, and that if said funds are not used for the purpose for which the bonds were sold, they would immediately pass into the sinking fund of the county for the redemption of the bonds so issued by the county .

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1673.

COUNTY COMMISSIONERS—REFUSING TO ACCEPT PERSON HAVING LEGAL RESIDENCE THEREIN FROM COUNTY TO WHICH SUCH PERSON REMOVED, ARE LIABLE FOR POOR RELIEF FURNISHED BY LATTER COUNTY IN OHIO STATE SANITORIUM.

(1) *A person has a legal residence in that county in which he has continuously resided for a period of twelve consecutive months and during said period has not received any relief under the provisions of law for the relief of the poor.*

(2) ***If the proper authorities of a county in which a person has a legal resi-***

dence refuses to accept such person from a county to which he has later removed, and said latter county furnishes necessary relief to the person, then said county has a right of action against the county in which the person has a legal residence for expenses so incurred in furnishing relief.

COLUMBUS, OHIO, January 6, 1919.

HON. LEWIS F. HALE, *Prosecuting Attorney, Bellefontaine, Ohio.*

DEAR SIR:—I have your communication of December 19, 1918, which reads as follows:

> "The county commissioners of Logan county were requested to care for one Davis. Investigation showed that Davis had been in Logan county only four days when this assistance was asked; that he had been brought from Putnam county by his son, a boy only about eighteen years of age, and who found after bringing him here that he was unable to care for him, and who himself had been in Logan county only about six months.
>
> Said Davis had been living in Putnam county for two years prior to his being brought to this county, living with a preacher, his brother-in-law, with whom he had been staying for years; that he with the preacher had moved to Putnam county from Van Wert county, having lived there two years.
>
> The infirmary superintendent of Logan county warranted him back to Putnam county; Putnam county refused to receive him. Thereupon Logan county had to take charge of him; sent him to Mt. Vernon to the tuberculosis hospital. Now Logan county has a bill from said hospital for clothing and care for said Davis.
>
> *Question* 1: Where is Davis a proper county charge?
>
> *Question 2*: Has Logan county a remedy against Putnam, or any other county, for any bills which it may pay for the care of said Davis?
>
> Davis has not been self-sustaining, but supported by his brother-in-law, the preacher."

There are several sections of the General Code which will have to be considered carefully in order to determine the answers which should be given to your questions. Possibly the one which lies fundamentally at the basis of your questions is Section 3477 G. C., which fixes the legal settlement of persons who must be afforded relief by the public. This section reads in part as follows:

> "Each person shall be considered to have obtained a legal settlement in any county in this state in which he or she has continuously resided and supported himself or herself for twelve consecutive months, without relief under the provisions of law for the relief of the poor, subject to the following exceptions: (then follows two exceptions)"

It will be noted in this section that a person does not obtain a legal settlement in any county in this state unless he has continuously resided therein for a period of twelve consecutive months and during those twelve months has supported himself without relief under the provisions of law for the relief of the poor.

The next section possibly that ought to be considered is Section 3481 G. C., wherein provision is made that when complaint is made to the township trustees or to the proper officers of the municipal corporation that a person therein requires public relief or support, investigation shall be made as to the county in the state in which the person complained of is legally settled. If it should be ascertained that

his legal settlement is in some county other than the one in which he resides at the time complaint is made, then Sections 3482 and 3483 G. C. apply. These sections read as follows:

> *Section* 3482.—"When it has been ascertained that a person requiring relief has a legal settlement in some other county of the state, such trustees or officers shall immediately notify the infirmary directors of the county in which the person is found, who, if his health permits, shall immediately remove the person to the infirmary of the county of his legal settlement. If such person refuses to be removed, on the complaint being made by one of the infirmary directors, the probate judge of the county in which the person is found shall issue a warrant for such removal, and the county wherein the legal settlement of the person is, shall pay all expenses of such removal and the necssary charges for relief and in case of death the expense of burial if a written notice is given the infirmary directors thereof within twenty days after such legal settlement has been ascertained."
>
> *Section* 3483.—"Upon refusal or failure to pay such expenses, such infirmary directors may be compelled so to do by a civil action against them by the board of infirmary directors of the county from which such person is removed, in the court of common pleas of the county in which such removal is made. If such notice is not given within twenty days after such directors ascertain such person's residence, and within ninety days after such relief has been afforded, the directors of the infirmary where such person belongs shall not be liable for charges or expenditures accruing prior to such notice."

Of course in these sections at the present time "county coommissioners" would have to be substituted for the term "infirmary directors."

From the facts which you set out in your communication Mr. Davis, of course, had not gained a legal settlement in Logan county, inasmuch as he had resided there for a period of only four days prior to the time that application was made for relief. When this was ascertained notice was given to the proper authorities in Putnam county that Davis was residing in Logan county and was in need of assistance; the Putnam county officials refused to take any jurisdiction over the matter and the county commissioners of Logan county then furnished relief. It seems to me that under the provisions of Sections 3482 and 3483 G. C. the county of Logan would have a claim against the county of Putnam for all expenses incident to the care and support of Mr. Davis. Section 3483 specifically provides that upon refusal or failure to pay such expenses, that is, the expenses of the removal of the indigent person to his proper county, and also the necessary charges for relief, then the county commissioners may be compelled to do so by a civil action against them by the board of county commissioners of the county in which such person resides or from which such person is removed. It provides then that notice must have been given within twenty days after the fact was ascertained of such person's residence, and within ninety days after such relief has been afforded.

As I understand it these conditions have been complied with. My predecessor, Hon. Timothy S. Hogan, in an opinion rendered June 15, 1911, (Vol. II Annual Report of the Attorney General, 1912, p. 1113) laid down the following principle in placing construction on these two sections:

> "So, also, the same section provides that if the person refuses to be removed the probate judge of the county shall, upon complaint of the in-

firmary directors, issue a warrant for removal, etc. Having regard to the same intent above referred to, I am of the opinion that whether or not there is any proceeding to compel removal or to pay the expenses of removal, when the indigent person is willing to be removed but the infirmary directors of the county to which he belongs are unwilling to receive him, there is at least enough in the sections to fix the liability of the county to which the person belongs for expenditures made by the infirmary directors of the county by which the relief is actually extended."

Here Mr. Hogan held that in the event that the county commissioners are not willing to receive a person who is properly chargeable to their county said county is liable for the expenses made by the county commissioners of the county by which the relief is actually extended.

While these sections are somewhat uncertain in their provisions yet it is my opinion that Mr. Hogan was correct in the conclusion at which he arrived in said opinion, and I would, therefore, hold that if the provisions of Section 3482 and 3483 G. C. have been complied with by the proper authorities of Logan county, then the county of Putnam would be liable for the expenses incurred by Logan county in caring for Mr. Davis.

It might be thought that the county commissioners of Logan county would not be justified in sending Mr. Davis to the tuberculosis hospital, but if in their judgment this was the only proper way by which Mr. Davis could be treated, then it is my opinion that they would have authority to pursue such a course and that Putnam county would be liable for the expense incident thereto. If Putnam county is not desirous of paying expenses incurred by Logan county along this line, then the authorities of Putnam county should receive Mr. Davis and care for him themselves.

In this connection it might be well to call attention to Section 2544 G. C. This section reads as follows:

"In any county having an infirmary, when the trustees of a township, after making the inquiry provided by law, are of the opinion that the person complained of is entitled to admission to the county infirmary, they shall forthwith transmit a statement of the facts to the superintendent of the infirmary and if it appears that such person is legally settled in the township or has no legal settlement in this state, or that such settlement is unknown, and the superintendent of the infirmary is satisfied that he should become a county charge, they shall forthwith receive and provide for him in such institution, or otherwise, and thereupon the liability of the township shall cease. The superintendent of the infirmary shall not be liable for any relief furnished, or expenses incurred by the township trustees."

Here we find the provision that if one becomes a county charge the county commissioners "shall forthwith receive and provide for him in such institution (the county infirmary) *or otherwise*." The term "or otherwise" is very broad and embodies within it the matter of outdoor relief. Under this term it seems to me clearly that the county commissioners would have authority to place Mr. Davis in a tuberculosis hospital if they feel this to be the proper place for him under all the circumstances. Of course in the case submitted by you Mr. Davis did not become a county charge of Logan county. This for the reason that it did not appear that he was "legally settled in the township or has no legal settlement in this state, or that such settlement is unknown." But right here is where the provisions of Sections 3482 and 3483 G. C. and the opinion of Mr. Hogan come into play. The su-

perintendent of the infirmary of Logan county notified the county commissioners of Putnam county of the situation, but they refused to receive Mr. Davis. Then it became the duty of the county commissioners of Logan county to take charge of him, and the expense incurred thereby became an obligation against Putnam county, and as said before, the county commissioners of Logan county in caring for him were warranted in placing him in the sanatorium at Mt. Vernon and paying the expenses incident thereto, charging the same back against Putnam county.

In connection with your questions it will be well to consider the provisions of Sections 1815-13 and 1815-14 G. C., which have to do particularly with the Ohio state sanatorium. They read as follows:

> *Section* 1815-13 *G. C.*—"It shall be the duty of the board of state charities to make collections for the support of patients at the Ohio State sanatorium. When the superintendent of the Ohio State sanatorium shall report to the board of state charities that an applicant for admission to or an inmate of that institution or any person legally responsible for his support is not financially able to pay the amount fixed by Section 2068 of the General Code, it shall be the duty of the board of state charities by its authorized agents to make a thorough investigation as is provided by law for such investigations in other institutions."
>
> *Section* 1815-14 *G. C.*—"If after the investigation provided in the next preceding section it shall be found that said applicant or inmate or any person legally responsible for his support is unable to pay the amount fixed by law, said board of state charities shall determine what amount, if any, said applicant or inmates or any person legally responsible for his support shall pay. The difference between the amount so determined and the amount fixed by Section 2068 of the General Code shall be paid by the county in which said applicant or patient has a legal residence. The amount so determined to be paid by the county shall be paid from the poor fund on the order of the county commissioners."

At first sight it might seem that these provisions would modify the conclusion above reached, but upon considering them carefully I do not think that they do. It must be kept in mind that Mr. Davis has become a charge of Logan county due to the fact that Putnam county has refused to take charge of him. Logan county, in a sense, is, in the first instance, legally responsible for his support. Mr. Davis did not make application for admission to the sanatorium. Logan county made application. It made application for one of its wards to whom it was furnishing outdoor relief. Logan county is, in the first instance, in my opinion, liable for the cost incident to his being placed there. The county, and not the individual, had contractual relations with the sanatorium. Hence there are no grounds whatever for reporting this case to the board of state charities. Logan county, which is responsible in the first instance for Mr. Davis' support, is financially able to pay for his care and support.

It might be thought that this bill should be presented by the sanatorium directly to Putnam county, and that Putnam county should pay the bill direct to the sanatorium, and this on account of the provision found in Section 1815-14 G. C., as follows: "Shall be paid by the county in which said applicant or patient has a legal residence." As Mr. Davis has a legal residence in Putnam county, it might be considered that Putnam county should pay the charges direct to the sanatorium. This would undoubtedly be the case if Mr. Davis had found his way into the sanatorium through his own application; but it must be remembered that he came under the charge of Logan county and is its ward; that it is responsible for his care and support and that it is instrumental in placing him in the sanatorium and that it is

evidently able to pay. Hence it is my opinion that Logan county, in the first instance, should pay the bill. It would then have a legal claim against Putnam county for the amount paid as hereinbefore set out.

Of course in reaching the above conclusion I am considering that Mr. Davis has a legal settlement in Putnam county, that is, he resided in Putnam county for a period of twelve consecutive months immediately before moving to Logan county, and that during those twelve successive months he received no relief under the provisions of law for the relief of the poor. The mere fact that he received support from his brother while living in Putnam county would not bring him without the provisions of Section 3477. The support spoken of in that section must have been support furnished under the provisions of law for the relief of the poor. If I understand your questions correctly the above fully answers them:

(1) Davis is a proper charge of Putnam county; and

(2) Logan county has a right of action against Putnam county for expenses incurred by it incident to the relief furnished to Mr. Davis provided the provisions of Sections 3482 and 3483 have been complied with.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1674.

APPROVAL OF BOND OF TREASURER OF STATE AS CUSTODIAN OF THE STATE INSURANCE FUND.

COLUMBUS, OHIO, January 7, 1919.

HON. JAMES M. COX, *Governor of Ohio, Columbus, Ohio.*

DEAR SIR:—Hon. Rudolph W. Archer, state treasurer for the State of Ohio, elect, has submitted to me a bond in the sum of $100,000.00 conditioned for the faithful performance upon his part of the duties devolving upon him as custodian of the state insurance fund of Ohio, he becoming such custodian under and by virtue of his office as state treasurer.

I have examined the bond submitted carefully and am of the opinion that it is correct in form and in all respects complies with the laws of the State of Ohio. Inasmuch as under the statute you are to pass upon the sufficiency of the bond, and also to the effect that it is in compliance with the laws of the state, I am forwarding the same to you for your consideration, and will mail a copy of this opinion to Hon. Rudolph W. Archer.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1677.

PROBATE COURT—MUST COMMIT PERSON FOUND INSANE AFTER INDICTMENT TO LIMA STATE HOSPITAL.

Where a person is found to be insane after indictment, and before sentenced the probate judge, when receiving a certificate to this effect, must commit such person to the Lima hospital, where he must remain until he is restored to reason.

COLUMBUS, OHIO, January 8, 1919.

HON. JOHN V. CAMPBELL, *Prosecuting Attorney, Cincinnati, Ohio.*

DEAR SIR:—I have your communication of December 31, 1918, which reads as follows:

"There has arisen in this county a question which we are respectfully submitting for your consideration. A prisoner, James Tate, was indicted here on two charges of robbery. These offenses were committed by Tate and a confederate. Tate's attorney, complying with Section 13608 of the General Code, filed a certificate of a physician that Tate was suffering from epilepsy. A hearing was had as provided in this section and Section 13609 and a jury found by unanimous verdict that Tate was insane. The insanity is based entirely on the fact that Tate is an epileptic and as such is irresponsible. Probate Judge Wm. H. Lueders of this county advises us that he will dismiss Tate when the matter is submitted to him as he has no authority to order Tate's confinement in any institution in this state. This is because Tate has not been a resident of the state a year. General Code Section 2044 provides that an epileptic, whose being at large is dangerous to the community shall be confined in the Ohio hospital for epileptics and his commitment and confinement to the hospital, care and custody while there and discharge therefrom shall be determined as is provided by law for the commitment and care of the insane; however, Section 2037 provides that a residence of one year is necessary before commitment to this institution. Sections 1984 and 2003 cover the commitment of the criminal insane to the Lima state hospital. Sections 1985-4 provides for the custody, care and special treatment of insane persons indicted or found to be insane.

Please advise if it is your opinion that in all cases where persons are indicted and then found to be insane, whether epileptic or otherwise, they must under all circumstances be confined in the Lima state hospital, or if a person suffering with epilepsy and found to be insane by a jury should be committed to the Ohio hospital for epileptics. If it is your opinion that the latter step should be taken, please advise what action, in your opinion, should be taken in the case of Tate, who has not been a resident of this state for a year."

In considering your question, let us first note a provision found in Section 13614 G. C. to this effect, "If a person under indictment appears to be insane, proceedings shall be had as provided for persons not indicted because of insanity." This provision makes it necessary for us to consider Section 13577 G. C., which provides in part as follows: "If a grand jury upon investigation of a person accused of crime finds such person to be insane, it shall report such finding to the court of common pleas. Such court shall order a jury to be impaneled to try whether or not the accused is sane at the time of such impaneling, and such court and jury shall proceed in a like manner as provided by law when the question of the sanity of a person indicted for an offense is raised at any time before sentence." This provision makes it again necessary for us to turn to the provisions having to do with the trial of a person to ascertain whether he is sane or not when such person has been indicted, but has not yet been sentenced. These provisions are found in Section 13608 to Section 13610 G. C. inclusive. Section 13608 G. C. reads as follows:

"When the attorney of a person indicted for an offense suggests to the court in which such indictment is pending, and before sentence, that such person is not then sane and a certificate of a reputable physician to that effect is presented to the court, such court shall order a jury to be impaneled to try whether or not the accused is sane at the time of such impaneling. Thereupon a time shall be fixed for a trial, a jury shall be drawn from the jury box and a venire issued, unless the prosecuting at-

> torney or the attorney of the accused demand a struck jury, in which case such jury shall be selected and summoned as required by law. The jury shall be sworn to try the question whether the accused is or is not sane and a true verdict given according to the law and the evidence, and, on the trial, the accused shall hold the affirmative."

Section 13609 provides that three-fourths of the jurors may return a verdict as to the sanity or insanity of the person under trial. Section 13610 G. C. provides in part as follows: "If the jury finds him to be not sane, that fact shall be certified by the clerk to the probate court, and the accused, until restored to reason, shall be dealt with by such court as upon inquest had." That is, the probate court, when the clerk thereof receives a certificate to the effect that a certain person has been found not to be sane, must proceed with the matter of commitment just the same as if the probate court itself had made the inquest and found that the person being inquired about is not sane. Of course, what the probate court can do with the person in the way of committing him to some institution depends altogether upon the provisions of the statutes in reference to the particular case which he has in hand. Right here it might be well for us to notice another provision of this section, which is as follows: "If he is discharged, the bond given for his support and safe-keeping shall contain a condition that when restored to reason, he shall answer to the offense charged in the indictment, or of which he has been convicted, at the next term of the court thereafter, and abide the order of such court."

If this provision applies to the case which you have in hand, then it would appear that the probate court might commit Mr. Tate to the proper hospital for the insane, and then if the superintendent thereof should deem it for the best interests of the public, he might discharge Mr. Tate upon a bond being given as provided in said provision of Section 13610 G. C.

The matter of the discharge of an insane patient is set forth in Section 1964 G. C., which reads as follows:

> "On consent and advice of the trustees, the superintendent may discharge any patient, from a state hospital for the insane, when he deems such discharge proper and necessary. No patient who in the judgment of the superintendent has homicidal or suicidal propensities shall be discharged. If, in the opinion of the superintendent, the condition of the patient at the time of discharge justifies it, he may permit him to go to his home, or leave the institution unattended."

But in connection with this matter, we must again note the provisions of Section 13614 G. C. This section provides, in part: "If such person is found to be insane, *he shall be committed to the Lima state hospital until restored to reason,* when the superintendent thereof shall notify the prosecuting attorney of the proper county, who shall proceed as provided by law with the trial of such person under indictment."

It will be well for us to keep in mind that Section 13614 G. C. was originally a part of an act "to povide for the erection, organization and management of the Lima state hospital, being Section 13 of said act. This act deals exclusively with the matter of the Lima state hospital, and in this connection it will be well for us to note the provisions of Section 1985, G. C., which was originally Section 2 of said act. This section provides in part, "The Lima state hospital shall be used for the custody, care and special treatment of insane persons of the following classes:

1. * * * * * * *.
2. * * * * * * *.
3. Persons accused of crime, but not indicted because of insanity.
4. Persons indicted, but found to be insane."

* * * * * * * *.

It appears to me, that this section itself is broad enough to warrant the conclusion that whenever a person has been indicted for a crime, and before sentence is found by special trial to be insane, then the indicted person must be committed to the Lima state hospital. Of course, it might be held that even though this section provides that the Lima state hospital shall be used for certain classes of insane persons, yet the legislature did not intend that it should be the only hospital to which such persons might be committed. But I do not think the section would bear that construction. However, when we take into connection with this section, the provisions of Section 13614 G. C. above quoted, and when we remember that 1985 and 13614 both formed a part of the same act, it seems to me that the only conclusion to which one can arrive is, that if a person under indictment is found to be insane, then he must be committed to the Lima state hospital. If this conclusion is correct, then, under the provisions of 13610 G. C., the probate court would have no other course to pursue than to commit Mr. Tate to the Lima state hospital.

Further, it is quite evident that Section 13614 negatives the idea that a person committed to said hospital, under the circumstances mentioned by you, may be discharged therefrom during the time of his insanity, because this section provides that he shall be committed to the Lima state hospital *"until restored to reason."*

The above reasoning is all the more effective when we remember that Section 1985 G. C., and 13614 G. C. are parts of a later enactment than Section 13608 G. C. et seq..

So that I would hold that the probate judge of your county has no authority to commit Mr. Tate to the Ohio hospital for epileptics; neither has he any authority to discharge Mr. Tate. But under the provisions of Section 13610, and 13614, G. C., he must commit Mr. Tate to the Lima state hospital, there to remain until he is restored to reason.

It must be kept in mind that Mr. Tate was not found by the jury to be an epileptic. He was found by the jury to be insane. This is the only ground which would warrant the court in not proceeding with a trial in order to ascertain whether Mr. Tate is guilty of the crime charged in the indictment or not. The provisions of Section 13608 G. C., et seq., are merely for the purpose of postponing a trial until an insane person becomes again sane, so that he can intelligently consult with his counsel and make the proper defense to the charge contained in the indictment.

I note in your communication that you state that the physician filed an affidavit to the effect that Mr. Tate was suffering from epilepsy. If this is strictly the nature of the affidavit, it possibly did not comply strictly with Section 13608, because that section provides that the certificate of a reputable physician must be made to the effect that a person is not sane. But however that may be, the court evidently decided that the affidavit was sufficient, and a special jury was impaneled, and the jury brought in a verdict to the effect that Mr. Tate was insane at the time of the impaneling of the jury.

Under all these circumstances and conditions, it is my opinion that the conclusion above reached is correct.

You state in your communication that the probate judge of your county contemplates discharging Mr. Tate, for the reason that he has not been a resident of the state of Ohio for one year, and that he did not contract the disease of epilepsy

while residing in this state. This idea is based on Section 2037 G. C., which makes such a provision, but this applies merely to the matter of committing persons to the Ohio hospital for epileptics at Gallipolis, and would not apply to the matter of committing persons to the Lima state hospital.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1675.

APPROVAL OF ABSTRACT OF TITLE TO LOT NO. 55 OF WOOD BROWN PLACE SUBDIVISION, COLUMBUS, FRANKLIN COUNTY, OHIO.

COLUMBUS, OHIO, January 8, 1919.

HON. CARL E. STEEB, *Secretary, Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—I am in receipt of abstract of title covering the following lot of land located in the city of Columbus, county of Franklin and state of Ohio, and described as follows:

> "Being lot No. fifty-five (55) of Wood Brown Place subdivision, as the same is numbered and delineated upon the recorded plat thereof, of record in plat book 5, page 196, recorder's office, Franklin county, Ohio.

The facts and circumstances surrounding the title to this lot, as shown by the abstract, are of such a nature that it is difficult for one to give satisfactory advice as to what the state should do. The abstract shows that this property was sold for taxes to John Faust, Roy Ashwell, the owner, failing to pay the same.

The records show that the lot was afterwards sold to T. B. Miller, said John Faust failing to pay the taxes thereon. The records further develop the fact that T. B. Miller failed to pay the taxes upon this lot and that at the February, 1916, sale of delinquent lands no one purchased the lot for the taxes due upon it and that it was therefore forfeited to the state of Ohio. The state is now desirous of purchasing the lot.

The sections of the General Code which relate particularly to the matter in question are Sections 5744 and 5746, which read as follows:

> "Section 5744.—Every tract of land and town lot offered for sale by the treasurer, as provided in the next preceding chapter, and not sold for want of bidders, shall be forfeited to the state. Thenceforth all the right, title, claim, and interest of the former owner or owners thereof, shall be considered as transferred to, and vested in, the state, to be disposed of as the general assembly may direct."
>
> "Section 5746.—If the former owner of a tract of land or town lot, which has been so forfeited, at any time before the state has disposed of such land or lot, shall pay into the treausury of the county in which such land or lot is situated, or into the state treasury, all the taxes and penalties which have since accrued thereon, as ascertained and certified by the

auditor, the state shall relinquish to such former owner or owners, all claim to such land or lot. The county auditor shall then re-enter such land or lot on his tax-list, with the name of the proper owner."

It will be noted that under Section 5744 G. C. when a lot is forfeited to the state of Ohio, all the right, title, claim and interest of the former owner shall be considered as transferred to the state and vested in it. So that under this section the state of Ohio now has all the right and title in and to this lot which the original owner had.

Section 5746 G. C. provides that at any time before the state has disposed of such lot the former owner of the same may redeem it by paying to the treasurer of the county all the taxes and penalties due thereon. On account of the provisions of this section, it is absolutely impossible for the state of Ohio to acquire such a title to this lot as would foreclose the right of the original owner to redeem the lot and I am informed that the whereabouts of the original owner, John Faust, are unknown, so it would be impossible to obtain a quit-claim deed from him.

Under all these circumstances, the only advice I am able to give is that the state of Ohio now has all the right, title and interest in and to this lot which the original owner had, subject, however, to the right of the original owner to redeem the same at any time prior to the time the state of Ohio may see fit to dispose of the lot. Hence it will require no deed to transfer the title to this lot to the state of Ohio. It is already in the state and if the original owner should ever demand the right to redeem the lot under the statute, the state would be compelled to secure a quit-claim deed from him or suffer him to redeem it under the provisions of Section 5746 G. C.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1676.

APPROVAL OF ABSTRACT OF TITLE TO LOT NO. 23 OF WOOD BROWN PLACE SUBDIVISION, COLUMBUS, FRANKLIN COUNTY, OHIO.

COLUMBUS, OHIO, January 8, 1919.

HON. CARL E. STEEB, *Secretary, Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—I am in receipt of abstract of title covering the following lot of land located in the city of Columbus, county of Franklin and state of Ohio, and described as follows:

Being lot No. twenty-three (23) of Wood Brown Place subdivision, as the same is numbered and delineated upon the recorded plat thereof, of record in plat book 5, page 196, recorder's office, Franklin county, Ohio.

I have examined said abstract and it shows that this property has been sold for non-payment of taxes; sold in the first instance to Ira H. Miller, George W. Ingham being the owner of said property at the time it was sold to Ira H. Miller for taxes.

Afterwards, this property was transferred from the name of Ira H. Miller to W. Guy Jones, by assignment of the tax certificate under date of March 13, 1906.

Further than this, the abstract shows no liens or encumbrances on said property, excepting the taxes for the year 1918, amounting to 44 cents, together with a special assessment for the improvement of Ridgview avenue, amounting to 50 cents.

Under the law, W. Guy Jones, who is now the holder of the tax certificate, is entitled to a deed from the auditor, more than two years having elapsed since the property was sold for taxes. It is my opinion that if W. Guy Jones would secure an auditor's deed for this property, he would be in a position to make a deed to the state of Ohio. I understand, however, that Mr. Jones is dead, but that his personal representatives are in a position to assign the tax certificate to the state of Ohio.

Under these circumstances possibly the best course would be to have said tax certificate assigned to the state of Ohio, upon its paying to the estate of W. Guy Jones an amount of money which may be agreed upon by the representatives of said W. Guy Jones and the state. The state would then be in a position to secure from the county auditor a tax deed and thus acquire as good a title for this property as possible under the circumstances. I realize a tax deed in this state is very unsatisfactory, but I can see no other course open, by which the state could secure title to this property, and I therefore recommend that the latter course above set out be followed.

I am returning herewith the abstract submitted by you.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1678.

GOVERNOR AND ADJUTANT GENERAL PERSONALLY LIABLE ON BOND PROVIDED FOR BY ACT OF CONGRESS OF JUNE 14, 1917.

In the event the governor of the state or the adjutant general thereof should sign the bond provided for by the act of Congress of June 14, 1917, he would be personally liable under said bond. In no event could either of them bind the state of Ohio as a state, by signing said bond.

COLUMBUS, OHIO, January 10, 1919.

HON. ROY E. LAYTON, *Adjutant General, Columbus, Ohio.*

DEAR SIR:—I have your request for an opinion on a certain bond form submitted to me. You wish to know whether the governor or the adjutant general would be individually responsible if they signed this bond.

Before noting the provisions of the bond we will consider the provisions of law under which one of said officials is contemplating signing same. On June 14, 1917, Congress passed an act entitled:

> "An act to authorize the issue to states and territories and the District of Columbia of rifles and other property for the equipment of organizations of Home Guards."

Section 2 of said act defines the term "Home Guards," which definition must be met in order to bring them within the provisions of the act. I might say at the outset that I doubt very much whether the organizations which we have in

the state are of a character such as would bring them within the purview of said definition. However, this is a matter for the federal government to decide, rather than the state of Ohio, through its departments. We will pass by this question and proceed to the consideration of whether the governor or the adjutant would be personally bound if he signed said bond.

Section 1 of the act above mentioned reads as follows:

> "That the secrtary of war during this existing emergency be, and he is hereby, authorized, in his discretion, to issue from time to time to the several states and territories and the District of Columbia for the equipment of such home guards having the character of state police or constabulary as may be organized by the several states and territories and District of Columbia, and such other home guards as may be organized under the direction of the governors of the several states and territories and the commisioners of the District of Columbia or other state troops or militia, such rifles and ammunition therefor, cartridge belts, haversacks, canteens, in limited amounts as available supplies will permit, provided that the property so issued shall remain the property of the United States and shall be receipted for by the governors of the several states and territories and commissioners of the District of Columbia and accounted for by them under such regulations and upon furnishing such bonds or security as the secretary of war may prescribe, * * *."

It is to be noted in this section that the property furnished by the federal government shall be receipted for by the governors of the several states and accounted for by them, under such regulations and upon furnishing such bonds or security as the secretary of war may prescribe.

Section 4 of the act reads as follows:

> "Every application for arms and equipment must be made by the governor of the state desiring the property and submitted to the chief of ordnance, Washington, D. C., on application blank furnished by the office of the chief of ordnance."

Section 7 of the act relates to the accountability for the property issued to any state by the federal government. This section reads as follows:

> "All material issued under the above mentioned law shall remain the property of the United States. It shall be issued to and receipted for by the governors of the several states or territories or the commissioners of the District of Columbia. Before the issue of any property a bond may be required to be furnished by the governors or commissioners in favor of the United States in the penal sum of the value of the property. If a bond is required, it must be signed by the commanding officer of the Home Guard forces of the state, territory, or District of Columbia for the use of which the property is issued, and will be conditioned on the performance of the following undertakings, namely, that said equipment will be safely kept and accounted for, and will be returned at the termination of the present exisiting emergency, or when no longer needed for the purposes for which issued, or returned at any time when an exigency requires the use of the property for other purposes, in good order and condition, reasonable wear excepted, to such officer or person as the secretary of war may designate to receive them. The bond may be

signed by two or more individuals who own property in excess of the penal sum named therein as sureties or by a surety company which has complied with the law and the regulations of the treasury department and has been designated by that department as acceptable surety on Federal bonds. A certified copy of the commission of the commanding officer must be attached to the bond."

It will thus be seen, from the sections above quoted, that the property must be receipted and accounted for by the governor of the state to which it is issued and that he is required to furnish a bond in favor of the United States. The state itself is not considered a party in the transaction, but the governor is specifically considered the principal, in that he receipts and accounts for the property and is responsible for it.

Section 7 further provides that the bond must be signed by the commanding officer of the Home Guard forces. It is my view that if the governor or the commanding officer of the Home Guard forces signs said bond, he is the principal thereof and is personally liable if the conditions of the bond are not fully met.

In no event could the state of Ohio, as a state, be bound by the bond. Before the governor or commanding officer of the Home Guard forces could bind the state by signing a bond, the General Assembly would have to pass the necessary legislation authorizing him to sign such bond for and on behalf of the state of Ohio and with a view to binding the state.

Inasmuch as this act does not in anywise purport to bind or deal with the state of Ohio and it clearly indicates that the governor of the state is the one who is responsible for the property furnished to the state, and inasmuch as the act specifically provides that the bond shall be signed by the commanding officer and there is no law in our state authorizing the governor or commanding officer of the Home Guards forces to bind the state, it is clearly my opinion that the governor or said commanding officer is personally liable if he signs the bond form submitted to me for consideration.

I take it that it is not necessary to set out the bond in this opinion, inasmuch as it is based strictly upon the sections of the act herein quoted and would be interpreted from the viewpoint of said sections. I might say, however, that the bond starts out on the theory that the commanding officer of the Home Guard of the state would be liable. It reads thus:

"Know all men by these presents, that we, ----------, the duly appointed commanding officer of the Home Guard of the state of Ohio, * * * and ---------- * * are held and bound unto the United States of America in the penal sum," etc.

Hence from all the above it is my opinion that the conclusion herein reached is correct.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1679.

APPROVAL OF BOND ISSUE OF WARREN CITY SCHOOL DISTRICT, TRUMBULL COUNTY, OHIO—$89,500.00.

COLUMBUS, OHIO, January 10, 1919.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In Re: Bonds of Warren City School district, Trumbull county, Ohio, in the sum of $89,500.00, for the purpoose of funding certain existing valid and binding indebtedness of said school district.

I am in receipt of a copy of a resolution adopted by you January 6, 1919, providing for the purchase of the above issue of bonds subject to the approval of this department. I have examined the transcript submitted of the proceedings of the board of education and of other officers of Warren City School district relating to said issue of bonds, and find same to be in conformity to the provisions of the General Code of Ohio relating to bond issues of this kind. Former proceedings relating to this isue of bonds purchased by you by resolution under date of October 23, 1918, were examined by me and found to comply with the provisions of law relating to the issue of funding bonds, and said proceedings were approved by me by opinion under date of November 27, 1918. Thereafter the printed bonds covering said issue were delivered at the office of the state treasurer, and in examining said bonds I found that the same were not signed in the manner required by law; that is, said bonds, although they were signed by the clerk of the board, were not signed by the president, but in lieu of the president's signature said bonds bore the signature of a member of the board of education designating himself as "president pro tem." Upon investigation I found that the board did not have a president. Upon my instructions the bonds were returned and proper proceedings had for the election of a president who would be legally authorized to sign the bonds. These proceedings necessitated a change in the resolution providing for the issue of the bonds so as to make a change both in the date of the bonds and in the maturity thereof. These changes necessitated a re-offer of the bonds both to the board of sinking fund commissioners of the school district and to your board. You accordingly rescinded the former resolution providing for the purchase of this issue and adopted a new resolution under date of January 6, 1919, providing for the purchase of the same. It is this purchase that is approved by this opinion.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1680.

COUNTY SUPERINTENDENT OF SCHOOLS—SALARY MAY BE RAISED DURING TERM—SUCCESSOR TO MAY RECEIVE LARGER SALARY—CERTIFICATE UNDER 4744-2 MAY BE AMENDED.

The salary of a county superintendent of schools may be raised during his term of office.

Where a county superintendent has resigned the county board of education may pay a larger amount as salary to his successor from that which the county superintendent would have received had he served the remainder of his term.

The certificate of the county board to the county auditor under Section 4744-2 may be amended to cover the increased amount of said salary.

COLUMBUS, OHIO, January 10, 1919.

HON. F. B. PEARSON, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—Your request for my opinion reads:

> "A county superintendent has resigned to engage in Red Cross work in France. His successor can not be employed at the same salary the superintendent who has resigned was to receive. Can the county board of education pay an additional salary and can such additional salary for the new superintendent be distributed by the county auditor and be certified to the state auditor?"

The salary of a county superintendent is fixed by the county board of education. Provision, therefore, is made in Section 4744-1 of the General Code which reads as follows:

> "The salary of the county superintendent shall be fixed by the county board of education, to be not less than twelve hundred dollars per year, and shall be paid out of the county board of education fund on vouchers signed by the president of the county board. Half of such salary up to two thousand dollars shall be paid by the state and the balance by the county school district. In no case shall the amount paid by the state be more than one thousand dollars. The county board may also allow the county superintendent a sum not to exceed three hundred dollars per annum for traveling expenses and clerical help. The half paid by the county school district shall be pro-rated among the village and rural school districts in the county in proportion to the number of teachers employed in each district."

Under the provisions of the above section a minimum salary is provided, i. e., the amount of not less than twelve hundred dollars per year, but no maximum amount is set as far as the county board is concerned. There is a maximum set which the state shall pay, i. e., the one-half of two thousand dollars or, in other words, the state in no case shall pay more than one thousand dollars, and it was determined in Opinion No. 1165, found in the Annual Report of the Attorney-General for 1914, Volume II, page 1265, that simply because the statute provided that half should be paid by the state and that the one-half to be paid by the state was limited to one thousand dollars, that the fact was not sufficient reason why the county board should not pay, or contract to pay, more than two thousand dollars as an annual salary to the county superintendent. It may be considered then that if conditions warrant the same, and it is for the county board of education to determine in the first instance as to such conditions, the county board may pay as salary to the county superintendent an amount in excess of two thousand dollars per annum.

The first question perhaps for me to answer in your inquiry is, "Can the salary of a county superintendent be increased during the term for which he was employed?" In Opinion No. 295, found in Opinions of the Attorney-General for

1917, Volume I, page 742, I held that the county school superintendent is a public school officer and that as such officer his salary might be changed during his term of office and that the county board of education is the proper body to make such change. Said opinion was based on the case of State ex rel. vs. Vance, et al., 18 O. N. P. (n. s.) 198, and State ex rel. vs. Board of Education, 21 O. C. C. 785.

It may, therefore, be considered, then, that the board has a right to change the salary of a county superintendent during his term of office and if such change can be had, it would follow that a greater amount per annum could be paid to a superintendent who is employed to fill an unexpired term over the amount the original superintendent would have received had he served to the end of his term.

When the salary of the county superintendent is fixed it shall be certified to the county auditor under the provisions of Section 4744-2 of the General Code which reads as follows:

> "On or before the first day of August of each year the county board of education shall certify to the county auditor the number of teachers to be employed for the ensuing year in the various rural and village school districts within the county school district, and also the number of district superintendents employed and their compensation and the compensation of the county superintendent; and such board of education shall also certify to the county auditor the amounts to be apportioned to each district for the payment of its share of the salaries of the county and district superintendents."

That is to say, the county board of education is the hiring body of the county superintendent and in order to secure funds from which the salary of such superintendent may be paid, the amount of such salary so fixed by the county board shall be certified to the county auditor, and that the county auditor may have instructions as to the place where such salary shall be procured, the county board of education shall certify the number of teachers which are employed in the various rural and village districts under the jurisdiction of the county board and shall certify the amounts to be apportioned to each district so that when the county auditor makes his semi-annual settlements, the amount necessary to pay the salary of the county superintendent may be withheld from such districts. The amounts so withheld shall be placed in what is called the "county board of education fund," which is provided for in Section 4744-3 G. C., which reads in part:

> "The county auditor when making his semi-annual apportionment of the school funds to the various village and rural school districts shall retain the amounts necessary to pay such portion of the salaries of the county and district superintendents and for contingent expenses, as may be certified by the county board. Such moneys shall be placed in a separate fund to be known as the 'county board of education fund'." * * *.

A county board of education fund may also be replenished from fees for examinations and through transfer of the surplus from the sheep claim fund and by transfer from the city institute fund, or otherwise.

The county board of education shall also certify under oath to the state auditor the amount due from the state as its share of the salary of the county and district superintendents of such county school district *"for the next six months,"* and upon receipt of such certificate the county auditor shall draw his warrant upon the state treasurer in favor of the county treasurer for the required amount, and the county auditor shall place said amount in the county board of education fund.

The above provision is found in the latter part of Section 4744-3 G. C., which reads:

* * * "The county board of education shall certify under oath to the state auditor the amount due from the state as its share of the county and district superintendents of such county school district for the next six months. Upon receipt by the state auditor of such certificate he shall draw his warrant upon the state treasurer in favor of the county treasurer for the required amount; which shall be placed by the county auditor in the county board of education fund."

This department has held at various times that the time mentioned, i. e., the first day of August in each year in Section 4744-2 is directory and not mandatory. That is to say, if the certificate of the county board to the county auditor was not for any reason made on or before said first day of August that the board might make such certificate at a later date. As for illustration, if a district failed to elect a district superintendent and failed to certify to the county board of education the amount of the salary of such district superintendent, the county board of education could on the first day of September elect such district superintendent and could lix the salary thereof and could at that time make the certificate to the county auditor which is required by said Section 4744-2.

The difficult question is, "Suppose the certificate is once made by the county board of education, is the same of such a nature that the acts of the board are functus officio?" Functus officio is a term applied to something which once has had life and power, but which has become of no virtue whatever. Bouvier's Law Dictionary, Volume II, page 1323, says:

"For example, a warrant of attorney on which a judgment has been entered is functus officio, and the second judgment can not be entered by virtue of its authority. When arbitrators can not agree and choose an umpire, they are said to be functi officio. If a bill of exchange be sent to the drawee and he places it to the credit of the holder, it is functus officio and can not be further negotiated. When an agent has completed the business with which he was entrusted, his agency is functus officio."

But is the action of the board in certifying the amount of salary to the county anditor of such a nature as the illustrations referred to by Bouvier? The very things which are certified may during the year be changed so that another or a different certificate should be made. I am satisfied that when the certificate has been made to the auditor and distribution is made to the various districts as provided therefor, no other and further certificate can have effect upon said distribution, but inasmuch as the distribution is made semi-annually, and inasmuch as it is specifically provided that the county board shall certify to the state auditor the amount due as its share of the salary of the county superintendent "for the next six months," that the county board should be permitted to also certify additional salary which is needed to the county auditor, provided such certificate is made on or before the time of the February semi-annual distribution and to be in addition to the certificate which is made for the August distribution.

Holding these views, then, I advise you that the salary of a county superintendent may be raised during the term for which he was employed, and that the county board of education has a right to certify an additional salary for a person who is elected to fill the place of a superintendent who has resigned.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General.

1681.

VALENTINE ANTI-TRUST LAW—ATTEMPT OF ASSOCIATION TO COMPEL DEALER TO TAKE ALL MILK OFFERED BY MEMBER AND REFUSE TO TAKE FROM NON-MEMBER MAY BE UNDER.

An attempt on the part of an association of milk producers to compel a milk dealer to accept all milk offered at any time by any member of the association, and to refuse to buy milk from any milk producer not a member of the association, evidences an unlawful combination under the Valentine anti-trust act in such degree as to justify an investigation by a grand jury.

COLUMBUS, OHIO, January 10, 1919.

United States Food Administration, Chief, Law Enforcement Division, Columbus, Ohio.

GENTLEMEN:—In your letter of recent date you have submitted for my consideration a letter received from the secretary of the Federal Milk commission for Ohio and invite my opinion as to whether or not the practice dscribed by him constitutes a violation of the Ohio statutes.

The letter referred to states the following facts and question:

> "It has been stated to the Federal Milk commission for Ohio that certain producers in Seneca county have incorporated under the name of the Seneca County Dairy association. This corporation buys milk from its members as individuals and possibly buys also from others, though I am not certain of this. The association then resells the milk to milk dealers. It was stated by a Tiffin dealer that the association had endeavored to compel him to accept all milk offered at any time by any member of the association and to refuse to buy milk from any milk producer not a member of the association. No evidence of this appears in writing, but presumably the dealer would be willing to testify to the facts.
>
> *Query*: Do the facts as stated afford an apparent ground for investigation by the county prosecutor for a violation of the Valentine law?"

These facts invoke consideration of the following sections of the General Code of Ohio, constituting what is popularly known as the "Valentine Anti-Trust Law."

> *Section* 6391.—"A trust is a combination of capital, skill or acts by two or more persons, firms, partnerships, corporations or associations of persons, for any or all of the following purposes:
>
> 1. To create or carry out restrictions in trade or commerce.
> 2. To limit or reduce the production or increase, or reduce the price of merchandise or a commodity.
> 3. To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or a commodity.
> 4. To fix at a standard or figure, whereby its price to the public or consumer is in any manner controlled or established, an article or commodity of merchandise, produce of commerce intended for sale, barter, use or consumption in this state.
> 5. To make, enter into, execute or carry out contracts, obligations or agreements of any kind or description, by which they bind or have bound themselves not to sell, dispose of or transport an article or commo-

dity, or an article of trade, use, merchandise, commerce or consumption below a common standard figure or fixed value, or by which they agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of an article, commodity or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, purchasers or consumers in the sale or transportation of such article or commodity, or by which they agree to pool, combine or directly or indirectly unite any interests which they have connected with the sale or transportation of such article or commodity, that its price might in any manner be affected. Such trust as is defined herein is unlawful, against public policy and void."

Section 6396.—"A violation of any or all of the provisions of this chapter is a conspiracy against trade, and a person engaged in such conspiracy or taking part therein, or aiding or advising in its commission, or, as principal, manager, director, agent, servant or employer, or in any other capacity, knowingly carrying out any of the stipulations, purposes, prices or rates, or furnishing any information to assist in carrying out such purposes, or orders thereunder, or in pursuance thereof, or in any manner violating a provision of this chapter, shall be fined not less than fifty dollars nor more than five thousand dollars or imprisoned not less than six months nor more than one year, or both. Provided, however, that when the violation of the provisions of this chapter consists of a combination to control the price or supply, or to prevent competition in the sale of bread, butter, eggs, flour, meat or vegetables or any one of said articles, the person or persons thus engaged shall upon conviction thereof be fined in any sum not less than five hundred dollars and be imprisoned in the penitentiary not less than one nor more than five years. Each day's violation of any of the provisions of this chapter shall constitute a separate offense."

Unquestionably the act of attempting to coerce milk dealers to deal only with the members of the association evidences the specific intent required by these statutes in two particulars:

(1) It manifests a purpose to create and carry out a restriction in trade or commerce, in that it aims at restricting the milk dealers in their purchases of milk from producers.

(2) It shows a purpose to prevent competition in the purchase of produce, in that it aims to secure the members of the association against the competition of non-members in their dealings with the milk dealers.

I am not able to see that any of the other specific intents mentioned in the statutes is shown by the facts as submitted.

The act denounced by the statute is that of combination, among other things, of acts. There is clearly present here a combination—an acting in concert—on the part of members of the dairy association. The only question is as to whether this combination in its relation to the intent manifested by the specific thing done is the kind of combination denounced by the statutes. To illustrate how the problem arises let it be said that it must be admitted that if the dealer who was approached by the association had agreed with the members of the association to do the things demanded of him by them, the result would clearly have been such a "trust" as is

prohibited by the statute. This would be true because both parties whose cooperation might be necessary to bring about the illegal restrictions or prevention of competition would have been thereby participants. It appears, however, that as a matter of fact the effort to obtain such effective cooperation was frustrated by the refusal of the milk dealer who was approached to limit his dealings to members of the association. Does this fact change the result? In other words, is it necessary in order to constitute the kind of "combination" to which Section 6391 G. C. refers that both the purchaser and the seller shall enter it?

I am clearly of the opinion that this is not the case and the statutes have been violated in the transaction described by the secretary of the milk commission. It is well known that the anti-trust laws were aimed not at combinations of buyers and sellers, but were in point of fact primarily directed against combinations among those interested in the same line of business. To be sure, such combinations can effectively do some of the other things denounced by Section 6391, such as the reduction of production, the increase of price, the prevention of competition in manufacturing, making and selling articles, the fixing of standard prices, etc. Hence, it might be argued—and this gives rise to the only doubt in the case—that the statute was intended to apply only to cases in which the restrictions or the preventions of competition aimed at could be accomplished by a combination and agreement among members of the same class.

In the case before us the members of the dairy association have agreed to restrict their several activities in selling milk, in that they have (presumably) agreed to market their entire product through the association. This of itself, and in the absence of proof of a concerted purpose to fix the price of a product or to limit the supply, would not be wrongful. The specific intent manifested by the attempt to coerce the dealer, then, does not effect or tend to establish illegal restrictions among the members of the association themselves, but is directed toward the curtailment of the activities of others who are not members of the combination. This aim can be accomplished only through coercion or persuasion exerted upon the dealers. That is to say, the only respect in which, so far as the facts submitted to me show, the association has manifested a purpose to restrict competition *illegally* is by acting in a concerted manner to destroy at least one market which its competitors might otherwise have.

Now it is clear, of course, that if any one of the members of the association should attempt to persuade or coerce a milk dealer to make such an agreement with him as is described it would probably not amount to a violation of the anti-trust act. But in this case we have a concerted effort participated in by many. It is very clear that the anti-trust act embodies principles closely analogous to, if not identical with, those by which the common law offense of conspiracy is governed. It is well settled that a conspiracy is a combination of two or more to do an act lawful in itself in an unlawful manner. A combination is of the essence of the offense.

It is also perfectly clear that a conspiracy is in the nature of an attempt, i. e., an incomplete act, in the sense that the intention harbored by the conspirators need not be achieved in order to complete the offense. Thus, if A, B and C confederate to murder D, and actually kill him, the offense is not conspiracy of course, but murder; but if they stop short of killing D and yet go far enough in their preparations to constitute a conspiracy they will have committed that offense, though the steps taken might fall short in legal effect of what would constitute an attempt on the part of a single person to murder D.

Upon this reasoning, then, I arrive at the conclusion which I have expressed, which is, again, that enough is disclosed by the statement of facts submitted to me to show an illegal combination (or a conspiracy), in that the end aimed at, i. e., the

stifling of competition on the part of non-members, is one of the purposes denounced by the statute; and also because if this were not so the manner in which the end aimed at was sought to be accomplished is, I gather from the letter, illegal. The language employed by the secretary of the milk commission is that "the association had endeavored to *compel* him (the dealer) to" do certain things. From this I infer that coercion was the method employed. We have, therefore, perfect evidence of a combination of some character; of a common intent to arrive at a result which is at the very least of dubious legality; and of a common intent to employ wrongful means in arriving at that result; though the result itself is not achieved and no success has—so far as the letter discloses—attended the efforts of the association in this particular, it is a complete conspiracy because no conspiracy needs to be successful in order to be legally complete.

Put very shortly, the enterprise would seem to be an effort to put non-members out of business in the market most convenient for the sale of their product by coercing dealers. In point of fact an enterprise which could only be successfully undertaken in combination—that is, by concert of several. Upon principle, then, I am satisfied that the facts stated by the secretary, though meager, would warrant an investigation by the proper authorities with a view to the enforcement of the criminal law applicable to the case.

On the various points involved in the reasoning in which I have indulged, the following authorities are applicable:

A mere selling agency or pool is not a monopoly, and neither the common law nor the anti-trust statutes apply to such.

> Reeves vs. Decorah Farmers Co-operative society, 44 L. R. A., n. s., 1104. Cummings vs. Union Blue Stone Co., 164 N. Y., 401.

So that the mere agreement of the members of the association as members to sell to the association, with a view to making it a common agent for the re-sale of the product to dealers, could hardly be made the predicate of a prosecution if unattended by price-fixing, etc.

Coercion as a means to an end to be reached by concerted action is of itself sufficient to establish a conspiracy.

> Reeves vs. Decorah Farmers Co-operative society, supra. Martell vs. White, 185 Mass. 265; 64 L. R. A. 260.

If the coercion implied though not described in the letter of the secretary was a threat on the part of the association not to sell any milk to the dealer unless he would take under the conditions dictated by it, the case is clear upon the authority of *Eastern States Retail Lumber Dealers' Association* vs. *United States,* 234 U. S. 600. In that case an organization of retail lumber dealers had issued and distributed among its members a document known as an "official report" in which were enumerated the names of wholesale dealers and companies selling directly to consumers. This "unfair list" was intended to invite a boycott of such wholesale dealers on the part of members of the association. Upon the authority of the Danbury Hatters case (Lowe vs. Lawler, 208 U. S. 274) and Gompers vs. Buck's Stove and Range Co., 221 U. S. 418, the supreme court of the United States in that case, per Mr. Justice Day, reached the conclusion that the mere issuance of the report without any proof of the formal agreement to boycott was sufficient evidence of a conspiracy in violation of the Sherman anti-trust act. The concluding paragraphs of his opinion are as follows, being partly quoted from the previous opinion of Mr. Justice Lurton in *Grenada Lumber Co.* vs. *Mississippi,* 217 U. S. 433:

"'* * * An act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy, and may be prohibited or punished, if the result be hurtful to the public or to the individual against whom the concerted action is directed.'"

"When the retailer goes beyond his personal right, and, conspiring and combining with others of like purpose, seeks to obstruct the free course of interstate trade and commerce and to unduly suppress competition by placing obnoxious wholesale dealers under the coercive influence of a condemnatory report circulated among others, actual or possible customers of the offenders, he exceeds his lawful rights, * * *."

None of these cases is strictly in point. It must be admitted that the facts stated come barely within the principles which govern the offense, even giving to them such an interpretation as that which I have imagined. Fuller investigation might show that the transaction was entirely innocent. However, your question is as to whether or not the information which has come to you would warrant an investigation by the prosecuting attorney. My conclusion is that it would.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1682.

MEMBER OF COUNTY BOARD OF EDUCATION AND COUNTY SUPERINTENDENT INCOMPATIBLE.

A member of a county board of education is not eligible to the office of county superintendent of schools, on the ground of public policy.

COLUMBUS, OHIO, January 10, 1919.

HON. HENRY W. CHERRINGTON, *Posecuting Attorney, Gallipolis, Ohio.*

DEAR SIR:—I am in receipt of your communication requesting my opinion on the following questions:

"A member of the county board of education is a candidate for the office of county superintendent. He has asked me two questions:

1. Is a member of the county board of education eligible to the office of county superintendent?

2. Can a member of the county board of education vote for himself for the office of county superintendent?"

You state you have already advised the county board of education that a member of said board could not vote for himself as county superintendent of schools, which I think is entirely correct. This disposes of your second question.

As to your first question will say there is nothing in the law which would prevent a member of the board of education from being elected to the office of county superintendent of schools, but it is my opinion that it would be against public policy to do so. In the election of a county superintendent, each member of the board, and the board as a whole, is entitled to the advice and counsel of every

other member thereof and this could not be given if one member of the board should be a candidate for county superintendent. Under such circumstances he could not give his advice and counsel in reference to the matter.

One of the most important duties which devolve upon the board of education is the selection of some one to act as county superintendent. The relationship between the members of a board of education, or of any other such body, is such that it seems to me it would be against public policy to hold that the electing body could select one of their own number to fill any office which they under the law are entitled to fill.

In the second edition of the American and English Encyclopedia, Volume XXIII, page 348, the following principle is laid down:

> "On the ground of public policy it has been held that the person or a member of the collective body invested with the appointing power can not be appointed."

In Kinyon vs. Duchene, 21 Mich. 498, the court lays down the following principle in the syllabus:

> "The boards of supervisors have no power to select from their own members drain commissioners which they are authorized to appoint."

In the opinion the court uses the following language:

> "At the time of their appointment as such commissioners, they were all of them members of the board of supervisors which made the appointment. Whether they voted for their own appointment does not affirmatively appear, but they had as much right to do so as the others had to vote for them."

I am of the opinion that the principles above laid down are correct and therefore advise you that a member of the county board of education is not eligible to the office of county superintendent of schools.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1683.

SATURDAY AFTERNOON—COUNTY OFFICES MAY CLOSE.

County offices may close on Saturday afternoon.

COLUMBUS, OHIO, January 10, 1919.

HON. ADDISON P. MINSHALL, *Prosecuting Attorney, Chillicothe, Ohio.*

DEAR SIR:—I have your letter of December 13, as follows:

> "The county officials of Ross county are considering the advisability of closing county offices at twelve o'clock noon, on each Saturday. Section 5978 of the General Code of Ohio, as you know, provides that each

Saturday afternoon shall be a one-half legal holiday for all purposes and they have asked me to request an opinion from you as to whether or not it would be proper to close the county offices on Saturday afternoon."

Section 5978 G. C. reads:

"Every Saturday afternoon of each year shall be a one-half legal holiday for all purposes, beginning at twelve o'clock noon and ending at twelve o'clock midnight. Nothing, however, in this section or any other, or any decision of any court, shall in any manner affect the validity of or render void or voidable any check, bill of exchange, order, promissory note, due bill, mortgage or other writing obligatory made, signed, negotiated, transferred, assigned or paid by any person, persons, corporation or bank upon said half holiday, or any other transaction had thereon."

Inasmuch as Saturday is made by this section a half holiday, I can see no reason why the county offices may not be closed on Saturday afternoon, as suggested.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1684.

DISTRICT SUPERINTENDENT OF SCHOOLS ENTITLED TO YEARLY SALARY THOUGH ENLISTS IN JULY.

A district superintendent of schools is entitled to the salary fixed for the year, even though he enlists in the navy at the beginning of July of said year, or engages in some other line of business for the months during which the schools are not in session.

COLUMBUS, OHIO, January 10, 1919.

HON. HENRY W. CHERRINGTON, *Posecuting Attorney, Gallipolis, Ohio.*

DEAR SIR:—I have your communication of December 27, 1918, which reads as follows:

"A district superintendent of rural schools enlisted in the United States navy in July after the county schools had been dismissed for the school year. The distrtict superintendent receives an annual salary, which is paid monthly during each month. The county auditor refused to pay the district superintendent in question any salary for the months of July and August, on the ground that the superintendent was not in Gallia county to perform the duties of his office. The county superintendent claims to have instructions from the state superintendent that the salary should be paid. The reason given is that the work had all been performed before his enlistment in the naval service. Please advise me whether or not the full year's salary should be paid."

I am of the opinion that the said district superintendent of schools is entitled to the full year's salary which his contract calls for.

Section 4741, 4742 and 4743 G. C. provide in part, as follows:

> Section 4741.—"The first election of any district superintendent shall be for a term not longer than one year, thereafter he may be elected in the same district for a period not to exceed three years." * * *.
>
> Section 4742.—"Not less than sixty days before the expiration of the term of any district superintendent, the presidents of the boards of education within such supervision district, or in supervision districts which contain three or less village or rural districts, the boards of education of such districts shall meet and elect his successor." * * *.
>
> Section 4743.—"The compensation of the district superintendent shall be fixed at the same time that the appointment is made and by the same authority which appoints him; such compensation shall be paid out of the county board of education fund on vouchers signed by the president of the county board. The salary of any district superintendent shall in no case be less than one thousand dollars per annum." * * *.

Under the provisions of law, as above set out, the compensation of the district superintendent was fixed at a yearly salary, said salary to be payable monthly. There is nothing in the law, nor under the contract of employment, which provides that the district superintendent must maintain an actual residence in his district during the year; nor that he shall devote his entire time during the whole year to the duties of his position; nor that he should hold no other position; nor that any part of his salary should be deducted for so doing. In this it must be remembered that there is no question raised that he did not perform all of the duties devolving upon him during the time the school was in session.

It is true that the school year runs from the first day of September of each year to the 31st day of August of the succeeding year. Section 7689 G. C. reads as follows:

> Section 7689.—"The school year shall begin on the first day of September of each year, and close on the thirty-first day of August of the succeeding year. A school week shall consist of five days and a school month of four school weeks.

But Section 7644 G. C. reads as follows:

> "Each board of education shall establish a sufficient number of elementary schools to provide for the free education of the youth of school age within the district under its control, at such places as will be most convenient for the attendance of the largest number thereof. Every elementary day school so established shall continue not less than thirty-two nor more than forty weeks in each school year. All the elementary schools within the same school district shall be so continued."

Thus we see that the schools of any county are in session for only a part of the school year.

The duties of the district superintendent are set out in Sections 7706, 7706-1 and 7706-2 G. C., which read as follows:

> Section 7706.—"The district superintendent shall visit the schools under his charge, direct and assist teachers in the performance of their duties,

classify and control the promotion of pupils, and shall spend not less than three-fourths of his working time in actual class room supervision. He shall report to the county superintendent annually, and oftener if required, as to all matters under his supervision. He shall be the chief executive officer of all boards of education within his district and shall attend any and all meetings. He may take part in their deliberations, but shall not vote. Such time as is not spent in actual supervision shall be used for organization and administrative purposes and in the instruction of teachers. At the request of the county board of education he shall teach in teachers' training courses which may be organized in the county school district."

Section 7706-1.—"The district superintendent shall, as often as advisable, assemble the teachers of his district for the purpose of conference on the course of study, discipline, school management and other school work and for the promotion of the general good of all the schools in the district. The county superintendent shall cooperate with the different district superintendents in holding such teachers' meetings and shall attend as many of them as his other duties will permit."

Section 7706-2.—"It shall be the duty of the district superintendent to recommend to the village and rural boards of education within such district, such text books and courses of study as are most suitable for adoption."

From a careful perusal of said sections, it is quite clear that the great bulk of the duties of a district superintendent must be performed during the time the schools are in session. The duties which might run through the months in which the schools are not in session are almost negligible. I want to call particular attention to this language found in Section 7706 G. C., "and shall spend not less than three-fourths of his working time in actual class room supervision."

This would seem to indicate that the working time of the district superintendent is considered as the time during which the schools are in session.

Further, supposing a district superintendent should during July and August engage in some other line of work—for example, work on a farm, or in a factory; become a book agent, as many do, or engage in institute work, as some do. It would hardly be held that he would not be entitled to receive his salary fixed for the year merely because he would engage in work of this kind. The law makes no such provision. And unless the contract of employment should clearly indicate that the district superintendent must not engage during the entire school year in any other kind of employment, I am of the opinion that he would not be prevented from so doing. Neither in the case submitted by you do I think the district superintendent would be deprived of the full salary fixed by the authorities employing him merely from the fact that he enlisted in the United States navy and served therein during July and August. If he had resigned his position as district superintendent the end of June, a different conclusion might be reached, but he did not resign, and as I said before, there is nothing in the law, nor in the contract, which would prevent his engaging in a different line of work for the two months, or three months that the schools of the district might not be in session.

Very truly,
JOSEPH MCGHEE,
Attorney-General.

1685.

ROADS AND HIGHWAYS—IF CONTRACT PROVIDES FOR TRUCKS OF NOT LESS THAN FIVE TONS CAPACITY, CONTRACTOR NOT ENTITLED TO MORE IF USES LARGER TRUCK.

Where a contract provides that a party is to receive $3.50 *per hour for each motor truck used, on condition that the motor trucks shall be not less than* 5 *tons capacity, he is not entitled to a larger sum than* $3.50 *per hour, even though he furnishes trucks of a greater capacity than* 5 *tons.*

COLUMBUS, OHIO, January 10, 1919.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of November 19, 1918, which reads as follows:

> "For your information, I beg to quote the following from the journal of the highway advisory board as of November 19, 1918:
>
> 'Morrow County—Section "F" I. C. H. No. 333—Interpretation of contract by attorney-general requested. Mr. H. W. Curry of the firm of H. W. Curry & Co., agent for the highway department in the completion of Section "F," I. C. H., No. 333, and his attorney, Mr. H. S. Atkinson, was presented, to further his request that the highway department allow payment to H. W. Curry & Co., at the rate of $4.90 per hour for the use of 7 ton trucks used in moving material on the above section. Article VI of agreement dated May 15, 1917, between the state of Ohio and H. W. Curry & Co., was read, this article being as follows:
>
> 'Sixth—The party of the first part agrees to pay the party of the second part, $3.50 per hour rental for every hour each motor truck is actually in use transporting materials for the road. Said motor trucks to be not less than 5 tons capacity. It is further agreed that in consideration of the foregoing rental of $3.50 per hour for each motor truck the party of the second part shall bear the entire cost of operating said motor trucks, including driver, gasoline, oil, renewals, depreciation and all other expense incident thereto, and further will maintain said motor trucks in good working condition for use at all times.'
>
> Assistant to Chief Engineer Darnell stated that prior to the use of 7 ton trucks on the above work of H. W. Curry & Co., trucks of less capacity than 5 tons had been used on the work and that rental for the use of these trucks had been paid on the basis of 70 cents per ton capacity.
>
> The claim of H. W. Curry & Co. is that since deductions were made on a pro rata basis for trucks having less than 5 ton capacity, additional allowance should be made on a similar basis for trucks having more than 7 ton capacity.
>
> The secretary was authorized to request the opinion of Attorney-General McGhee in the matter, and to transmit to the attorney-general copy of the claim of H. W. Curry & Co., as set forth by their attorney, H. S. Atkinson in his letter of September 30."

The part of the contract between the state highway commissioner and the firm of H. W. Curry & Co. which must be construed in order to answer your question is that which you have quoted in your communication. It is to be noted in the

matter quoted that the state highway commissioner agrees to pay $3.50 per hour rental for every hour that a motor truck is actually used in transporting materials for the road; that is, the payment to be made is so much per hour per truck used in the transporting of materials. The provision then is further made that the motor trucks are not to be less than 5 tons capacity. It will be seen there is no provision made as to the maximum capacity of the trucks to be used by Mr. Curry. The only provision is that the trucks used are not to be of a less capacity than 5 tons and for such trucks he was to receive a credit of $3.50 per hour for each motor truck Mr. Curry should furnish. From this provision it is esident that Mr Curry would not be entitled to anything other than the contract price, even though he should furnish trucks of a greater capacity than five tons, and I advise you that you would not be warranted under the contract to pay Mr. Curry at a rate exceeding said sum set out in the contract.

There is some question as to whether there was a supplemental agreement that Mr. Curry should receive, for trucks of a greater capacity than 5 tons, at the rate of 70 cents per ton per hour, or, in other words, $4.90 per hour for 7 ton trucks. The parties interested not definitely agreeing as to this point, I am driven to render an opinion based strictly upon the language of the original contract itself, and in doing this can arrive at no other conclusion than as hereinabove set out.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1686.

COUNTY AUDITOR—APPOINTMENT DEPUTY SEALER WEIGHTS AND MEASURES MANDATORY.

Section 2622 G. C. providing for the appointment of a deputy sealer of weights and measures, is mandatory and the county auditor may not refuse to make such appointment.

COLUMBUS, OHIO, January 11, 1919.

HON. P. A. SAYLOR, *Prosecuting Attorney, Eaton, Ohio.*

DEAR SIR:—I have your letter of December 17, 1918, requesting my opinion as follows:

> "I write you with reference to the construction of 2622 of the General Code of Ohio, relative to the appointment of a deputy sealer of weights and measures. Is it compulsory, under this law, or is it optional with the county auditor, to make the appointment? In other words, can the county auditor himself, with the assistance that he has in his office, look after the duties imposed upon the sealer of weights and measures, without making this appointment.
>
> This county is a small county, has but five or six incorporated towns within the borders of the county, and all of them are villages, and it may be that it would be advisable from a business standpoint, to dispense with the appointment of a deputy sealer of weights and measures and have the work done from the auditor's office."

Section 2622 G. C. reads:

"Each county sealer of weights and measures shall appoint by writing under his hand and seal, a deputy who shall compare weights and measures wherever the same are used or maintained for use within his county, or which are brought to the office of the county sealer for that purpose, with the copies of the original standards in the possession of the county sealer, who shall receive a salary fixed by the county commissioners, to be paid by the county, which salary shall be instead of all fees or charges otherwise allowed by law. Such deputy shall also be employed by the county sealer to assist in the prosecution of all violations of laws relating to weights and measures."

In an opinion by this department rendered to Hon. George F. Crawford, under date of February 24, 1917, the following statement is found relative to the provisions of Section 2622:

"The language of Section 2622 G. C. is certain and specific in relation to the appointment of the deputy sealer; the provision, I think, in relation thereto, is mandatory and very good reasons are apparent why this should be so because the duties of the sealer in comparing weights and measures, wherever the same are used or kept for use, makes it necessary for the person performing those duties to go about the county where such weights and measures are so kept and so used and necessarily makes it impossible on account of the other duties of his office for the county auditor to perform that portion of the duties of the office of county sealer."

Following this view of the statute, I advise you that Section 2622 is mandatory and that the appointment of a deputy sealer may not be dispensed with.

Very truly yours,
JOSEPH MCGHEE,
Attorney-General.

1687.

FEES—ALLOWANCE UNDER 3019 G. C. MERELY PREVENTS ALLOWANCE IN EXCESS OF $100.00 IN ANY ONE YEAR.

Section 3019 G. C. does not aim to prohibit the allowance or payment of more than $100.00 during any one year if the excess has been earned by the officer in some previous year or years, during which no allowance, or one below the statutory limit, was made, but merely prevents an officer from being allowed more than $100.00 for services during any one year.

COLUMBUS, OHIO, January 11, 1919.

HON. CLARE CALDWELL, *Prosecuting Attorney Warren, Ohio.*

DEAR SIR:—I have your letter of December 18, 1918, as follows:

"In General Code, Section 3019, provision is made for an allowance in lieu of fees not in excess of $100.00 in any year. Quoting the last sentence, the section reads:

'Nor in any year shall the aggregate amount allowed to an officer exceed $100.00.'

In interpreting this section is one bound to the year when the fees are created, or to the year when the allowance is asked? In the case which I have in mind the fees were earned in the year 1916. Could an allowance be made at this time, not to exceed $100.00, for the year 1916, when no allowance was asked for during the year 1916?"

Section 3019 G. C. reads:

"In felonies wherein the state fails, and in misdemeanors wherein the defendant proves insolvent, the county commissioners, at any regular session, may make an allowance to any such officers in place of fees, but in any year the aggregate allowances to such officer shall not exceed the fees legally taxed to him in such causes, nor in any year shall the aggregate amount allowed an officer exceed one hundred dollars."

You will note that this section provides that the aggregate allowances to the different officers shall not exceed the fees taxed to him in such costs or in any year shall the aggregate amount allowed an officer exceed $100.00.

To my mind this statute does not aim to prohibit the allowance or payment of more than $100.00 during any one year if the excess has been earned by the officer in some previous year or years, during which no allowance, or one below the statutory limit, was made. The statute, I think, merely prevents an officer from being allowed more than $100.00 for his services during any one year, and whether or not he is paid $200.00, for instance, at one time for two years' services or $100.00 each year for two years, is immaterial. The important thing is that the rate of payment shall not exceed $100.00 per year.

It is therefore my opinion that allowance can be made in the case you refer to at this time for the year 1916.

Very truly yours,

JOSEPH MCGHEE,

Attorney-General