and inasmuch as you make the further findings, satisfying the requirements of sections 13965, et seq., General Code, that these parcels of land cannot be leased for an annual rental of six per cent upon the appraised value of the property, I have no difficulty in finding that you are authorized to sell this property under the statutory provisions above referred to. And since, in this connection, it further appears that neither of these parcels of land has been appraised at more than the sum of five hundred dollars, I likewise find that you are authorized to sell this property at private sale. I am therefore approving your proceedings relating to the sale of these parcels of abandoned canal lands and the transcripts submitted to me with respect to such proceedings as to the legality and form thereof, which approval is endorsed upon said transcripts and upon the duplicate copies thereof.

Appended to the several transcripts of your proceedings relating to the sale of these properties are deed forms of the deeds to be executed by the Governor conveying the property to The Chesapeake and Ohio Railway Company. Upon examination of the deed forms submitted and of the provisions and conditions therein contained, I find the same in all respects to be correct. In examining these deed forms, I have not, however, checked the descriptions of the properties in said several deeds as I assume that this is a matter that has been done with due care by your department.

I am accordingly approving said deed forms, and the same, together with the transcripts of your proceedings in these matters, are herewith enclosed.

Respectfully,
JOHN W. BRICKER,
*Attorney General.*

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2827.

VILLAGE—COUNCILMEN MAY NOT BE COMPENSATED IN EXCESS OF PROVISIONS OF SECTION 4219, GENERAL CODE.

*SYLLABUS:*

*Villages have no authority to compensate their council at a rate in excess of the amount set forth in Section 4219, General Code.*

COLUMBUS, OHIO, June 18, 1934.

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

GENTLEMEN:—I am in receipt of your communication which reads as follows:

"We are inclosing a letter written by William K. Divers, Solicitor of the village of Addyston, to one of our examiners, Mr. R. D. Lemon, who in turn referred it to this office. Our reply, as of September 29th, reads as follows:

'Relative to the compensation of councilmen in villages, we are forced to take an opposite view from that of the Solicitor of Addyston. Article XVIII, Section 1 of the Constitution of Ohio, definitely classifies munici-

pal corporations as between cities and villages and the decision of the Appellate Court in the case of *Mansfield* vs. *Endly*, 38 O. App. 528, which was affirmed by the Supreme Court in 124 O. S., 652, holds section 4209 G. C., unconstitutional for the reason that this section attempts to further classify municipal corporations by classifying cities. The first branch of the syllabus of this decision reads as follows: "All legislation affecting municipal government, notwithstanding general and uniform operation, having classification of cities as basic principal, is unconstitutional (Article XVIII, Sections 1 to 3, Constitution)."

Section 4219 G. C., fixing the salary of councilmen at $2.00 per meeting, only applies to villages and is not considered in the decision above referred to.

If the Solicitor does not agree with our contention in this matter, we will submit the question to the Attorney General for an opinion upon request.'

Upon receipt of this letter, Mr. Divers again wrote insisting that this matter be submitted to you for an opinion. We are therefore asking that the following question be answered at your convenience:

Question: Are the salaries of councilmen in villages controlled by the provisions of section 4219 of the General Code?"

Section 4219, General Code, provides as follows:

"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."

In the last sentence of the foregoing section, the legislature has in clear and unmistakable language sought to preclude the payment of village council compensation in excess of two dollars for each meeting and further to limit the number of meetings within a period of any one year for which such councilmen may be paid to twenty-four. The question then is whether or not the legislature has the power to so limit villages in this expenditure of public funds. There is no lack of judicial authority upon this question, but the cases are not in harmony and must be carefully considered.

The only authority of which I am aware which would seem on its face to indicate a lack of such legislative power as has been assumed under Section 4219, supra, is the case of *City of Mansfield* vs. *Endly*, decided by the Court of Appeals for Richland County January 21, 1931, and reported in 38 O. App. 528. In this case, to which reference is made in your communication, the court held Section 4209, General Code, to be unconstitutional. This section provided that salaries of councilmen in cities shall not exceed certain maximum amounts depending upon population and provided a graduated scale of maximum amounts upon this basis. The Court of Appeals held this last mentioned section to be unconstitutional on two grounds:

First, that since the Constitution in Article XIII, Section 1, classified all

municipal corporations into cities and villages, those having a population of five thousand or over as cities and all others as villages, the legislature was without power to further classify municipalities as to population for the purpose of computing councilmen's salaries, following the case of *City of Elyria* vs. *Vandemark,* 100 O. S. 365, the second branch of the syllabus of which case reads as follows:

> "The constitution of the state having classified municipalities on a basis of population, the legislature is without authority to make further classification thereof for the purpose of legislation affecting municipal government."

Second, that Section 4209, General Code, was unconstitutional for the reason that it contravened the home rule provisions of the Constitution as contained in Article XVIII thereof. Article XIII, Section 6 of the Constitution authorizes the legislature to restrict the power of municipalities in matters of "taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent the abuse of such power." This decision held that the matter of the expenditure of public funds for councilmen's salaries was not within the control of the legislature in non-charter cities under this last mentioned section of the Constitution. These two grounds upon which the Court of Appeals held Section 4209 to be unconstitutional are set forth in the syllabus consisting of seven branches as follows:

> "1. All legislation affecting municipal government, notwithstanding general and uniform operation, having classification of cities as basic principal, is unconstitutional (Article XVIII, Sections 1 to 3, Constitution).
>
> 2. Statute classifying cities according to population and making councilmen's salaries dependent thereon *held* void as violating Constitution classifying municipalities as cities or villages (Section 4209, General Code; Article XVIII, Sections 1 to 3, Constitution).
>
> 3. Municipalities derive all powers of local self-government directly from Constitution, irrespective of adoption of charter, which is prerequisite to home-rule powers (Article XVIII, Sections 3 and 7, Constitution).
>
> 4. Municipality's constitutional powers of 'local self-government' authorize measures pertaining exclusively to municipality, in which people of state have no interest (Article XVIII, Section 3, Constitution).
>
> 5. Ordinance fixing councilmen's salaries *held* within constitutional powers of 'local self-government' and not unconstitutional as contravening legislature's power to control municipal indebtedness (Article XIII, Section 6, and Article XVIII, Sections 2, 3 and 13, Constitution).
>
> 6. Municipal official's salary is not 'debt' within legislature's constitutional power to control municipalities as regards tax limitation, maximum indebtedness, and expenditure of public funds (Article XIII, Section 6, and Article XVIII, Sections 3 and 13, Constitution).
>
> 7. Councilmen's salaries, being within municipality's constitutional powers of local self-government, *held* 'provided for in Constitution', within constitutional provision giving legislature power to fix compensation in all other cases (Article II, Section 20, and Article XVIII, Section 3, Constitution)."

The foregoing case was taken to the Supreme Court, which court affirmed the decision of the Court of Appeals solely on the first ground of unconstitutionality hereinabove set forth. The journal entry of the court is contained in 124 O. S. 652 and reads as follows:

> "It is ordered and adjudged by this court that the judgment of the said court of appeals be, and the same hereby is affirmed upon the authority of *City of Elyria* vs. *Vandemark,* 100 O. S. 365. Judgment affirmed. All judges concur."

It becomes necessary to determine whether or not the decision of the Court of Appeals on what I have designated as the second ground of unconstitutionality of Section 4209, which ground was not affirmed by the Supreme Court, is declarative of the law of Ohio. If it is, the legislature is without power to limit villages in the matter of compensating or paying salaries to their councilmen. The pertinent language and reasoning of the Court of Appeals wherein it was held that Section 6 of Article XIII did not empower the legislature to limit expenditures of this nature, appears at page 537. The court said:

> "And now, considering the plaintiff's theory that the ordinance incurs a debt and that Section 13 of Article XVIII and Section 6 of Article XIII of the Constitution of Ohio warrants the legislature in its assumption of power to curtail that prerogative of local self-government, we are of opinion that the salary of a municipal official, although it be in a manner a debt, is not such as is contemplated by these two constitutional limitations upon a city's power, but rather that they refer to the legislature's power to create a tax limitation and maximum indebtedness, and to the manner of expenditure of public funds."

In the absence of a decision of any other Court of Appeals of this state to the contrary, the Attorney General should follow this holding of the court in the Mansfield case, unless it is contrary to the position taken with respect to this matter by the Supreme Court. The Court of Appeals expressly held that the limitations upon a city's power set forth in Section 6 of Article XIII of the Constitution "refer to the legislature's power to create a tax limitation and maximum indebtedness, and to *the manner of expenditure of public funds.*" The court evidently did not consider the power of the legislature to limit municipalities in "the manner of expenditure of public funds" as a power to limit municipalities in the payment of their councilmen's salaries which are payable from public funds. Be that as it may, the Supreme Court has not taken the narrow view of Article XIII, Section 6 and Article XVIII, Section 13, authorizing the legislature to limit the power of municipalities in incurring debts for local purposes, adhered to by this Court of appeals. The position of the Supreme Court as to legislative power in this respect is clearly set forth in the case of *Phillips* vs. *Hume,* 122 O. S. 11, which case was not mentioned by the Court of Appeals in the decision of the Mansfield case. The syllabus of the Phillips case is as follows:

> "1. The power of municipalities to incur debts may be limited or restricted by general laws. Such limitations or restrictions are war-

ranted by Section 6, Article XIII of the Constitution adopted in 1851, and also by Section 13, Article XVIII of the amendments adopted in 1912. Such limitations or restrictions apply to all municipalities, whether operating under charter or otherwise. *(State, ex rel. Toledo,* vs. *Cooper,* 97 Ohio St, 86, *State, ex rel.,* vs. *Bish,* 104 Ohio St., 206, and *Berry et al.* vs. *Columbus,* 104 Ohio St., 607, are approved and followed.)

2. The requirement for advertising provided in Section 4328, General Code, is one of the methods of limitation expressly imposed upon the debt incurring power of municipalities, when an expenditure exceeds five hundred dollars; and if the provisions of a city charter are in conflict with a state law upon that method they must yield to the requirements of the state law."

In the opinion at page 14, the court said: "It cannot be successfully disputed that the purchases and contracts for supplies made by the purchasing agent become debts". It is observed that under the provisions of Section 5625-33 of the General Code, a contract for the purchase of supplies is not valid until the certificate of the fiscal officer is attached thereto, showing that money is on hand and appropriated to meet the same. Municipalities are expressly prohibited from entering into a contract, which shall be a debt of the municipality as the term is ordinarily used. Provisions for the creation of indebtedness are contained in the Uniform Bond Act. Sections 2293-1, et seq., General Code. The conclusion is irresistible that the Supreme Court has construed the word "debt" as used in Section 6, Article XIII and in Section 13, Article XVIII of the Constitution in a broad rather than in a limited sense. If legislation with respect to advertising for bids prior to entering into municipal contracts is one of the methods of limitation expressly imposed upon the debt incurring power of the municipalities as contained in these sections of the Constitution, then it would seem *a fortiori* legislation limiting municipalities with respect to the expenditure of public funds for the payment of councilmen's salaries is similarly one of the methods of limitation expressly imposed upon the debt incurring power of the municipalities. It is difficult to distinguish the two. The Supreme Court has apparently construed Section 6 of Article XIII and Section 13 of Article XVIII of the Constitution as reserving to the legislature the power to limit municipalities in this regard. It might well be argued that the decision of the Court of Appeals in *City of Mansfield* vs. *Endly, supra,* as to what I have considered the second ground of unconstitutionality of Section 4209, General Code, is contrary to the decision of the Supreme Court in *Phillips* vs. *Hume, supra,* and therefore not declarative of the law of Ohio on this point.

There is an additional element of consideration in connection with your inquiry which must command my attention. This office has for a great many years consistently adhered to the position that after a bill has been duly enacted into law by the legislative branch of the government, the Attorney General has no authority to set the same aside as violative of the Constitution, this being probably the highest function of the judicial branch of our government. While the Mansfield case, supra, lays down principles which might justify a court in holding Section 4219, General Code, unconstitutional, the Court of Appeals as I have shown was passing upon the constitutionality of Section 4209, General Code, which was held unconstitutional by the Supreme Court on other grounds than those applicable to the section here under consideration. I have found no decision holding Section 4219, General Code, here under consideration, to be violative of

the Constitution, and under these circumstances it is not my province to advise you to disregard this statute.

In view of the foregoing, I am impelled to state that in my opinion villages have no authority to compensate their council at a rate in excess of the amount set forth in Section 4219, General Code.

Respectfully,
JOHN W. BRICKER,
*Attorney General.*

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2828.

WILBERFORCE UNIVERSITY—UNDER SECTION 7980, GENERAL CODE, TRUSTEES OF COMBINED NORMAL AND INDUSTRIAL DEPARTMENT REQUIRED TO MEET ON DATES PRESCRIBED THEREIN

*SYLLABUS:*

*The terms of Section 7980, General Code, wherein it directs the trustees of the Combined Normal and Industrial Department of Wilberforce University to hold two regular meetings per year on the third Thursday in June and the first Thursday in November, respectively, are mandatory, and it is the duty of the trustees to hold the two regular meetings as directed by the statute, which duty could no doubt be enforced in an action in mandamus.*

COLUMBUS, OHIO, June 18, 1934.

MR. JAMES A. OWEN, *President, Board of Trustees, Combined Normal and Industrial Department, Wilberforce University, 7818 Cedar Avenue, Cleveland, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion which reads as follows:

> "Section 7980 G. C., states that the Board of Trustees of the Combined Normal and Industrial Department at Wilberforce shall meet in regular session at the university twice a year; the first meeting on the third Thursday in June, etc.
>
> Several of the trustees have requested that this meeting be held on the 29th instead of on the 21st.
>
> I would like to accommodate them if permissible. I am therefore asking your opinion as to June 29th."

The Combined Normal and Industrial Department at Wilberforce University, in Greene County, Ohio, was created by the Legislature of Ohio, by the enactment of Sections 7975 et seq. of the General Code, of Ohio. Section 7976, General Code, provides that the government of the said department shall be vested in a board of trustees, to be known as "the board of trustees of the combined normal and industrial department of Wilberforce University." Said section further provides for the appointment of the members of the said board of trustees. Section 7980, General Code, provides for the meetings of the said board of trustees as follows:

> "The board of trustees so created shall meet in regular session at the university twice a year. The first meeting shall be on the third Thursday in June, and the second on the first Thursday in November of each