The presumption is even greater in the case of exemption from taxation for, as has been held on several occasions, laws exempting any property in the state from taxation are in derogation of common right and should therefore be strictly construed. *Cincinnati College* vs. *State,* 19 Oh. 110, 115; *Lima* vs. *Cemetery Association,* 42 O. S. 128; *Lee* vs. *Sturges,* 46 O. S. 153; *Sturges* vs. *Carter,* 114 U. S. 511, 29 L. Ed. 240; *Waterson* vs. *Halliday,* 77 O. S. 150.

While many of the working parts of a self-propelled gasoline motor crane or derrick may be similar to that of ditch digging machinery, or gasoline shovels, if the apparatus is neither used for the purposes of digging ditches or shoveling earth nor equipped to be so used, it would be almost a perversion of the language to say that such apparatus came within the meaning of the terms.

The term "traction engine" is defined in Section 6290, paragraph 3, as follows:

> "'Agricultural tractor' and 'traction engine' mean any self-propelled vehicle designed or used for drawing other vehicles or wheeled machinery but having no provision for carrying loads independently of such other vehicles, and used principally for agricultural purposes."

The vehicle in question is not designed or used for drawing other vehicles.

I am therefore of the opinion that when a gasoline motor operated hoisting derrick is propelled over the highways of the state on its own wheels, by means of an engine or motor mounted thereon, it is a motor vehicle, within the meaning of that term as defined in Section 6290, General Code, and is subject to the motor vehicle license tax.

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

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420.

ORDINANCE—MUNICIPALITY GRANTING PUBLIC UTILITY A FRANCHISE AND FIXING RATE—REFERENDUM PROCEDURE OF CONSTITUTION APPLICABLE—FAILURE OF COUNCIL TO ORDER SUCH REFERENDUM AND OF THE ELECTION TO BE HELD WITHIN TIME UNLESS SUCH ELECTION INVALID.

*SYLLABUS:*

1. *Where an ordinance is passed by council granting to a public utility company a franchise for furnishing its product and service to a municipality and its inhabitants, and fixing the rates therefor, the procedure for a referendum thereon is governed by the provisions of sections* 5 *and* 8 *of article XVIII of the Ohio Constitution, and section* 4227-2, *et seq., of the General Code, do not apply thereto.*

2. *Where, in such a case, a referendum petition to such an ordinance was filed with a village clerk who certified the same to the board of elections, and an election was had thereon one hundred and ninety days after the passage of the ordinance, the council never having taken any action thereon, the failure to file such referendum petition with the legislative authority of the village, and the*

*failure of the council thereof to submit the ordinance to the electors within the time required by section 8 of Article XVIII of the Ohio Constitution, rendered such election invalid.*

COLUMBUS, OHIO, March 30, 1933.

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

GENTLEMEN:—I acknowledge receipt of your letter in which you request an opinion on the questions contained in an accompanying letter which reads in part as follows:

> "Whereas the council of a Village passes certain ordinances granting to a public utility a contract for lighting the public streets and places of the village, a contract providing a schedule of rates to be charged to the citizens, and a franchise granting the right to erect and operate its plant; where a petition for referendum was filed under Sec. 4227-2 G. C. and certified direct by the Clerk to the Board of Elections, to be voted upon at the regular election (not municipal) held one hundred and ninety days after the passage of the ordinance and fifty days beyond the limitation provided by Secs. 5 and 8 of article 18 of the Constitution of Ohio; and where a majority of the electors voting at said election voted against said ordinances.
>
> The questions to be answered are, first: Do the constitutional provisions of the code, Article 18, Secs. 5 and 8, apply to the exclusion of the code Sec. 4227-2? Second: If they do, did the failure to comply with Sec. 8 of article 18 in that (a) no ordinance was enacted by the council ordering such referendum; (b) The election was held beyond the limit fixed by the Constitution; render said election invalid."

Sections 4 and 5 of article XVIII of the Ohio Constitution read as follows:

> Sec. 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."
>
> Sec. 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 8 of article XVIII reads in part as follows:

> "The ordinance providing for the submission of such question shall require that it be submitted to the electors at the next regular municipal election if one shall occur not less than sixty nor more than one hundred and twenty days after its passage; otherwise it shall provide for the submission of the question at a special election to be called and held within the time aforesaid."

These provisions of the Constitution are self-executing and apply to every municipality, regardless of whether or not it has adopted a charter. *State, ex rel.,* vs. *Weiler,* 101 O. S. 123. The general procedure for referendums on ordinances and other measures is outlined in section 4227-2, et seq., of the General Code. These statutes provide in substance that such a referendum petition shall be filed with the city auditor or village clerk within thirty days after the ordinance or measure has been filed with the mayor or passed by village council, and the auditor or clerk shall after ten days certify the petition to the board of elections, which board shall submit such ordinance or measure to the electors of the municipality at the next succeeding or regular election, in any year, occurring subsequent to forty days after the filing of such petition, unless such ordinance or measure is repealed or held to be invalid.

From your letter, I assume that the statutory and not the constitutional procedure was followed and that the referendum petition was filed with the village clerk who certified it to the board of elections, which board submitted the ordinance to the electors at the next general election, and that council never took any action thereon.

The first question to be determined is whether the provisions of section 5 of article XVIII of the Constitution apply at all to an ordinance granting a franchise to a public utility company for the furnishing by it of its product or service to the municipality and its inhabitants, or whether the procedure for a referendum contained in section 4227-2, et seq., of the General Code, applies. While the question of procedure does not seem to have been raised in the following cases, they inferentially hold that section 4227-2, et seq., General Code, apply: In the case of *State ex rel.,* vs. *Burris, Treasurer,* 91 O. S. 70, an ordinance regulating the price to be charged for water to be furnished by a water company to the city and to its inhabitants was involved, and the court said on page 72:

> "The council of the village of London was therefore authorized to pass the ordinance of February 7, 1913, subject to the approval or rejection thereof by the qualified electors of the village, in the manner prescribed by Section 4227-2, General Code."

Likewise, in the case of *Cincinnati* vs. *Public Utilities Commission,* 96 O. S. 270, involving a gas franchise, the court said on page 272:

> "Under the provisions of Section 614-44, General Code, the municipality was authorized at any time within one year prior to the expiration of its contract with the gas companies, which was October 26, 1916, to proceed under the provisions of Sections 3982 and 3983, General Code, and fix by ordinance the rate to be charged for natural gas in said city during the ensuing period, not exceeding 10 years, which upon its accep-

tance by the public utility would become operative unless within 60 days there was filed with the public utilities commission a complaint signed by not less than three per cent of the qualified electors of the municipality, or unless within 30 days a referendum petition was filed as provided by Section 4227-2, General Code."

And on page 276:

"If the electors considered that an emergency existed calling for early action, that could have been obtained by the submission of the rate ordinance to the electors at a special election under the provisions of Section 4227-5, General Code (104 O. L., 239)." (Now repealed.)

On the other hand, the following cases inferentially hold that the constitutional procedure applies, although the procedural question does not seem to have been raised in any of them. In the case of *Link* vs. *Public Utilities Commission,* 102 O. S. 336, the following is said:

"The authority of a municipality to enter into a contract with a public utility for its product and service is now expressly conferred by the constitution and is valid and binding upon the parties thereto unless disapproved by a majority of the electors voting thereon at a referendum election held pursuant to the provisions of Section 5, Article XVIII of the Ohio Constitution."

See also *Dravo-Doyle Company* vs. *Orville,* 93 O. S. 236; *Local Telephone Company* vs. *Mutual Telephone Company,* 102 O. S. 524; *Parks* vs. *Cleveland Railway Company,* 124 O. S. 79. In the case of *The Ohio River Company* vs. *Steubenville,* 99 O. S. 421, the fourth branch of the syllabus reads:

"A contract entered into between a public utility and a municipality of this state, whereby the public utility agrees to supply its product or service to the municipality or its inhabitants for a period of ten years, at a rate, price, charge, toll or rental specified in such contract, is expressly authorized by Section 4, Article XVIII of the Constitution of Ohio, and is valid and binding upon the parties thereto, unless disapproved by a majority of the electors voting thereon, at a referendum election held under the provisions of Section 5, Article XVIII of the Constitution of this state."

While the procedural question was not raised in the Steubenville case, nevertheless the Supreme Court saw fit to put into the syllabus thereof language which clearly holds that section 5 of article XVIII applies to such an ordinance or franchise. Section 4 of said article clearly vests the municipality with the power of contracting with others for public utility products and service. Section 5 refers to "any municipality proceeding to acquire, contract, own, lease or operate a public utility, or to contract with any person or company therefor." The procedural question was squarely raised in the case of *Kuertz* vs. *Union Gas and Electric Company,* 27 N. P. (N. S.), 221, and with reference to this language contained in section 5, the court said:

"The use of the word 'therefor' in the third line of Section 5 is unfortunate as occasioning controversy as to whether it refers to and

means 'public utility,' or refers to and means the 'product and service' as referred to in Section 4."

The court then said on page 228:

"The court concludes that the word 'therefor' as used in Section 5 refers to and means 'product and service,' which the municipalities of the state by force and favor of Section 4, Article XVIII, may secure for themselves and their inhabitants from others by contract.

If this is not the proper meaning to give to the word 'therefor' as used in this section, then the third line of this section is surplusage, and is merely saying over again what had already been said in the two lines preceding.

Sections 4 and 5 of Article XVIII must be construed together—the former as vesting the municipalities of the state with the power to acquire public utilities of their own, or to contract with others for utility product and service, and Section 5 must be construed as providing the procedure for the exercise of the power conferred upon municipalities by Section 4."

In view of the foregoing, I am of the opinion that the constitutional procedure applies to the ordinance in question.

I come now to the question as to whether such procedure is exclusive. As to this, the court in the case of *Kuertz* vs. *Union Gas and Electric Company,* supra, says on page 234:

"The court finds that—

A. The referendum invoked is a constitutional referendum, and that the failure of the city council of Cincinnati to submit same to the electors within the time prescribed by Section 5, Article XVIII of the Ohio Constitution renders such referendum inoperative and void."

In that case the referendum petition was filed with the auditor and thereafter council, under authority of section 4227-8, repealed the ordinance which under said section was not required to be submitted to the electors if the statutes applied thereto. After the filing of the referendum petition and before the repeal of the ordinance, the company filed its acceptance thereof and the court held that the ordinance was in effect at the time of such acceptance and that the referendum petition was inoperative, and that council was without authority to repeal the ordinance which upon its acceptance constituted a binding contract between the city and the company.

In the case of *Union Gas and Electric Company* vs. *Cincinnati,* 33 O. L. R. 214, a referendum petition to a rate ordinance was filed on May 29, 1925, with the auditor who certified it to the board of elections, and the vote thereon in November, 1925, was against the ordinance. The court held that the ordinance was not subject to a referendum because it was passed under the authority of an ordinance of 1905 before the adoption of the constitutional provisions hereinbefore referred to. However, the court of appeals of Hamilton County in this case said:

"We are further of opinion that a referendum in such cases, and in this case, could only be had, if at all, under the constitutional provisions for referendum in contracts between municipalities and public utilities;

and that, were the ordinance subject to referendum, the referendum attempted in this case was ineffective, in that it proceeded under the statutory provision for referendums and not under the procedure provided in the constitution."

This court cites the case of *State ex rel.,* vs. *Abele,* 119 O. S. 210, as authority for this statement. The opinion in this case does contain some language which seems to support the proposition that a statutory referendum would be of no effect. For instance, the court says on page 219:

"We hold, therefore, that the constitutional referendum is available in this action, and is the only method of referendum available."

And on page 220:

"The filing with the auditor was of no avail, because no referendum could be had upon this particular ordinance under the statute, * * *."

A reading of this case, however, indicates that the court in saying that the statutory referendum was not available did so because the ordinance in question was the second or so-called "follow-up" ordinance in the construction of an improvement, a referendum to which is not permissible under the statutes. On page 216 the court says:

"It is conceded by the respondents that the general initiative and referendum provision of the Constitution (Section 1-f, Article II), and the statute enacted in pursuance thereof (Sections 4227-1 to 4227-12, General Code), cannot avail here because of the fact that Section 4227-3 expressly provides that there shall be no referendum except upon the initial ordinance."

It seems clear, however, that, the Constitution having prescribed a definite procedure for a referendum in such cases, its provisions must prevail to the exclusion of an entirely different mode of procedure prescribed by statutes, not only because the constitutional provisions deal only with public utility matters while the statutes are general in their application, but also because the Constitution, being the paramount law, must prevail over statutory provisions which are inconsistent therewith. In *Switzer, et al.,* vs. *State, ex rel.,* 103 O. S. 306, in which it was held that the statutes providing optional forms of municipal government pursuant to section 2 of article XVIII of the Constitution, and providing for the adoption of any one of them by referendum vote, have no application to the municipalities that have adopted a charter form of government under sections 7 and 8 of article XVIII, the court said:

"Where constitutions speak, statutes should be silent. This doctrine has been announced and applied in so many cases of constitutional construction that it has become settled as the standard of constitutional power and legislative want of power."

See also *Fulton* vs. *Smith,* 99 O. S. 230; *Elyria* vs. *Vandermark,* 100 O. S. 365. In the case of *Ohio River Company* vs. *Steubenville,* 99 O. S. 421, the following is said:

> "Therefore, when the utility names the rate at which it is willing to furnish its product, and the city accepts that rate on its own behalf and on behalf of its inhabitants, and enters into a contract, the terms of which include the rate so agreed upon, such contract, including the agreement as to rate, clearly comes within the authority conferred upon municipalities by Section 4, Article XVIII of the Constitution of Ohio; and if there were any conflict between the provisions of the Constitution and the provisions of any statute of this state existing at the time or enacted since this constitutional amendment was adopted such statute must fall."

And in the case of *Link* vs. *Public Utilities Commission,* 102 O. S. 336, the court says:

> "No legislative act can in any wise modify or restrict the power conferred by constitutional provision, and therefore any provision of the statute inconsistent with the constitutional provision conferring such power must fall."

The constitution provides that the referendum petition must be filed with the executive authority and makes it the duty of the legislative authority thereupon to submit the ordinance to the electors at the next regular municipal election if one shall occur in not less than sixty or more than one hundred and twenty days after its passage, otherwise at a special election to be held within such time. The duty imposed upon a public board or authority in submitting an ordinance to the electors carries with it the duty of determining the sufficiency and validity of the referendum petition. As stated in *State, ex rel.,* vs. *Gibbons,* 116 O. S. 390:

> "A submission by the legislative authority clearly implies, if it does not definitely express, that some power and some duty is intrusted to that legislative authority. * * * On political grounds the submission should not be made unless the petitions are sufficient in form and substance and all statutory requirements calling for the submission have been fairly met."

See also *State, ex rel.,* vs. *Rupert, Auditor,* 99 O. S. 17; *State, ex rel.,* vs. *Michell,* 124 O. S. 161. In the case presented here, nothing whatever was done by council. This is not a case of substantial compliance but of absolute noncompliance with the provisions of the Constitution, and as there was no substantial compliance with the mandatory provisions referred to, I am of the view that the referendum in question was invalid. *Board of Education* vs. *Briggs,* 114 O. S. 415; *State, ex rel.,* vs. *County Commissioners,* 122 O. S. 456.

Answering your inquiry, therefore, I am of the opinion that:

1. Where an ordinance is passed by council granting to a public utility company a franchise for furnishing its product and service to a municipality and its inhabitants, and fixing the rates therefor, the procedure for a referendum thereon is governed by the provisions of sections 5 and 8 of article XVIII of the Ohio Constitution, and sections 4227-2, et seq., of the General Code, do not apply thereto.

2. Where, in such a case, a referendum petition to such an ordinance was filed with a village clerk who certified the same to the board of elections, and an

election was had thereon one hundred and ninety days after the passage of the ordinance, the council never having taken any action thereon, the failure to file such referendum petition with the legislative authority of the village, and the failure of the council thereof to submit the ordinance to the electors within the time required by section 8 of Article XVIII of the Ohio Constitution, rendered such election invalid.

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

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421.

TUITION—HIGH SCHOOL PUPIL—BOARD OF EDUCATION MAY NOT REQUIRE PAYMENT OF TUITION OF PUPIL FROM ANOTHER DISTRICT AS A CONDITION PRECEDENT TO ADMITTING PUPIL.

*SYLLABUS:*

1. *Where, by reason of the assignment made in pursuance of Section 7764, General Code, or otherwise, a school pupil is entitled to admission to a high school and is entitled under the law to attend that high school, at public expense, the authorities in charge of the said high school must admit the pupil to said school and allow him all the advantages of the school the same as other pupils in the school, regardless of whether or not his tuition is paid in advance, and even if it is probable that it will be necessary to bring suit to enforce collection of the tuition.*

2. *A board of education is not authorized to enforce collection of moneys due it for tuition from other districts on account of the attendance in its schools of high school pupils residing in the other districts, liability for which is fixed by Sections 7747 and 7748, General Code, by withholding from said pupils the privilege of attending school until such tuition is paid.*

3. *Boards of education are limited, in the collection of foreign tuition which has accrued on account of the attendance of high school pupils in the schools of its district, to an action in the courts for the collection of the amount accrued.*

COLUMBUS, OHIO, March 30, 1933.

HON. C. G. L. YEARICK, *Prosecuting Attorney, Newark, Ohio.*

DEAR SIR:—You have requested the opinion of the Attorney General as follows:

> "The question as to whether a rural board of education maintaining a high school may demand the tuition of pupils resident in adjoining districts having no high school to be paid in advance, and, if such demand is not complied with, whether such non-resident pupils may be excluded from such high school, has been brought to our attention and your opinion is requested."

In the interpretation and application of all legislation relating to public schools and public education it is well to bear in mind certain fundamental principles and purposes that were the corner-stone of organized government in this state.