against the city of Campbell for the period from April 1, 1932, to December 31, 1932.

Respectfully,
JOHN W. BRICKER,
Attorney General.

885.

BEER—PERMIT FROM OHIO LIQUOR CONTROL COMMISSION TO MANUFACTURE AND SELL IN MUNICIPALITY CONTROLS LOCAL ORDINANCES TO CONTRARY—PROHIBITING BY VOTE IN MUNICIPALITY CONTROLS LOCAL ORDINANCES TO CONTRARY—VOTING ON BEER ISSUE DISCUSSED.

SYLLABUS:

1. *Beer with an alcoholic content of not more than 3.2% of alcohol by weight, may be manufactured and sold lawfully in municipalities in the State of Ohio, when licenses or permits have been issued therefor by the Ohio Liquor Control Commission, regardless of the provisions of local ordinances to the contrary.*

2. *The method provided in Section 19 of Amended Substitute Senate Bill No. 346, of the 90th General Assembly, for prohibiting the sale of beer containing not more than 3.2% alcohol by weight in municipalities by vote of the people therein, is exclusive, local ordinances to the contrary notwithstanding.*

3. *The sale of beer with an alcoholic content of 3.2% by weight may be prohibited in a municipality by a vote of the people thereof, when the question is submitted at a proper election in the manner provided by law.*

COLUMBUS, OHIO, May 27, 1933.

HON. FRAZIER REAMS, *Prosecuting Attorney, Toledo, Ohio.*

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

> "An ordinance was passed some years ago prohibiting the sale of intoxicating liquors in conformity with the Volstead and Crabbe Acts. This ordinance has never been repealed.
>
> The City Solicitor of Sylvania has advised the Mayor and Council that the recent Ackerman-Lawrence Bill has no effect in that village unless the ordinance prohibiting the sale of beverages with alcoholic content greater than one-half of one percent is repealed. In other municipalities the Solicitors have advised their Mayor and Council that the recent Ackerman-Lawrence Bill overrides the local ordinance except under the local option provision of the Ackerman-Lawrence Bill.
>
> Since there is a conflict of opinion in this county and undoubtedly the same conflict has arisen all over the state, I will appreciate very much your opinion."

What is commonly known as the Second Crabbe Act, Sections 6212-13 to 6212-20, inclusive (108 O. L., Part II, p. 1182) entitled "An Act to prohibit the

liquor traffic and to provide for the administration and enforcement of such prohibition and repeal certain sections of the General Code" was enacted by the General Assembly of Ohio in 1920. It sought to prohibit the manufacture, sale, possession, transportation, furnishing and giving away of liquor or intoxicating liquor intended for beverage purposes, and especially, to prohibit the trafficking in liquors. Penalties were provided in said act for the violation of its provisions.

Section 6212-14, General Code, as enacted therein, defined the terms "liquor" and "intoxicating liquor", as used in said act. It was there provided that the terms "liquor" and "intoxicating liquor" as used in the said act should be construed as including alcohol, brandy, whiskey, rum, gin, beer, ale, porter and wines, and in addition thereto, any distilled, spirituous, malt, vinous, or fermented liquor, and also any liquid or compound whether or not the same is medicated, proprietary, or patented and by whatever name called, containing one-half of one percent. or more of alcohol by volume which is fit for beverage purposes.

The 90th General Assembly, in Amended Substitute Senate Bill No. 346, commonly referred to as the Ackerman-Lawrence Bill amended Section 6212-14, General Code, effective March 30, 1933. As amended, said Section 6212-14, General Code, reads in part as follows:

> "In the interpretation of the provisions of the General Code of Ohio (1) the word 'liquor' or the phrase 'intoxicating liquor' shall be construed to include alcohol, brandy, whiskey, rum, gin, beer, ale, porter, and wine, and in addition thereto any distilled, spirituous, malt, vinous, or fermented liquor, and also any liquid or compound whether or not same is medicated, proprietary, or patented, and by whatever name called, containing more than 3.2 per centum of alcohol by weight which is fit for use for beverage purposes: Provided, that the foregoing definition shall not extend to de-alcoholized wine, nor to any beverage or liquid produced by the process by which beer, ale, porter, or wine is produced, if it contains 3.2 per centum of alcohol or less by weight."

The effect of this amendment is to render the penalties provided in Section 6212-17, General Code, for a violation of the restrictions, limitations and prohibitions contained in the Crabbe Act applicable in those cases only where the liquid, or compound, or any beverage or liquid produced by the process by which beer, ale, porter or wine are produced, contains more than 3.2% alcohol by weight.

The legislation referred to above was enacted in pursuance not only of the broad inherent police power possessed by the state but in pursuance as well, of the express provisions of Article XVIII of the Amendments to the Federal Constitution and of Section 9 of Article XV of the Constitution of Ohio.

The said Ackerman-Lawrence Act creates the "Ohio Liquor Control Commission" to consist of seven members appointed by the Governor. This Commission is empowered to issue and rescind licenses for the manufacture, distribution and sale of beer containing not more than 3.2% alcohol by weight, at wholesale or retail, including beer manufactured outside the State of Ohio, and to make rules and regulations for its own government and for that of its appointees, employes and agents as well as rules and regulations with reference to the application for and the issuance of such licenses and permits as it is authorized to issue.

The act further provides, in Section 19 thereof, a method whereby the sale of 3.2% beer may be prohibited in a municipality, a residential district of a municipality, a township in which no municipality exists and in a portion of a township outside of an incorporated municipality by vote of the people thereof to be submitted in the manner and form prescribed by the act.

Prior to the enactment of the Ackerman-Lawrence Bill and the amendment of Section 6212-14, General Code, as contained therein by the 90th General Assembly, there were in force in many municipalities of this state ordinances containing provisions identical with those of the so-called Crabbe Act, that is provisions making punishable by fine or otherwise, the sale, possession or giving away within the municipality of beverages containing more than one half of one percent of alcohol by volume.

The manifest purpose of such municipal legislation was to provide a method whereby prosecutions for such offenses could be had under the ordinance rather than the state law so that the entire revenues from fines imposed for such violations would accrue to the municipal treasury, the state law having provided that fines for offenses prosecuted under the Crabbe Act were to be divided one half between the state and the municipality, county or township where the prosecution was held.

Similar municipal legislation has been upheld by the Supreme Court in a number of cases so long as it is not in conflict with general laws of the state. *City of Fremont* vs. *Keating,* 96 O. S. 468; *Welch* vs. *City of Cleveland,* 97 O. S. 311; *City of East Liverpool* vs. *Dawson,* 101 O. S. 527; *Heppel* vs. *Columbus,* 106 O. S. 107.

The gravaman of the decisions above referred to is that municipalities are empowered by Section 3 of Article XVIII of the Constitution of Ohio, to adopt and enforce within their limits such local police, sanitary and other similar regulations as are not in conflict with general laws. In the case of *Schneiderman* vs. *Sesanstein,* 121 O. S. 80, it is held as stated in the first branch of the syllabus:

> "An ordinance of a municipality which prescribes a manner of driving or a rate of speed of automobiles in conflict with the provisions of the statute is invalid."

It follows from this rule that an existing ordinance of a municipality providing police, sanitary or other similar regulations in conflict with general law must yield to the general law.

That the sale and dispensing of beverages containing alcohol is a proper subject for legislative regulation within the police power is fundamental whether that legislation be municipal for local purposes or state wide by the legislature. That existing ordinances at the time of the effective date of the Ackerman-Lawrence Bill providing for the regulation of the sale or giving away of beverages containing alcohol had been enacted as police regulations is clear. It is equally clear that the enactment of the Ackerman-Lawrence Bill by the General Assembly was an exercise of the police power of the state and that the provisions of that act are general laws. In so far as any such ordinances conflict, if they do conflict with the state law they must yield to that state law.

Any such ordinances that make it unlawful to sell, possess or give away beer of a lesser alcoholic content than 3.2% by weight do conflict in my opinion, with the provisions of the Ackerman-Lawrence Act which, in effect makes it lawful to manufacture, sell, possess or give away beer containing 3.2% alcohol by weight or

less, providing a proper permit or license is granted therefor. In deciding the case of *Schneiderman* vs. *Sesanstein,* supra, Judge Matthias said:

> "When the law of the state provides that a rate of speed greater than a rate therein specified shall be unlawful, it is equivalent to stating that driving at a less rate of speed shall not be a violation of law; and therefore an ordinance of a municipality which attempts to make unlawful a rate of speed which the state by general law has stamped as lawful would be in conflict therewith."

By the application of the principle stated by Judge Matthias, it follows that when the law of the state provides that the traffic in beverages containing an alcoholic content of more than 3.2% of alcohol by weight, shall be unlawful, it is equivalent to stating that the traffic in such beverage with an alcoholic content of 3.2% or less by weight, shall not be a violation of law; and therefore an ordinance of a municipality which attempts to make unlawful the traffic in beverages containing alcohol of 3.2% or less by weight, which the state by general law has stamped as lawful would be in conflict therewith.

By a similar course of reasoning, it must be held that inasmuch as the legislature in the Ackerman-Lawrence Act referred to above, provided a method whereby the traffic in beer containing more than one-half of one percent. of alcohol by weight and not more than 3.2% of alcohol by weight may be prohibited within the limits of a municipality by a vote of the people therein, when properly submitted, the method thus provided is exclusive and that it is not within the legislative power of a municipality to prohibit such traffic by local ordinance.

Principles long recognized and frequently applied, particularly in the cases of *Fulton, Secretary of State* vs. *Smith,* 99 O. S. 230, and *City of Elyria* vs. *Vondermark,* 100 O. S., 365, have peculiar application to this question.

In the Fulton case, supra, there was involved the question of whether or not a probate judge might lawfully be elected to a non-judicial office during his term as probate judge. The pertinent statute then in force, provided:

> "All votes for any judge for an elective office except a judicial office under the authority of this state, given by the General Assembly, or by the people shall be void."

This provision of the statutes is comprehensive and clearly embraced the office of probate judge. The Constitution of Ohio, however, in Section 14 of Article IV, contained a similar. provision as to Judges of the Supreme Court and of the Court of Common Pleas, only. Probate judges were not included. The Supreme Court held that the provisions of the statute, so far as it embraced probate judges, was invalid. In the course of the opinion it was stated:

> "Under rules which are familiar and sanctioned by experience, it must be presumed that when the makers of the Constitution took up and considered the subject and specified the two courts as to which the prohibition should apply they intended that as to judges of other courts no such prohibition should be made."

Applying the principle stated above, it follows that when the legislature took up and considered the question of prohibiting the sale of liquor of an alcoholic

content of not more than 3.2% by weight in municipalities, and provided a method for so doing, it intended that method to be exclusive. A local ordinance providing otherwise, would be contrary to general law and therefore, invalid.

The same principles apply in construing statutes as do in construing constitutional provisions. *Miami Co.* vs. *Dayton,* 92 O. S. 215, 223; *Shryock* vs. *Zanesville,* 92 O. S. 375, 383, 384; *Mfg. Co.* vs. *Shorling,* 96 O. S. 305; *State ex rel.* vs. *Fulton,* 99 O. S. 168, 176.

Section 19 of Amended Substitute Senate Bill 346, reads as follows:

> "The question of the sale of beer as defined in this act, by holders of C or D permits, may be presented to the qualified electors of an incorporated municipality, a residential district of a municipality as hereinafter defined, a township in which no incorporated municipality exists, or to the qualified electors of that part of a township outside of an incorporated municipality, for their adoption or rejection.
>
> The question to be submitted shall be,—Shall the sale of beer as defined in section 20 of substitute senate bill 346 enacted by the 90th General Assembly, be permitted within the district, municipality, township, or part of a township outside of the municipality?
>
> The exact wording of the question and form of ballot as printed, shall be determined by the board of elections in the county wherein the election is held, subject to approval of the secretary of state of Ohio.
>
> Upon presentation of a petition to the board of elections of the county wherein such election is sought to be held, requesting the holding of such election signed by qualified electors of the district concerned equal to thirty-five (35%) percent of the total votes cast for governor at the last regular state election in such incorporated municipality, residential district of a municipality, township in which no incorporated municipality exists, or of that part of a township outside of an incorporated municipality, the board of elections shall submit such question to the electors of the district concerned, at the first general election occurring subsequent to sixty (60) days after the filing of said petition.
>
> If a majority of the electors voting on said question vote 'yes' thereon, the sale of beer as defined herein shall be subject only to the provisions of this act. If a majority of the electors voting on said question vote 'no' thereon, it shall be unlawful for any C or D permit holder to sell beer within the district concerned until at a subsequent election similarly called and held, a majority of the votes cast shall vote 'yes' on said issue.
>
> No such election shall be held oftener than once in each three (3) years.
>
> A residential district shall be held to mean any or two or more contiguous precincts in the residential portion of a municipality."

I am therefore of the opinion, in specific answer to your questions:

(1) Beer with an alcoholic content of not more than 3.2% of alcohol by weight, may be manfuactured and sold lawfully in municipalities in the State of Ohio, when license or permits have been issued therefor by the Ohio Liquor Control Commission, regardless of the provisions of local ordinances to the contrary.

(2) The method provided in Section 19 of Amended Substitute Senate Bill No. 346, of the 90th General Assembly, for prohibiting the sale of beer containing

not more than 3.2% alcohol by weight in municipalities by vote of the people therein, is exclusive, local ordinances to the contrary notwithstanding.

(3) The sale of beer with an alcoholic content of 3.2% by weight may be prohibited in a municipality by a vote of the people thereof, when the question is submitted at a proper election in the manner provided by law.

Respectfully,
JOHN W. BRICKER,
Attorney General.

886.

VOLUNTEER FIRE COMPANY—TOWNSHIP OR VILLAGE AUTHORIZED TO CONTRACT FOR FIRE PROTECTION—COMPENSATION MUST BE REASONABLE—CONTRACT OF SALE—COMPETITIVE BIDDING.

SYLLABUS.

1. *A township or village may enter into an agreement with a volunteer fire company for fire protection for a period of years. However, the payment for such protection must not exceed the benefit of the services obtained.*

2. *Where a township or village enters into an arrangement with a volunteer fire company owning a fire truck and equipment, whereby the subdivision agrees to pay* $250.00 *per year for a period of three years, at the end of which time the truck and equipment is to be transferred to the subdivision, such an arrangement is a contract of sale and is violative of the principles of competitive bidding where section* 4221, *General Code, is not complied with.*

COLUMBUS, OHIO, May 27, 1933.

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

GENTLEMEN:—This will acknowledge receipt of a request for my opinion relative to a communication from the Prosecuting Attorney of Ashland County. This letter reads as follows:

> "I will appreciate your opinion as to the legality of payment by township trustees and village councils to the Ashland Community Fire Company for fire protection under the following circumstances.
>
> On April 11th the Ashland Community Fire Company composed of 'residents of Ashland and vicinity' was organized purporting to be a volunteer fire company. The residents mentioned are drawn from Orange, Milton, Perry, and Montgomery townships of Ashland County, Weller Township of Richland County and Jeromeville and Savannah corporations.
>
> The S. Corporation proposes to sell to the Ashland Community Fire Company a fire truck complete with equipment upon an installment payment contract.
>
> It is then proposed that the Ashland Community Fire Company will contract with the City of Ashland for the housing and operation of this fire equipment for calls to be made in the townships and in incorporated villages mentioned above.