2124.

APPROVAL, FINAL RESOLUTIONS ON ROAD IMPROVEMENTS IN ASHTABULA COUNTY.

COLUMBUS, OHIO, May 18, 1928.

HON. GEORGE F. SCHLESINGER, *Director of Highways, Columbus, Ohio.*

2125.

APPROVAL, FINAL RESOLUTIONS ON ROAD IMPROVEMENTS IN DARKE AND WYANDOT COUNTIES.

COLUMBUS, OHIO, May 18, 1928.

HON. GEORGE F. SCHLESINGER, *Director of Highways, Columbus, Ohio.*

2126.

UTILITIES—MUNICIPALITIES MAY OPERATE BY OHIO CONSTITUTION—SCHOOL BUILDING CHARGEABLE FOR WATER FURNISHED —CHARTER NOT NECESSARY.

SYLLABUS:

1. *Municipalities derive the right to acquire, construct, own, lease and operate utilities the product of which is to be supplied to the municipality or its inhabitants, from Section* 4, *Article XVIII of the Constitution of Ohio, and this right is not in any wise dependent upon or conditioned by Section* 7 *of Article XVIII of said Constitution which provides that, "a municipality may adopt a charter."*

2. *That portion of Section* 3963, *General Code, which prohibits a city or village, or the waterworks department thereof, from making a charge for supplying water for the use of the public school buildings or other public buildings in such city or village, is unconstitutional for the reason that it is a violation of the right conferred upon municipalities by Section* 4 *of Article XVIII of the Constitution, and for the further reason that it results in taking private property for public use without compensation therefor, in violation of Section* 19, *Article I of the Ohio Constitution* (*Board of Education of the City School District of Columbus, Ohio* vs. *City of Columbus, Ohio,* 118 *O. S.* 295).

3. *Whether or not a municipality which owns and operates its own waterworks is governed by a charter, which it may adopt by authority of Section 7 of Article XVIII of the Constitution of Ohio, it may lawfully charge for supplying water for the use of the public school buildings or other public buildings in the municipality.*

4. *The grant to municipalities of the right to acquire, construct, own, lease and operate waterworks, the product of which is to be supplied to a municipality or its inhabitants, as granted by Section 4 of Article XVIII of the Constitution of Ohio, is equally to municipalities that did not adopt a charter as well as those that did adopt a charter, and includes therein the right to charge for supplying water for the use of the public school buildings or other public buildings in such municipalities, regardless of any restriction or limitation on such right which the Legislature may make.*

COLUMBUS, OHIO, May 18, 1928.

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

GENTLEMEN:—This will acknowledge receipt of your inquiry as follows:

"Under date of April 4th, 1928, the Supreme Court of Ohio decided the case of *The Board of Education of the City School District of Columbus, Ohio,* vs. *The City of Columbus, Ohio,* being case No. 20903. The syllabus of the decision reads:

'That portion of Section 3963, General Code, which prohibits a city or village or the waterworks department thereof from making a charge for supplying water for the use of the public school buildings or other public buildings in such city or village, is a violation of the rights conferred upon municipalities by Section 4 of Article XVIII of the Ohio Constitution, and is unconstitutional and void. (*East Cleveland* vs. *Board of Education,* 112 *O. S.* 607, *overruled.*)

That portion of Section 3963, General Code, above referred to, is unconstitutional and void for the further reason that it results in taking private property for public use without compensation therefor, in violation of Section 19, Article I of the Ohio Constitution.

Municipalities derive the right to acquire, construct, own, lease and operate utilities the product of which is to be supplied to the municipality or its inhabitants from Section 4 of Article XVIII of the Constitution and the Legislature is without power to impose restrictions or limitations upon the right. (*Euclid* vs. *Camp Wise Assn.,* 102 *O. S.* 207, *approved and followed.*)

The question was raised by the city of Columbus which operates under a charter providing that all water furnished by the municipal waterworks shall be paid for.

Question: Is the above decision applicable in all Ohio municipalities, which have or have not adopted a charter?"

In the decision of the case of *Board of Education of the City School District of Columbus, Ohio,* vs. *The City of Columbus, Ohio,* the syllabus of which is quoted in your letter, the Supreme court adopted, by reference, as the reasons in support of its judgment in the case, the dissenting opinion of Chief Justice Marshall in the case of *East Cleveland* vs. *Board of Education of the City School District of East Cleveland,* 112 *O. S.* 607, *which it overruled.*

In the course of the opinion in the Columbus case, Chief Justice Marshall said:

"The controversy is in every essential detail identical with the case of *East Cleveland* vs. *Board of Education of the City School District of East Cleveland, Ohio,* 112 O. S. 607, decided May 26, 1925. * * *

* * *

In the East Cleveland case the lower courts had declared Section 3963 to be constitutional and two members of this court were empowered to affirm that judgment over the dissent of the other five. In the instant case the situation is reversed, the lower courts having declared the statute unconstitutional and void and a majority of the court have power to affirm that judgment. The several members of this court entertain their respective views upon the legal questions involved, as expressed in the opinions published in that case, and the dissenting opinion in that case becomes the reasons of the five members of this court in support of the judgment of affirmance of the judgment in the instant case, and that opinion will therefore be adopted by reference and without repetition."

Prior to the adoption of Sections 2, 3, 4, 5, 6, and 7 of Article XVIII of the Constitution of Ohio in 1912, municipalities acquired all their powers of government from legislative enactment. During that period municipalities could not claim and exercise the power thus conferred without at the same time assuming and discharging the burdens and obligations which the Legislature had seen fit to impose upon such municipalities. This cannot be said to be true since 1912, either with respect to the powers of local self-government granted to municipalities by Section 3 of Article XVIII or as regards public utilities, the right to acquire and operate which is granted by Section 4 of Article XVIII of the Constitution of Ohio.

Sections 2, 3, 4 and 7 of Article XVIII of the Constitution of Ohio in so far as pertinent to your inquiry, read as follows:

Sec. 2. "General laws shall be passed to provide for the incorporation and government of cities and villages; and additional laws may also be passed for the government of municipalities adopting the same; * * *."

Sec. 3. "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."

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. * * *"

Sec. 7. "Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of Section 3 of this article, exercise thereunder all powers of local self-government."

Section 3963, General Code, reads in part as follows:

"No charge shall be made by a city or village or by the waterworks department thereof for supplying water for extinguishing fire * * * or for the use of public school buildings in such city or village."

Chief Justice Marshall, speaking for the majority of the Court, in the East Cleveland case, supra, which involved the constitutionality of Section 3963, General Code, in so far as it provided for the supplying of water by municipalities for the use of the public school buildings within the municipality free of charge, said on page 618:

> "The majority respectfully claim that this controversy is controlled, not by Section 3 of Article XVIII, pertaining to home rule, but by Section 4 of Article XVIII, pertaining to ownership, operation, and control of public utilities. * * * There has heretofore been perfect unanimity and harmony upon the proposition that by those amendments certain utilities within the state of Ohio have been placed within the entire control of the municipalities within whose boundaries their operations have been carried on.
>
> It is the spirit of the unanimous decision of this court in the case of *Village of Euclid* vs. *Camp Wise Assn.*, 102 Ohio St. 207, 131 N. E. 349, that whereas, prior to the amendments of 1912, all authority to a municipality to own and operate public utilities was derived from the Legislature, after those amendments, and by reason of their adoption, the authority came direct from the people, entirely absolved from any conditions or restrictions theretofore imposed or which might thereafter be imposed. * * *
>
> It did not seem to the court at that time that Sections 2 and 3 of Article XVIII had any bearing upon the case, because they are general sections, and it seemed that Section 4 being a special provision pertaining to utility service the special provision became paramount over the general provisions. The present controversy is not different in that respect."

Chief Justice Marshall then quoted the provisions of Section 4 of Article XVIII of the Constitution and continued:

> "This delegation of power to a municipality directly from the hands of the people is plain, unambiguous and unequivocal, and it is free from conditions; it is apparently self-executing, requiring no enabling legislation to complete the grant of power."

The several delegations of power contained in Sections 3, 4 and 7 of Article XVIII, supra, are each independent of the others and in no wise conditioned on the exercise or acceptance of the others. Each is self-executing and requires no legislation to make it available to the municipality. Nowhere in the Constitution is found language that qualifies the exercise of any one of these grants of power by making the exercise or acceptance of that grant dependent on the exercise or acceptance of any one of the others.

In the case of *Perrysburg* vs. *Ridgway*, 108 O. S. 245, it is held, as stated in the fourth branch of the syllabus:

> "The exercise of 'all powers of local self-government,' as provided in Article XVIII, Section 3, is not in any wise dependent upon or conditioned by Section 7, Article XVIII, which provides that 'a municipality may adopt a charter,' etc."

In my opinion the same is true as to the right of municipalities to acquire and operate public utilities by virtue of Section 4 of Article XVIII of the Constitution, a charter being merely the mode provided by the Constitution for a new delegation or distribution of the powers granted by the Constitution.

I conclude, therefore, that the grant to municipalities of the right to acquire, construct, own, lease and operate waterworks, the product of which is to be supplied to the municipality or its inhabitants as granted by Section 4 of Article XVIII of the Constitution of Ohio, is equally to municipalities that did not adopt a charter as well as to those that did adopt a charter, and includes therein the right to charge for supplying water for the use of the public school building or other public buildings in such municipality, regardless of any restrictions or any limitations on such right which the Legislature may make.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2127.

APPROVAL, ABSTRACT OF TITLE TO LAND OF E. W. LONG, IN CADIZ TOWNSHIP, HARRISON COUNTY, OHIO.

COLUMBUS, OHIO, May 18, 1928.

HON. GEORGE F. SCHLESINGER, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—In Opinion No. 2054 under date of May 5, 1928, this department had under consideration an abstract of title and a warranty deed executed by one E. W. Long, covering certain property situated in Cadiz Township, Harrison County, Ohio, and which is more particularly described in said former opinion.

As you will note from the opinion of this department above referred to, I was unable to approve the title on the abstract then submitted, by reason of the objections therein pointed out. I was also unable to approve the deed tendered by Mr. Long for the reason that the same named the Division of Highways of the State of Ohio as the grantee therein.

There has been submitted to me an additional or supplemental abstract containing information which in my opinion quite effectually obviates the objections to the title noted in said former opinion. Likewise, the objection made by me to the former deed tendered by Mr. Long has been obviated by a new deed which has been signed, acknowledged and in other respects properly executed by said E. W. Long and Alberta B. Long, his wife, in which the premises here in question are conveyed directly to the State of Ohio, its successors and assigns.

I am therefore of the opinion that said E. W. Long has a good and merchantable fee simple title to the premises here in question, subject only to the lien of taxes for the last half of the year 1927, the amount of which is stated by the abstracter as $2.98, and subject to the lien of taxes for the year 1928, the amount of which is yet undetermined. The new deed tendered by said E. W. Long is likewise hereby approved.

The encumbrance estimate and Controlling Board's certificate with respect to the purchase of this property were examined and approved by me in the former opinion of this department above referred to.

I am herewith returning to you the original abstract of title, the supplement thereto and the warranty deed of said E. W. Long and wife.

Respectfully,
EDWARD C. TURNER,
Attorney General.