From this examination, in the light of the law under authority of which these bonds have been authorized, I am of the opinion that bonds issued under these proceedings constitute a valid and legal obligation of said city.

Respectfully,
HERBERT S. DUFFY,
*Attorney General.*

---

1069.

GOVERNMENTAL FUNCTIONS DEFINED — PROPRIETARY FUNCTIONS DEFINED—SUPREME COURT.

*SYLLABUS:*

*The Supreme Court of Ohio defined and distinguished governmental and proprietary functions of municipalities in the case of Wooster* vs. *Arbenz,* 116 *O. S.,* 281, *viz: "In performing those duties which are imposed upon the state as obligations of sovereignty, such as protection from crime or fire, or contagion, or preserving the peace and health of citizens and protecting their property, it is settled that the function is governmental, and if the municipality undertakes the performance of those functions, whether voluntarily or by legislative imposition, the municipality becomes an arm of sovereignty and a governmental agency and is entitled to that immunity from liability which is enjoyed by the state itself. If on the other hand there is no obligation on the part of the municipality to perform them, but it does in fact do so for the comfort and convenience of its citizens, for which the city is directly compensated by levying assessments on property, or when it is directly benefited by growth and prosperity of the city and its inhabitants, and the city has an election to do or omit to do those acts, the function is private and proprietary.*

*Another familiar test is whether the act is for the common good of all the people of the state or whether it relates to special corporate benefit or profit. In the former class may be mentioned the police, fire and health departments, and in the latter class utilities to supply water, light and public markets."*

*So long as this opinion of the Court of last resort remains unreversed and unmodified, it must be accepted as the definition of and dis-*

*tinction between the governmental and proprietary functions of municipalities.*

COLUMBUS, OHIO, August 27, 1937.

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

GENTLEMEN: I am in receipt of your communication of recent date, as follows:

> "It has been the understanding of this Bureau that only such municipally owned utility plants as Water Works, Electric and Gas plants, are operated in the capacity of a proprietorship, and that other municipal functions are purely governmental.
>
> Accordingly, will you kindly review the enclosed letter in which various municipal functions are defined as proprietary, and advise us as to the accuracy of such definitions."

I likewise note the enclosure from The Unemployment Compensation Commission of Ohio, which I will not quote but content myself by reference thereto. Condensed, your letter and enclosure amount to a request to distinguish and designate the governmental and proprietary functions of municipal corporations. There seems to be a popular misconception as to the real distinction between these functions, namely, that if the municipal corporation in the exercise of a function injures some one, and for such injury the General Assembly has by statute attached liability to the municipality, such tort liability stamps the function as proprietary. Such is not a true test in any respect, as will be readily seen from the following example.

The improvement and maintenance of streets, alleys and other public highways is a purely governmental function, but note

*Section* 3714, General Code:

> "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."

For failure to perform the duties imposed by this special delegation of power, municipalities are liable to tort, not because the function

is proprietary, for it is not. The General Assembly saw fit to enjoin upon municipalities certain specific duties relative to their streets, alleys and other highways, and it follows as a matter of law that if the municipalities failed to perform these duties and injury resulted, liability attached to the municipality and the imposition of specific duties by the General Assembly amounted to a consent to be sued.

The Supreme Court of Ohio has distinguished these functions in a number of cases. I shall quote from one, viz: *Wooster* vs. *Arbenz*, 116 O. S., 281:

> "In performing those duties which are imposed upon the state as obligations of sovereignty, such as protection from crime, or fire, or contagion, or preserving the peace and health of citizens and protecting their property, it is settled that the function is governmental, and if the municipality undertakes the performance of those functions, whether voluntary or by legislative imposition, the municipality becomes an arm of sovereignty and a governmental agency and is entitled to that immunity from liability which is enjoyed by the state itself. If on the other hand there is no obligation on the part of the municipality to perform them, but it does in fact do so for the comfort and convenience of its citizens, for which the city is directly compensated by levying assessments on property, or where it is directly benefited by growth and prosperity of the city and its inhabitants, and the city has an election to do or omit to do those acts, the function is private and proprietary. Another familiar test is whether the act is for the common good of all the people of the state or whether it relates to special corporate benefit or profit. In the former class may be mentioned the police, fire and health departments, and in the latter class utilities to supply water, light and public markets."

The most comprehensive classification of governmental and proprietary functions of municipalities will be found in 28 O. J., Sec. 63, pp. 97, 98, 99 and 100. I quote therefrom using the headings used therein viz:

> *"Exercise of Police Powers Generally:* A municipality in the exercise of its police powers acts in a governmental capacity.
>
> *Police Department.* A municipal corporation in the creation and maintenance of a police department does so in the exercise of its governmental functions.

*Fire Department.* In the creation and maintenance of a fire department, a municipality acts in its governmental as distinguished from its proprietary capacity.

*Health Measures Generally, Quarantine; Fumigation.* The carrying out of health measures is an exercise of the police power and governmental in character. This rule applies in the case of the enforcement of quarantine regulations and other measures for the prevention of disease, such as fumigation.

*Sewers, Drains, etc.* It has been stated in recent cases involving liability for injuries resulting from sewers and drains, that in determining whether drainage will be provided, and in the adoption of plans for a drainage or sewer system, a municipality acts in a governmental capacity, but that the operation and upkeep of sewers involve the exercise of the proprietary functions of the municipality. It seems, however, that the rules relating to liability in such cases might equally as well, if not more correctly, be based upon the nature and character of the powers exercised as judicial or discretionary in the first instance and as ministerial in the latter instance, as has been done in at least one case. It has been definitely held in a recent decision by the Supreme Court that the construction of sewers is a governmental function (*Hutchinson* vs. *Lakewood,* 125 O. S., p. 100).

*Sewage Disposal or Purification Plant.* In the construction and maintenance of a sewage disposal or purification plant, a municipality acts in a governmental rather than a proprietary capacity; at least, where such plant is constructed in compliance with a statutory requirement.

*Collection and Disposal of Garbage, Refuse, etc.* In the collection and disposal of garbage, rubbish, ashes, etc., primarily as a health measure, a municipality exercises a governmental function. But it seems that where a municipality undertakes the collection and disposal of garbage, rubbish, etc., not primarily as a health measure, but for the purpose of deriving revenue therefrom, it acts in a proprietary rather than a governmental capacity.

*Prisons, Workhouses, etc.* A municipality in constructing and maintaining a prison and workhouse, acts in a governmental capacity.

*Municipal Hospitals.* In maintaining and operating a hospital as a public and charitable institution, in the interest of the public health, a municipality acts in its governmental capacity, even though some of the patients who are able and willing to do so pay for the treatment received at such institution.

*Permits Generally.* The issuing of permits to persons or organizations for the holding of exhibitions on public grounds or in public places, is an exercise of the police power and is governmental in character.

*Issuing or Revoking Building Permits.* In the matter of issuing and revoking building permits, a municipality acts in its governmental capacity.

*Taxation.* In the levying and collection of taxes, a municipality acts in its governmental capacity.

*Issuance of Bonds.* The issuance of municipal bonds payable by general taxation is a governmental act.

*Streets and Other Public Ways.* The improvement and maintenance of streets, alleys and other public ways is the performance of a governmental function. Street cleaning comes within the classification of governmental functions.

*Parks and Other Public Property.* The management of parks and public property fails within the general classification of proprietary functions.

*Public Utilities.* In the acquisition, maintenance and operation of public utilities, such as lighting power and heating plants, and waterworks, municipalities act in their private and proprietary capacity. But it is said that in so far as a municipality undertakes to provide water for the extinguishment of fires, it acts in a governmental capacity."

The text above quoted is very complete and is a thorough resume of Ohio cases dealing with governmental and proprietary functions of municipalities.

The General Assembly has not seen fit to define or classify governmental and proprietary functions of municipalities. Such definition and classification has heretofore been left to the Courts of Ohio and in all probability will continue to so remain, as it is a question of law. This question has given our Courts much concern for many years.

In the case of *Cincinnati* vs. *Cameron,* 33 O. S., 336, the Supreme Court said:

"The corporation of a city possesses two kinds of powers, one governmental and public, and, to the extent they are held and exercised, is clothed with sovereignty; the other private, and, to the extent they are held and exercised, is a legal individual. The former are given and used for public purposes, and the latter for private purposes. While in the exercise of the former, the corporation is a municipal government, and while

in the exercise of the latter, is a corporate legal entity."

Likewise in the case of *Toledo* vs. *Cone,* 41 O. S., 149, the same court said:

> "Municipal corporations are agencies or instrumentalities to which the general assembly, vested with the legislative power of the state, delegates a portion of its governmental power, in order to meet those local wants of the people in cities and villages for which state laws make only general provision, leaving a more particular provision to local councils."

The list or schedule of governmental and proprietary functions hereinbefore quoted does not include all functions of municipalities but it does enumerate those functions concerning which a doubt might be entertained as to their classification.

This list or schedule is not intended to last for all time. Tomorrow a municipal function might spring into being, not included in such list or schedule, and so close to the borderline that the application of the general rule would not satisfy. In such case it would be necessary to do just what has invariably been done heretofore, namely, go into court for a definition and classification.

Respectfully,
HERBERT S. DUFFY,
*Attorney General.*

---

1070.

DEALER LICENSED UNDER SECTION 8624-18, GENERAL CODE, MUST FILE APPLICATION TO QUALIFY, WHEN—SALES WITHIN AND WITHOUT STATE.

*SYLLABUS:*

1. *Every dealer licensed under the provisions of Section* 8624-18, *General Code, is required to file an application under Section* 8624-49, *General Code, to qualify warehouse receipts in order to lawfully sell such warehouse receipts in other than exempt transactions in this state.*

2. *The right to file an application for qualification of warehouse receipts for intoxicating liquor under Section* 8624-49, *General Code, is*