2052.

APPROVAL, CONTRACT BETWEEN STATE OF OHIO AND CHARLES W. TAYLOR OF ZANESVILLE, OHIO, FOR CONSTRUCTION AND COMPLETION OF GENERAL CONTRACT ON GREENHOUSE AND SERVICE BUILDING AT OHIO AGRICULTURAL EXPERIMENT STATION AT WOOSTER, OHIO, AT AN EXPENDITURE OF $17,730.00—SURETY BOND EXECUTED BY UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND.

COLUMBUS, OHIO, July 2, 1930.

HON. A. T. CONNAR, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval a contract between the State of Ohio, acting by the Department of Public Works for the Board of Control of the Ohio Agricultural Experiment Station, Wooster, Ohio, and Charles W. Taylor of Zanesville, Ohio.

This contract covers the onstruction and completion of general contract (exclusive of plumbing, heating, electrical work and greenhouse superstructure), on greenhouse and service building at Ohio Agricultural Experiment Station, Wooster, Ohio, as set forth in Item 1 and Item 4, Alternate G-3A, of proposal submitted January 27, 1930. Said contract calls for an expenditure of Seventeen Thousand Seven Hundred and Thirty dollars ($17,730.00).

You have submitted the certificate of the Director of Finance to the effect that there are unencumbered balances legally appropriated in a sum sufficient to cover the obligations of the contract. You have also furnished evidence to the effect that the consent and approval of the Controlling Board to the expenditure has been obtained as required by Section 11 of House Bill No. 510 of the 88th General Assembly. In addition you have submitted a contract bond, upon which the United States Fidelity and Guaranty Company of Baltimore, Maryland, appears as surety, sufficient to cover the amount of the contract.

You have further submitted evidence indicating that plans were properly prepared and approved, notice to bidders was properly given, bids tabulated as required by law and the contract duly awarded. Also it appears that the laws relating to the status of surety companies and the workmen's compensation have been complied with.

Finding said contract and bond in proper legal form, I have this day noted my approval thereon and return the same herewith to you, together with all other data submitted in this connection.

Respectfully,
GILBERT BETTMAN,
Attorney General.

2053.

MUNICIPALITIES—NON-CHARTER AND CHARTER—FORMER MAY NOT CONTRIBUTE FUNDS TO AMERICAN LEGION POST FOR FOURTH OF JULY CELEBRATION—WHEN LATTER MAY CONTRIBUTE.

SYLLABUS:

There exists no authority for the expenditure of the funds of a non-charter municipality for the purpose of holding a Fourth of July celebration. The legality of such an expenditure by a charter municipality is dependent upon whether the charter

contains an express provision authorizing such expenditure, or a general provision from which such authority may be inferred.

COLUMBUS, OHIO, July 3, 1930.

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

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

> "Section 2503, G. C., as amended, 113 O. L., page 496, authorizes the expenditure of funds by a municipality in observing Memorial Day.
>
> May a municipal corporation appropriate and contribute funds to an American Legion Post, for the purpose of aiding in the payment of expenses of a Fourth of July celebration?"

There is considerable conflict of authority on the question of whether or not a municipal corporation, without specific statutory or constitutional authority therefor, may legally appropriate public moneys for the purpose of public entertainments and celebrations held in commemoration of historic events. The cases turn to some extent upon the question of whether or not such expenditures are for a public municipal purpose.

In practically all cases where by legislative authority a state is authorized to appropriate money for such purposes, the action is upheld. Thus, in the recent case of *Sambor* vs. *Hadley,* 291 Pa., 395, it was held that a municipal appropriation to a private corporation formed for the purpose of celebrating the Sesqui Centennial Anniversary of Independence, which appropriation was made by virtue of statutory authority, was lawful and for a public purpose. Under the law there in question the city of Philadelphia appropriated upwards of $5,000,000 for the purpose of celebrating the 150th Anniversary of the signing of the Declaration of Independence.

Where, however, statutes are brought in question, authorizing minor subdivisions to make similar expenditures, the courts are in hopeless conflict.

It is said in Cooley on Taxation, Section 203:

> "So it is a public purpose to provide for the celebration of important events or eras, and for making exhibits at public fairs or expositions, including national expositions outside the state, * * *
>
> To furnish amusements and entertainments to its citizens has been held not one of the functions of government, but the trend of recent decisions is to the contrary."

In the footnotes there are cited a number of cases on either side of the proposition. Among others is cited the case of *Egan* vs. *City and County of San Francisco,* 165 Calif., 576, in which it was held:

> "The trend of authority, in more recent years, has been in the direction of permitting municipalities a wider range in undertaking to promote the public welfare or enjoyment."

In McQuillin on Municipal Corporations, Section 381, it is said:

> "Without express authority, a municipal corporation may not appropriate the public revenue for celebrations, entertainments, etc. Such power cannot be implied. In Massachusetts it was early held that a town cannot appropriate money for a Fourth of July celebration. *Hood* vs. *Lynn,* 1 Allen, 103. The

approval of the court was withheld notwithstanding it was supported by uniform practice and custom. The same ruling was made in *Conn. New London* vs. *Bronnel,* 22 Conn. 552, and also in North Carolina. *Lynn* vs. *Raleigh,* 116 N. C., 296.

In late years, authority to make use of public money by cities and towns for buildings, monuments and celebrations designed to promote the sentiment of patriotism among their citizens is more freely granted by states, usually with limitations as to amount and restrictions concerning the manner of exercise. *Schieffelin* vs. *Hylan,* 236 N. Y., 254."

It is very probable that if authority were granted by the Legislature to municipal corporations to appropriate the funds of the municipality for the purpose of celebrating Independence Day, the courts would uphold the power as being for a public purpose. Such a grant of power, however, can not be implied as being so analogous to the authority extended to municipalities by Section 2503, General Code, as amended by the 88th General Assembly, (113 O. L., 496) as to be included in that authority. There is quite a difference between a Fourth of July celebration and the commemoration of our soldier dead, and the mere fact that the Legislature extended to municipalities, by virtue of Section 2503, General Code, the power to contribute funds for the proper observance of Memorial Day, does not in the least signify that the Legislature intended thereby to grant the power to expend those funds for Fourth of July celebrations or for any other purpose than that unequivocally stated in the statute.

Unquestionably, the appropriation of funds for the observance of Memorial Day is for a public purpose, and, as stated above, it is very probable that an appropriation properly authorized for the observance of Independence Day would likewise be held to be for a public purpose. In the state of our law, however, I do not deem it necessary at this time to pass upon this question.

There is no statutory authority extending to municipal corporations the power to expend public funds for Fourth of July celebrations, in the absence of which there would be no question but that municipalities did not possess the power were it not for the home rule powers extended to municipalities by Article XVIII of the Constitution of Ohio.

These home rule powers are said to be self-executing, and if so, it would seem that in the absence of a charter provision of a municipality expressly prohibiting such action, the municipality would have the same power, to be exercised by appropriate legislation, to provide for contributions for the purpose of celebrating important historical events as would the Legislature itself, at least until the Legislature, by general law, prohibited or limited such action.

The Supreme Court of Ohio, however, in dealing with questions relating to the right of a municipality to expend public funds for purposes similar to holding celebrations, celebrating historical events, contributing to and supporting associations of municipalities and the like, seems to be committed to the doctrine that unless the authority to make such contributions is extended to the municipality by express provision of its charter or by some general provision thereof from which authority may be inferred to expend the funds of the municipality for the said purpose, the authority does not exist. *State ex rel* vs. *Semple,* 112 O. S., 559.

On the other hand, however, it is to be noted that expressions indicating the contrary conclusion are to be found in the late case of *Meyer* vs. *City of Cleveland, et al.,* decided by the Court of Appeals of Cuyahoga County, and reported in the Ohio Law Bulletin and Reporter for June 23, 1930. While that case dealt with the authority of the municipality to construct a municipal stadium, during the course of the opinion by Judge Williams, it was indicated that expenditure of funds for municipal patriotic celebrations, among other things, would be proper. It may be added that

this case was refused admission to the Supreme Court, although it would be improper to base any definite conclusion thereon.

In spite of the confusion that exists, I fee limpelled to the conclusion that the council of a non-charter city may not expend funds for the purpose which you mention, since its legislative authority is such only as is either expressed in the general law or implied from the powers therein set forth. No express authority existing, and, none being fairly to be inferred, the right must be denied.

The situation is, however, somewhat different with respect to charter cities. The Semple case recognizes that the power might exist if authorized either by express provision of the charter or by more general provision thereof from which the authority may be inferred. Since in the consideration of your question I have not before me the provisions of any particular charter, it is impossible to make a more categorical answer to your question with respect to charter municipalities.

I am therefore of the opinion, in specific answer to your inquiry, that there exists no authority for the expenditure of the funds of a non-charter municipality for the purpose of holding a Fourth of July celebration. The legality of such an expenditure by a charter municipality is dependent upon whether the charter contains an express provision authorizing such expenditure, or a general provision from which such authority may be inferred.

Respectfully,
GILBERT BETTMAN,
Attorney General.

2054.

CEMETERY LOT—TOWNSHIP TRUSTEES MAY ADOPT RULE PROVIDING FOR TRANSFER OF TITLE FROM DECEDENT TO AN HEIR OR NEXT OF KIN.

SYLLABUS:

There is no provision of the statute which authorizes the transfer of the record title to a cemetery lot from the name of the decedent to that of an heir at law or next of kin, in the absence of a rule providing for such transfer duly enacted by the board of township trustees.

COLUMBUS, OHIO, July 3, 1930.

HON. JOHN K. SAWYERS, JR., *Prosecuting Attorney, Woodsfield, Ohio.*

DEAR SIR:—You have requested my opinion on the following statement of facts:

> "The clerk of the board of trustees in one of the townships in this county has inquired of me with reference to the matter set out in the following paragraph or two. It seems that the trustees of the township in question have sold cemetery lots in the township as provided for in Section 3448 of the General Code. One such deed was made to a married woman who has since died. Her husband, who is her sole survivor, is anxious to have this lot transferred to his name.
>
> If this was an ordinary parcel of real estate, an affidavit of transfer would suffice. Inasmuch as this cemetery lot or lots in question is not recorded anywhere except in the book kept for that purpose by the township