incident to attendance at the school to which they shall have been assigned."

Upon consideration of the last sentence of Section 7764, supra, and assuming that the high school pupils resident in a school district comprised within a joint high school district are assigned to the joint high school therein maintained, and transportation is provided or offered thereto, it clearly follows that inasmuch as the board of education of that district does not pay tuition as such, for those pupils in the joint high school, it would not be required to pay any tuition in any other school the pupils might choose to attend.

I am therefore of the opinion, in specific answer to your question, that when a board of education of a school district, which has joined with another district or other districts in the maintenance of a joint high school in pursuance of Sections 7699 et seq. of the General Code of Ohio, furnishes or offers transportation to the joint high school so maintained for its resident high school pupils, the said board cannot be held for the tuition of any such pupils who attend another high school, regardless of the distance the pupils live from the said high school or the school which they may attend, unless the pupil or pupils are assigned by the Superintendent of Schools to some other school in accordance with law.

Respectfully,

JOHN W. BRICKER,

Attorney General.

6000.

WATER RENTAL—BOARD OF EDUCATION LIABLE FOR, WHEN—WATER FURNISHED BY MUNICIPAL WATER WORKS FOR SCHOOL PURPOSES—VILLAGE OF WILLARD CASE DISCUSSED—STATUTE OF LIMITATIONS AND RES ADJUDICATA AVAILABLE TO SCHOOL BOARDS.

SYLLABUS:

Boards of education in the Ninth Appellate District, and throughout the State of Ohio, are legally liable for the payment of water rentals charged against them by municipalities which own and operate municipal waterworks, for water furnished from said waterworks and consumed by said boards of education for school purposes prior to the decision of the case of Board of Education v. Village of Willard, 130 O. S., 311, by the Supreme Court of Ohio, as well as thereafter, subject to the limitations as to time as provided by the statutes of Ohio, except to the

extent that the matter is res adjudicata between the parties, in cases where suits were brought for the collection of water rentals and judgments were rendered in favor of the school board. To the extent that the matter is res adjudicata as between the parties, no liability exists.

COLUMBUS, OHIO, August 26, 1936.

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

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

> "In your Opinion No. 5655, it was held that in the Fifth Appellate District, wherein the Appellate Court had held Section 3963, General Code was unconstitutional, and that the school district was liable for water rental to the city, the city was liable for such water rental from the time meters were installed, to determine the amount of water used.
>
> QUESTION: In the Ninth Appellate District, where the Appellate Court had held Section 3963 to be constitutional, is the board of education liable for water rental prior to the decision of the Supreme Court in the Willard case?"

Under the unique provision of the Constitution of the State of Ohio contained in Section 2 of Article IV of that instrument, courts of appeals were in effect constituted courts of last resort with respect to the constitutionality of laws where the Supreme Court does not by a concurrence of all but one of the judges thereof reverse the position of the Court of Appeals which had held a particular law to be constitutional. However, it must be conceded that the Supreme Court is a higher court than a Court of Appeals and that its jurisdiction is state-wide. Where the Supreme Court by the concurrence of all but one of the judges, does reverse a holding of the Court of Appeals, to the effect that a certain statutory provision is constitutional no one would contend that such reversal had not the effect of neutralizing the holding of the Court of Appeals in the particular case. The rule thus established by the Supreme Court because of its being the highest court in the state and having state-wide jurisdiction becomes under the rule of stare decisis binding on all courts of inferior jurisdiction including Courts of Appeals, in the state. It likewise overrules all contrary hodings previously made not only by the Supreme Court itself, but by lower courts as well.

Not until the decision of the Supreme Court in the case of Board of Education of Willard School District v. Village of Willard, 130 O. S., 311, did the Supreme Court by the concurrence of all but one of

its judges hold affirmatively that the provision of Section 3963, General Code, requiring municipalities or the municipally owned waterworks thereof to furnish water for the use of school buildings therein free of charge, is unconstitutional.

Having so held in the Willard case, I am of the opinion that the effect of the decision is to overrule all decisions of all courts in the state which had prior to this decision held otherwise. See Opinion 5147, rendered under date of February 6, 1936. In that opinion I said:

> "Since all but one of the judges of the Supreme Court have now concurred in the holding of the statutory provisions in question to be unconstitutional in the Willard case, that decision is now binding on all courts and administrative officers throughout the state under the rule of stare decisis and that holding should be followed and acted upon accordingly."

The effect of the decision of the Willard case and of its overruling of previous contrary decisions of Courts of Appeals is the same in those appellate districts where the Court of Appeals had held the statutory provision in question to be constitutional as though that Court of Appeals had reversed itself and overruled its former decision.

The effect of overruling any and all former adjudications of Courts of Appeals holding the statutory provision in question constitutional and the holding of it to be unconstitutional as was done in the Willard case, is to render that statutory provision nugatory as an effective law not only for the future but for the past as well. The rule of law that adjudication of unconstitutionality of statutes operates retrospectively as well as prospectively with certain exceptions is one of practically universal application by the courts.

It is stated in Cooley's Constitutional Limitations, Eighth Edition, Volume one, page 382:

> "When a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made. And what is true of an act void in toto is true also as to any part of an act which is found to be unconstitutional, and which, consequently, is to be regarded as having never, at any time, been possessed of any legal force."

In Ruling Case Law, Volume 7, page 1010, it is stated:

"The general principle is that decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former decision is bad law but that it never was the law. To this the courts have established the exception that where a constitutional or statute law has received a given construction by the courts of last resort, and contracts have been made and rights acquired under and in accordance with such construction, such contracts may not be invalidated nor vested rights acquired under them impaired by a change of construction made by a subsequent decision."

The same rule is stated in Corpus Juris, Volume 15, page 960:

"The effect of overruling a decision and refusing to abide by the precedent there laid down is retrospective and makes the law at the time of the overruled decision as it is declared to be in the last decision, except in so far as the construction last given would impair the obligations of contracts entered into or injuriously affect vested rights acquired in reliance on the earlier decisions."

Many authorities are cited by textwriters in support of the proposition stated above. It will be noted that there are certain well recognized exceptions to the general rule with reference to this matter where the principle of estoppel intervenes or where contractual rights or vested rights are involved and the application of the rule would impair those contractual rights or vested rights. These exceptions are noted and discussed in my opinion No. 5655, rendered under date of June 1, 1936, and the following cases are cited as illustrative thereof:

Tone v. Columbus, 39 O. S., 281;
Mott v. Hubbard, 59 O. S., 199;
Findlay v. Pendleton, et al., 62 O. S., 88, 89;
City of Mt. Vernon v. State, 71 O. S., 428;
Thomas v. State, 76 O. S., 341.

In my opinion, no vested or contractual rights are involved so far as the furnishing of water by a municipal corporation from municipally owned waterworks to its customers is concerned, nor are there any grounds for the application of the principle of estoppel, and therefore no

reason exists for the application of the exceptions to the general rule in such cases. It is pointed out in my former opinion that the assessment of water rents for water consumed by a municipal corporation which owns and operates municipal waterworks is analogous to assessments made for street improvements. In the case of City of Sidney v. Cummings, 93 O. S., 328, it is held that in the assessment of property for a street improvement by the foot front of the property bounding and abutting upon an improvement under Section 3812, General Code, no contractual relation exists between the municipal corporation and the property owner.

In some few school districts during the past few years, suit was brought by municipalities against the board of education for the collection of water rentals, which suit resulted in a judgment for the school board. As to the rentals involved in these particular suits, the question of liability is, by reason of such judgment, res adjudicata as between the parties and in such cases no recovery can now be had and no liability exists, for the payment of rentals which were involved in the particular suits.

I am therefore of the opinion in specific answer to your question that boards of education in the Ninth Appellate District, and throughout the State of Ohio, are legally liable for the payment of water rentals charged against them by municipalities which own and operate municipal waterworks, for water furnished from said waterworks and consumed by said boards of education for school purposes, prior to the decision of the case of Board of Education v. Village of Willard, 130 O. S., 311, by the Supreme Court of Ohio, as well as thereafter, subject to the limitations as to time as provided by the statutes of Ohio, except to the extent that the matter is res adjudicata as between the parties, in cases where suits were brought for the collection of water rentals and judgments were rendered in favor of the school board. To the extent that the matter is res adjudicata as between the parties, no liability exists.

Respectfully,

JOHN W. BRICKER,

Attorney General.

6001.

APPROVAL, BONDS OF CLEVELAND CITY SCHOOL DISTRICT, CUYAHOGA COUNTY, OHIO, 35,000.00

COLUMBUS, OHIO, August 26, 1936.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.