to the lessee above named the right to mine and take coal from a certain 46-acre tract in Section 16 School Lands in Elk Run Township, Columbiana County, Ohio, the surface rights in which are now held by said lessee under a previous lease executed to him for a stated term; and subject to certain conditions providing for an earlier termination of the lease, the lease here in question by its terms is to be in force and effect as long as said lessee holds the lease of the surface of said lands.

This lease provides for the payment of a royalty of ten cents per ton, run of mine, for all coal mined by the lessee under the lease, with provision for a minimum production of 500 tons of coal annually.

Upon examination of this lease, I find that the same has been executed and acknowledged in the manner provided by law and that the terms of the lease are in conformity with the provisions of the section of the General Code under the authority of which the same is executed. In this connection, it is noted that there is a recital in the lease that the same is executed under the authority of an act of the General Assembly of Ohio amending section 3209 of the General Code, passed February 16, 1914. The recital in the lease as to this should be that the same is executed pursuant to the authority of section 3209-1, General Code, as amended by the act of July 20, 1914, 105 O. L., page 6. Subject to this correction in the lease to be made by you, the same is herewith approved, as is evidenced by my approval endorsed upon the lease and upon the duplicate copy thereof, both of which are herewith returned.

Respectfully,
JOHN W. BRICKER,
*Attorney General.*

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1759.

PUBLIC DANCE—DEFINED AND DISCUSSED—PERMIT REQUIRED WHEN—MAYOR HAS DISCRETIONARY POWER TO ISSUE.

*SYLLABUS:*

1. *Where a proprietor of a restaurant maintains a floor for dancing, employs an orchestra, permits dancing and advertises in a newspaper that a dance is to be held but does not charge any admission other than the cost of food and refreshments, such constitutes a "public dance" within the meaning of section* 13393, *General Code. A person conducting a public dance without a permit may be prosecuted under section* 13393-2, *General Code.*

2. *A mayor is vested with discretionary power and authority to either issue or refuse to issue a permit for a public dance.*

COLUMBUS, OHIO, October 24, 1933.

HON. ERNEST L. WOLFF, *Prosecuting Attorney, Norwalk, Ohio.*

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

> "I desire your official opinion concerning the proper construction of Section 13393 of the General Code in connection with the following state of facts: M. is the owner and proprietor of a restaurant known as 'The M.' in the City of N., Ohio. In connection with his restaurant he maintains a floor for dancing purposes upon Saturday nights and possibly

upon other nights. He employs an orchestra and permits the patrons of the restaurant to dance in such restaurant without charge being made for the dancing other than the charge for food and refreshments purchased at the restaurant.

He advertises from time to time in the local newspapers that people may dine and dance therein and occasionally in the Saturday papers in addition to the advertisement for his restaurant has had advertisements ending with the words 'Dance Tonight.'

No permit has ever been issued by the Mayor to the proprietor of this restaurant, although permits have been issued by the Mayor and are still being issued by the Mayor to persons desiring to hold public dances in the municipality.

The proprietor contends he is not operating a public dance and is not required to have a permit. This raises the following questions:

1. Is the entertainment above outlined a public dance as provided by the laws of Ohio and is the proprietor required to obtain a permit, and no permit having been issued, has he in allowing dancing under the above conditions been guilty of violation of this section?

The next question which arises is: The Proprietor, Mr. M., insists that if a permit is required that the Mayor is bound under the provisions of this law to grant him such permit even though objections be made thereto and that the Mayor has no discretion in the matter, inasmuch as other official dance permits are being issued in the City of N.

The second question therefore is: Under the circumstances if the above Section requires a permit, upon Mr. M.'s making application therefor and tendering the necessary fee and in the event of refusal by the Mayor to issue him a permit can Mr. M. be prosecuted criminally under the above section, if he allows his patrons to dance in the restaurant?"

Section 13393, General Code, referred to in your letter reads as follows:

> "No person shall give a public dance, roller skating or like entertainment in a city, village or township without having previously obtained a permit from the mayor of such city or village if such public dance, roller skating or like entertainment is given within the limits of a municipal corporation, or from the probate judge if such public dance, roller skating or like entertainment is given outside a city or village, or permit another so to do. All permits issued under the authority of this section shall be subject to revocation at all times. The provisions of this section shall not apply to charter cities where the licensing authority is vested in some other officer than the mayor."

Your first inquiry raises the question of what constitutes a public dance. Webster defines "public" as "pertaining to, or belonging to the people; opposed to private * * * the people, indefinitely." Bouvier's Law Dictionary defines "public" as "the whole body politic, or all the citizens of the state. The inhabitants of a particular place." The primary end of all statutory construction is to arrive at the legislative intent. No doubt, the legislature intended to use the word "public" in contradistinction to the word "private." The legislature by the enactment of this section intended to regulate places where the public in general mingle together. Such legislation has been uniformly upheld as a proper exercise of the police power. This office has been called upon in various opinions to pass upon section

13393, supra, relative to public dances. The syllabus of an opinion found in Opinions of the Attorney General for 1927, Vol. II, page 1536, reads in part as follows:

> "1. Whether or not dances given within or without municipalities are public dances is a mixed question of law and fact, and in the decision of such question, the fact of financial profit to an individual or group would be determinative in most cases. * * *
>
> 2. In determining whether or not a dance is a public dance or a dance given under the auspices of a bona fide social club as a private dancing party consideration should be given to the organization of the club, the bona fide limitation on its membership, the attendants of the dance, who, if anyone, stands to profit or lose thereby, and in short, the good or bad faith of the promoters of the party in complying with or attempting to evade the law."

The following language appears in that opinion at page 1538:

> "* * * It can not be denied that dances held as mere incidents to the activities of bona fide social clubs and fraternal organizations and confined in their attendance to the membership of such clubs and bona fide guests of the members are private dances and as such do not require the securing of a permit for the holding of them. But where to draw the line between such dances and public dances, as well as how to determine when a club is a bona fide club or a mere camouflage to accomplish something otherwise prohibited is fraught with considerable difficulty and to my mind is practically impossible, without resort to the rule of construction that permits the going behind the plain wording of the statute and looking to the purpose of the passage of the law and the remedying of the evils which the law sought to reach.
>
> * * * But the discrimination exercised in the selection of the membership and the limitations imposed on the attendance of parties given by such clubs must be so defined as not captiously to permit the attendance of so much of the general public as to bring about the existence of the very evil the legislature aimed to prevent, else they lose their private character and become public dances."

In an opinion found in Opinions of the Attorney General for 1927, Vol. I, page 521, it was held as disclosed by the syllabus:

> "In a given case where a public notice is given through the press or otherwise that a dance will be given at a particular time and place, and that everybody is invited, and where upon the assemblage of the parties interested in the dance and who propose to attend the same, printed invitations are handed out to the prospective dancers before appearing upon the dance floor, the proposed dance in question is a public dance and will require a permit under the provisions of Section 13393, General Code of Ohio."

In an opinion found in Opinions of the Attorney General for 1930, Vol. II, page 922, it was held as disclosed by the syllabus:

"A dance given by an individual, where invitations are sold for fifty cents and some small gift is given as an inducement to aid in the sale of tickets, and the number of patrons to whom such tickets are sold is limited by the capacity of the hall, constitutes a 'public dance' within the meaning of Section 13393 of the General Code."

See also Opinions of the Attorney General for 1925, pages 385 and 462; Opinions of the Attorney General for 1930, Vol. III, page 1722; *City of Chicago* vs. *Greenmill Gardens,* 305 Ill. 87; Note in 48 A. L. R. 146.

An examination of the above authorities compels the conclusion that by the term "public dance" the legislature meant a dance which is open generally to the community, and where the rules of admission are not based upon invitation or personal selection. The difficulty does not arise so much in defining the term "public dance" as it does in determining whether or not the facts in a particular case come within the definition. Oftentimes public dances may be given under the guise of private dances to circumvent the terms of a statute. Whether or not a dance is a public dance is, of course, a question of fact to be determined from all the facts and circumstances in each particular case. You state in your letter that the proprietor of the restaurant maintains a floor for dancing and employs an orchestra. Obviously, any of the patrons of the restaurant may dance, and are even invited to dance, otherwise there would be no reason for the dance floor and the orchestra. Likewise, as you state, the proprietor advertises on certain occasions in the local newspapers that a dance is to be held at the restaurant. The 1927 opinion appearing in Vol. I, page 521, supra, places a great deal of emphasis upon this point. The fact that the proprietor advertises in the newspaper indicates that he wishes any and all persons to dance at his restaurant, subject to the limitation that they pay for their food and refreshments. One of the elements tending to show a public dance is the fact that an admission is charged and profit accrues to the management of the dance. In the present situation, an outright charge is not made for the dancing. However, the patrons really pay for the dancing in the cost of their food and refreshments. An interesting case on this point is the case of *Herbert* vs. *Shanley Company,* 242 U. S. 591. The syllabus of that case reads in part as follows:

"The performance of a copyrighted musical composition in a restaurant or hotel without charge for admission to hear it but as an incident of other entertainment for which the public pays, infringes the exclusive right of the owner of the copyright to perform the work publicly for profit, * * *."

Mr. Justice Holmes, in the course of the opinion at page 594, says:

"* * * The defendants' performances are not eleemosynary. They are a part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order, is not important. It is true that the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere. The object is a repast in surroundings that to people having limited powers of conversation or disliking the rival noise give a luxurious pleasure not to be had from eating a silent meal. If music did not pay it would be given up. If it pays it pays out of the public's pocket."

Without extending this opinion further, it is sufficient to say that the facts as presented in your letter constitute a public dance within the meaning of section 13393, General Code. Consequently, he is required to secure a permit, and if he fails, he is subject to the penalty in section 13393-2, General Code.

Your second question relates to the mayor's authority to refuse an applicant a permit for a public dance. This question has been passed upon by the Supreme Court of this State in the case of *Rowland* vs. *State of Ohio,* 104 O. S. 366. The syllabus in that case reads as follows:

> "1. Section 13393, General Code, relating to public dancing without a permit from the mayor of a city or village, is a valid and constitutional enactment.
>
> 2. By virtue of that statute, the mayor is vested with full power and authority to either issue or refuse to issue such a permit to any and all persons and places within a city or village without giving any reasons therefor, and such exercise of such power under such statute is not an arbitrary abuse of the statutory or constitutional power."

In the course of the opinion, Wanamaker, J., says:

> "* * * The legislature declared public policy to be against public dances in cities and villages, unless the one giving such dance should secure a permit from the mayor, who, in the preservation of the public peace and good order, is the people's representative in affairs of government. In short it was left to the judgment and discretion of the mayor, having regard to the local conditions in the city or village, to determine whether or not public dances might be allowed notwithstanding the statute.
>
> * * * * * * * * *
>
> We are not advised by the record as to what the controlling reasons were for the mayor's refusal to issue permits at that time or at that place for any public dance, and the statute does not require him to give any reasons either for issuing a permit or refusing to issue a permit. We are clear that the mayor acted within his rights and powers under the statutes, and even if there were any doubt about it that doubt should be resolved in favor of the constitutionality of the statute and the proper exercise of the power vested in the mayor thereunder."

It is therefore my opinion, in specific answer to your questions, that:

1. Where a proprietor of a restaurant maintains a floor for dancing, employs an orchestra, permits dancing and advertises in a newspaper that a dance is to be held but does not charge any admission other than the cost of food and refreshments, such constitutes a "public dance" within the meaning of section 13393, General Code. A person conducting a public dance without a permit may be prosecuted under section 13393-2, General Code.

2. A mayor is vested with discretionary power and authority to either issue or refuse to issue a permit for a public dance.

Respectfully,
JOHN W. BRICKER,
*Attorney General.*