824.

APPROVAL, BONDS OF VILLAGE OF GREENFIELD, HIGHLAND COUNTY, OHIO—$4,300.00.

COLUMBUS, OHIO, September 3, 1929.

Industrial Commission of Ohio, Columbus, Ohio.

825.

APPROVAL, BONDS OF VILLAGE OF WEST FARMINGTON, TRUMBULL, COUNTY, OHIO—$27,537.64.

COLUMBUS, OHIO, September 3, 1929.

Industrial Commission of Ohio, Columbus, Ohio.

826.

AIRPORT—MUNICIPAL—A PUBLIC UTILITY—HOW MANAGED—COUNCIL OF NON-CHARTER CITY MAY NOT CREATE BOARD FOR SUCH UTILITY'S CONTROL.

SYLLABUS:

1. *The authority given to municipalities in this state, by Section 3939, General Code, to purchase or condemn land necessary for landing fields for aircraft and transportation terminals, and rights of way for connection with highways and railways, gives to such establishments the character of a public utility, and all laws applicable to municipally owned utilities are applicable thereto.*

2. *The authority of a municipality in Ohio, to acquire, construct, own, lease and operate a municipal airport or landing field for aircraft, is not dependent upon the adoption by the municipality of a charter except as such authority may be limited, restricted or qualified by charter provisions.*

3. *Council of a non-charter city is without power to create by ordinance a municipal airport board to control the operations of a municipal airport. Such airport, if established, should be managed and supervised as provided by general laws, that is by the Director of Public Service in cities, and by a board of trustees of public affairs in villages, until such time as other provision is made therefor by municipal charter.*

COLUMBUS, OHIO, September 3, 1929.

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:

"Council of the city of Mansfield passed an ordinance creating a municipal airport board for the administration of a municipal airport.

Section 2, part 2, of the ordinance reads:

'The Airport Board shall be authorized to provide for the management and operation, establish suitable rules and regulations, and to enter into agreements with reputable individuals, firms, or corporations for the privilege of local commercial flying for hire, and to lease such portions of Mansfield's airport as may be designated by the Airport Board for the purpose of building hangars or installing other permenent equipment. All leases and contracts of the Airport Board are subject to the approval of the council of the city of Mansfield.'

Section 4324, General Code, provides that the director of public service shall manage and supervise all public works and undertakings of the city except as otherwise provided by law. Sections 4325 and 4326, General Code, are also pertinent.

May a council of a non-chartered city legally create, by ordinance, a municipal airport board to control the operation of a municipal airport in the above manner?"

Section 3939, General Code, gives authority to municipalities "for purchasing or condemning land necessary for landing fields, either within or without the limits of a municipality, for aircraft and transportation terminals and uses associated therewith or incident thereto, and the right of way for connections with highways, electric, steam and interurban railroads, and improving and equipping the same with structures necessary or appropriate for such purposes." On the strength of the authority thus given to municipalities by that portion of Section 3939, quoted above, the Supreme Court of Ohio, in the case of *State ex rel. Chandler* vs. *Jackson, et al.*, in cause No. 21715, decided June 5, 1929, 121 Ohio St. p. ——, held that the establishment of a landing field for aircraft, sometimes called an airport, is the establishment of a public utility. The syllabus of this case reads as follows:

"The authority given to municipalities in this state by Section 3939, General Code, to purchase or condemn land necessary for landing fields for aircraft and transportation terminals and rights of way for connection with highways and railways gives to such establishments the character of a public utility, and all laws applicable to municipally owned utilities are applicable thereto."

It will be noted that in accordance with the above decision all laws applicable to municipally owned utilities are applicable to municipal landing fields for aircraft or municipal airports.

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

Section 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; * * * "

Section 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."

Section 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. * * * "

Section 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."

It is well settled by the Supreme Court of Ohio that 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 that right. *Village of Euclid et al.* vs. *Camp Wise Assn.,* 102 O. S. 207; *East Cleveland* vs. *Board of Education,* 112 O. S. 607; *Board of Education* vs. *City of Columbus,* 118 O. S. 295.

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 a supply of water by municipalities for the use of the public school buildings within the municipality, free of charge, which opinion was adopted by specific reference as the opinion of the majority of the court in the Columbus case, supra, 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. * * * "

Chief Justice Marshall then quoted the provisions of Section 4, 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."

It is very clear, from the terms of Article XVIII, Section 4, of the Constitution of Ohio, read in the light of the interpretation given to it by the Supreme Court, in the cases cited, that every municipal corporation in Ohio has the power and the right to 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, free from any restrictions or limitations imposed by general laws, and in such a manner as it sees fit, within constitutional limitations.

It may be contended that, in the absence of any other provisions of the Constitution limiting or prohibiting the municipality from so doing, said section of the Constitution would be held to imply the power to exercise the right in the same manner and

to the same extent as is municipal legislative power exercised generally, and that it need not be exercised in conformity with orders made by an administrative officer created by statute, but may be exercised in the manner provided for by the legislative authority of the municipality. That is to say that inasmuch as the State, in providing by general laws that affairs pertaining to municipalities should be administered by a board of trustees of public affairs in villages and in cities by a service director, made those provisions by authority of its power to legislate, the municipality, since the amendments of 1912, having the power to operate the utility independent of State control might provide the method of operation and the municipal agencies to do the actual operating by legislation enacted by the municipal agency empowered by general laws, in the absence of charter, to legislate for the municipality. In other words, to make the section of the constitution completely operative, would require nothing more than a law for the organization of municipal corporations and the prescribing of a mode of their exercising legislative power. When this is done, it may be questioned whether the municipality may not in exercising its legislative power in the manner prescribed, provide for operating its public utilities independently of general laws and independently of any administrative officers created by statute.

Before any power to own and operate a public utility may be operative there must of course exist a corporate entity and a corporate agency within such entity empowered and authorized to act in the premises. Under our system of government, and in the light of our conception of municipal government, a municipal corporation cannot be brought into existence by a force coming from within. It cannot be its own creature. It acquires its vital force from its creator, the State.

Since the organization of the State, no doubt has ever existed but that it was through the exercise of legislative power of the State, vested by constitutional grant in the General Assembly, that the incorporation of municipalities was effected, and provision was made for the organization of their local governments. The Constitution of 1802 made no mention of municipal corporations. It practically recognized their existence by providing in Article VI, Section 3, that all town officers should be chosen annually, by the inhabitants thereof. Article I, Section I of the said instrument provided that,

> "The legislative authority of this State shall be vested in the General Assembly."

The Supreme Court in *Town of Marietta* vs. *Fearing,* 4 Ohio 428, held that the General Assembly, through its legislative power, might create public corporations and quasi corporations, or it might abolish them or enlarge or restrict their powers. In the Constitution of 1851, Article XIII, Section I, it was provided that the General Assembly should pass no special act conferring corporate powers, and in Section 6 of the said Article XIII, it was provided that the General Assembly should provide for the organization of cities and incorporated villages by general law. Upon the adoption of the amendments of 1912, without repealing Section 6, of Article XIII, it was again provided, in Section 2, of Article XVIII:

> "General laws shall be passed to provide for the incorporation and government of cities and villages."

At the same time, there were adopted Sections 3, 4 and 7 of Article XVIII of the Constitution of Ohio. By force of said Section 7, municipalities were authorized to provide by charter for the organization of their government, including, without a doubt, the distribution of powers within that government, and were authorized, subject to the provisions of Section 3, of Article XVIII, to exercise thereunder all powers

of local self government. Said Section 3 secures to municipalities the right to exercise all powers of local self government, subject, of course, to other constitutional restrictions. The operation of municipally owned utilities is a matter of local government and, especially in view of the holdings of the Supreme Court, a proper subject of local self government, irrespective of, and independent of the provisions of Sections 3 and 7 of Article XVIII of the Constitution. In view of the self-executing provisions of Section 4, of Article XVIII, of the Constitution, there is no authority to provide for their operation otherwise than by the municipality owning and operating them, in the exercise of its powers of local self government, unless resort is had to the broad principle of State sovereignty, as stated by Chief Justice Marshall in one of his opinions, where, without reservation, he speaks of,

> "That immense mass of legislation which embraces everything within the territory of a State not surrendered to the general government, which includes the complete internal commerce of the State, the power of regulating their own purely internal affairs, whether of trade or police, the acknowledged power of a State to regulate its police, its domestic trade, and to govern its own citizens." *Gibbons* vs. *Ogden,* 9 Wheat 1.

At least a portion of the sovereign power of the State spoken of by Chief Justice Marshall has been surrendered or limited by our Constitution, so far as matters of local municipal self government and the operation of municipally owned utilities are concerned. These powers, however, although granted in broad and unqualified language, are limited to some extent by other provisions of both the federal and state constitutions. Property and personal rights and rights of a pecuniary character, even though involved in the administration of the affairs of local self government, are within the protection of important provisions of the State and Federal Constitution. The right to limit the powers of municipalities to levy taxes and incur debts for local purposes is reserved to the State by Section 13, of Article XVIII, of the Constitution of Ohio, as is the power to require reports from municipalities as to their financial condition and transactions, and the General Assembly may provide for the examination of the vouchers, books and accounts of all municipal authorities or of public undertakings conducted by such authorities. None of the judicial powers incident to the sovereignty of the State are conferred on the municipality by any of the home rule provisions of the Constitution, Section I, Article IV, Constitution of Ohio. *State ex rel* vs. *Hutsinpiller,* 112 O. S. 468.

Many questions have arisen with reference to what are and what are not "powers of local self government." The courts are constantly being called upon to differentiate between the powers of the State and of municipalities within the state, under so called home rule constitutional provisions. The result has been a mass of judicial opinions on the subject that has created a hazy and perplexing situation, to say the least. Not only is this true in Ohio, but in every other state where similar constitutional provisions exist. McQuillen in his work on municipal corporations, Second Edition, in a quite exhaustive treatment of the subject, says in Section 93:

> "While the rights of local self government, or rights of home rule are constantly dealt with by the courts they have never been precisely defined authoritatively. * * * This difficulty is of long standing. In its very nature the differentiation is not, and never can be, entirely free from perplexity. Efforts to prescribe a definite municipal orbit, excluding state activity therein, has brought about confusion, and has evolved so-called distinctions which are not distinctions at all. The result has been involved artificial legal rules, superfined legalism beyond the comprehension of the layman, which

entwine or shade into each other, impracticable of general application, or even of application in the state of their origin."

The question is further complicated by reason of the grant to municipalities, in Section 3, of Article XVIII, of the Constitution, of all powers of local self government, and in Section 7 thereof, adopted at the same time, the power to "frame, adopt or amend a charter for its government," under which it may exercise all powers of local self government, subject to the provisions of said Section 3, without defining, or even suggesting, what the limitations of the charter may be, other than the exercise thereunder of all powers of local self government, subject to the provisions of Section 3, of Article XVIII, of the said Constitution.

In the early English Law, a charter was an instrument in writing, containing a grant from the Crown to any person or persons or to any body politic of any rights, liberties, franchises or privileges, otherwise called a Royal Charter. In modern law, a charter is a grant in writing of certain privileges and franchises, usually to a corporation by the supreme power of a State; an act of incorporation. Broadly speaking, a charter is an instrument emanating from the sovereign power in the nature of a grant, either to a whole nation, or to a class or portion of the people, or to a colony or dependency, and assuring to them certain rights, liberties and powers. McQuillin, in his work on municipal corporations in Section 336, says:

"The word charter, when used in connection with a municipal corporation, consists of the creative act and the laws in force relating to the corporation, whether in defining its powers or regulating their mode of exercise."

Judge Dillon, in his work on the same subject, at Section 63, says:

"The power and authority conferred by the Constitution upon cities to frame their own charters extend to all subjects and matters properly belonging to the government of municipalities, and this necessarily includes any subject appropriate to the orderly conduct of municipal affairs."

The above definitions of a charter were quoted with approval by the Supreme Court of Ohio, in the case of *Fitzgerald* vs. *Cleveland,* 88 O. S. 338, 343. It will be noted that there is included within the concept of a municipal charter, as so defined, both the creative act, and all laws in force relating to the corporation, whether in defining its powers or regulating their mode of exercise. Apparently, the framers of our Constitution did not use the word charter in such a broad sense, as the provisions of the Constitution authorizing a municipality to adopt a charter presuppose the existence of the corporation and the existence of a "legislative authority" within the corporation. Section 8 of Article XVIII of the Constitution of Ohio provides in part:

"The legislative authority of any city or village may by a two-thirds vote of its members, and upon petition of ten per centum of the electors shall forthwith, provide by ordinance for the submission to the electors, of the question, 'Shall a commission be chosen to frame a charter.'"

It is apparent that a charter adopted by authority of Sections 7 and 8 of the Constitution of Ohio does not include the "creative act," as the corporation must necessarily have been created, and a "legislative authority" for it defined, before advantage could be taken of the provisions of Sections 7 and 8 of said Article XVIII in the adoption of a charter.

Historically considered, and broadly speaking, it appears, as noted above, that the charter of a municipal corporation consists of three things:

First, a creative act, giving to the municipality corporate existence.

Second, all laws and constitutional provisions which confer, limit, or in any way relate to the powers of the corporation.

Third, all laws relating to the mode of exercise of the powers conferred, or those inherent in the corporation, if any.

It seems clear, however, that the word "charter," as used in Section 7, of Article XVIII, of the Constitution of Ohio, is not to be given its broad and comprehensive meaning as stated above.

The conception of a charter, held by the framers of the Constitution could not have been that the charter embraced all those things included within the broad definition of the word. The provisions of the Constitution providing for the machinery for the adoption of a charter contained in Section 8, of Article XVIII, thereof presuppose corporate existence and preclude from the conception of such a charter the creative act giving to the corporation its corporate existence.

The powers of a municipal corporation are partly fixed by Section 3, of Article XVIII, which grants to the municipality "all powers of local self government," limited to some extent as to police, sanitary and similar regulations, and by Section 4, of Article XVIII, which grants to municipal corporations the power to acquire, construct, own, lease and operate certain public utilities, and are partly authorized by the constitution to be fixed and limited by the Legislature. Section 6, Article XIII, Section 2, Article XVIII, Section 13, Article XVIII of the Constitution of Ohio. It is the application of these several constitutional provisions relating to the powers of municipalities, and the drawing of the line between those powers inherent in the sovereign state and which may be granted to the municipality by the State only, and those which are conferred on the municipality directly from the hands of the people through the medium of the Constitution, that has given rise to many and varied controversies, and resulted in the drawing of hazy and perplexing distinctions.

The Constitution itself, however, must be looked to for the determination of the functions of a local municipal government and those which it shares with the state. As McQuillin speaks of it, the prescribing of a definite municipal orbit, excluding state activity. No authority exists for the municipality to change or modify its powers, as prescribed by the Constitution, and through the Constitution by the state, by the provisions of a charter which it may adopt. In fact, the section of the Constitution granting to municipalities the right to frame, adopt and amend a charter specifically says with reference to the powers of local self government, that the municipality under a charter which may be adopted may exercise those powers in the same manner and to the same extent as they are extended to the municipality by the preceding section of the Constitution.

However, as I view it, the Constitution precludes the idea of a creative act and the fixation of the powers of a municipality from the conception of a municipal charter, authorized to be adopted by force of Section 4, of Article XVIII, of the Constitution, and there remains but one other function of the broad conception of the charter which may be carried out by its adoption, to-wit: the internal government of the municipality, the mode of exercising the powers already granted to it, or as sometimes expressed, the distribution of the powers within the municipal government.

True, the section provides that a municipality may adopt a charter for its government. The term "government" is variously defined. In a broad sense it may be held to mean the entire body of laws by which a state or political subdivision functions, including not only laws setting forth the powers of government but as well, the distribution of those powers. In a narrower sense, it has been held to mean the officers and agencies authorized to make and administer the laws. Bouvier defines the term as:

"That institution or aggregate of institutions by which a State makes and carries out those rules of action which are necessary to enable men to live in a social state or which are imposed upon the people forming a State."

After all, definitions are only valuable to explain or support the context, and words are held to mean what the context implies. In my opinion, the word "government" as used in Section 4, of Article XVIII, means the machinery for, or mode of, exercising the functions of government in a municipality, in the carrying out of the powers possessed by it.

It seems apparent that the Constitution makers, in framing Article XVIII of the Constitution of Ohio, meant to provide definitely for all the powers which might be possessed by a municipal corporation, and did not mean to permit the municipality to enlarge on these powers by the adoption of a charter. They, as well, designated the agency empowered to create a municipal corporation, and provided for the distribution of the powers granted to the corporation within its governmental structure. They provided further, that the municipal corporation might change its governmental structure and re-distribute its powers within its government by the adoption of a charter. Until such time as it did adopt a charter by authority of Section 4, of Article XVIII, the distribution of its powers and its governmental structure is to be controlled by general law.

The above conclusion is borne out by the language of the court in the case of *Perrysburg* vs. *Ridgeway,* 108 O. S. 245. This case went further, in construing the provisions of Section 3, of Article XVIII, of the Constitution of Ohio, so as to broaden the powers conferred upon a municipality in matters of local self government, than perhaps any other case decided by our Supreme Court before or since. Although the soundness of the holding in this case has sometimes been questioned, it has never been overruled, and has often been cited with approval. The opinion was written by Judge Wanamaker, than whom no other judge of our Supreme Court has been more liberal in construing the home rule provisions of the Constitution so as a grant the municipality the widest possible latitude in the exercise of local powers, or more zealous in protecting municipalities in the exercise of powers of local self government under the Constitution. Note his language on page 253:

"But what is a city charter but a city constitution, and a city constitution can in no wise enlarge the municipal power granted in the state Constitution. After all, it only distributes that power to the different agencies of government, and in that distribution may place such limitation, but not enlargement, upon that power, as the people of the municipality may see fit in such charter or constitution."

The question of just how far a municipality may go in providing the mode of exercising its powers, or in designating the officers to administer its laws, in some other manner than that provided by general laws, without adopting a charter, has not been considered to any great extent by the Supreme Court. An examination of the many cases in this state involving the question of home rule will disclose that in practically all of them where questions in controversy have arisen the municipality operated under a charter, and the question of how far a municipality not having a charter may go in providing the machinery for its government, has not been involved in the cases. As before stated, in the case of *Perrysburg* vs. *Ridgeway,* it was held that the terms of Section 3, of Article XVIII, of the Constitution of Ohio, giving to municialities all powers of local self-government are self-executing, yet it was said in that case that the distribution of these powers within a local government was the function of a charter to be adopted by authority of Section 4, of Article XVIII.

Upon consideration of the home rule provisions of the Constitution, in the light of the many and varied decisions of courts on the subject, I am of the opinion that the administration of municipal government in this State must be conducted in the manner provided for by general laws, until a new delegation or distribution of the powers granted to municipalities is made by charter provision which it may adopt, although there are some expressions of the Supreme Court which would seem to support the opposite view.

It is therefore my opinion, in specific answer to your question, that it is not within the power of the council of a non-charter city to create by ordinance a municipal air port board to control the operations of the municipal air port and administer the affairs of the municipality with reference thereto, the Legislature having provided by general laws that all public utilities in cities should be managed and supervised by the Director of Public Service, and in villages by a Board of Trustees of Public Affairs.

Respectfully,
GILBERT BETTMAN,
Attorney General.

827.

RAILROAD COMPANIES—STREET, SUBURBAN, INTERURBAN AND STEAM—EFFECT OF AMENDMENTS IN HOUSE BILL NO. 22.

SYLLABUS:

Effect should be given to the provisions of Sections 5472, 5473, 5477 *and* 5478, *General Code, as amended by House Bill No. 22, enacted by the 88th General Assembly, in reporting and determining the gross earnings of each street, suburban or interurban railroad company and of each railroad company for the year ending June* 30, 1929, *for the purposes of ascertaining the measure upon which the excise taxes imposed by Sections* 5484 *and* 5486, *General Code, are to be charged by the Auditor of State; and said public utilities are not required to report or pay excise taxes on earnings accruing from the operation of busses operated by said public utilities during said year.*

COLUMBUS, OHIO, September 4, 1929.

The Tax Commission of Ohio, Wyandotte Building, Columbus, Ohio.

GENTLEMEN:—This is to acknowledge receipt of your recent communication, which reads as follows:

> "Referring to House Bill No. 22 which was passed at the last session of the Legislature and which bill amends Sections 5472, 5473, 5477 and 5478 of the General Code, relating to the excise tax on street, suburban and interurban railroad companies and railroad companies, your opinion is requested upon the following:
>
> This bill was approved by the Governor on April 25th and becomes effective on this date, July 24th.
>
> Under the provisions of Sections 5472 and 5473, street, suburban and interurban railroads and steam railroads make report of their entire gross earnings, including all sums earned or charged whether actually received or not, for the year ending on the thirtieth day of June.