1009.

EMERGENCY MEASURES—WHEN RESOLUTION OF NECESSITY FOR MUNICIPAL IMPROVEMENT DOES NOT REQUIRE PUBLICATION.

SYLLABUS:

Ordinances and measures enacted in the course of the legislation for a municipal improvement subsequent to the resolution of necessity therefor may be passed as emergency measures under authority of Section 4227-3 of the General Code, when in the sound judgment of council such emergency exists, and such ordinances or measures so passed do not require publication.

COLUMBUS, OHIO, September 16, 1927.

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

GENTLEMEN:—This will acknowledge your recent letter reading as follows:

"We have been advised by the solicitor for the Village of Chagrin Falls that Mr. Denison, of Squire, Sanders & Dempsey, asserts that there is no court decision holding that municipal legislative measures after the original resolution declaring the necessity for an improvement may be passed under an emergency clause, and, therefore, that such subsequent measures should be published or posted.

The village solicitor is of the opinion that such subsequent measures may be passed under an emergency clause and need not be published. His view of the matter is as follows:

'In Schrey (Shryock) vs. Zanesville, 92 O. S., 375, the Supreme Court held that the legislature might authorize municipalities to pass legislation under an emergency clause although the constitution did not expressly authorize such procedure as it did in the case of state legislation; the court recognized the dire necessity of having certain legislation become immediately effective. In Van Such vs. State, 112 O. S., 688, the Supreme Court held that emergency legislation did not require publication; there is no statutory language dispensing with publication so certainly it is logical to interpret this holding that since emergency legislation becomes immediately effective and the voters are denied any referendum thereon, publication would serve no purpose and it is, therefore, declared to be unnecessary. My point is that similarly since G. C. 4227-3 makes the referendum applicable "only to the first ordinance or other measure required to be passed and not to any subsequent ordinances and other measures," in relation to legislation to make and pay for public improvements, the voters are even in a worse position in respect to a referendum in such case than if it were the original or first measure or one like those under consideration in the Schrey (Shryock) case and the Van Such case, supra. There can be no object or purpose then in publishing such subsequent legislation, and construing G. C. 4227-3 with the same logic underlying the construction of the constitution by the Supreme Court in the Schrey (Shryock) case would necessarily result in implying that "provisions of this act" referred only to the referendum and that it was not intended thereby to limit the emergency privilege only to the first measure in improvement cases. If it were an anomaly would result. For instance, assume a sudden casualty required a speedy improvement. Under the emergency privi-

lege, the resolution declaring the necessity could be passed and no publication would be required, and thereafter each successive measure would have to be published and improvement be delayed pending the effective date of each of the subsequent measures. Certainly if the most important measure, the first one, may be passed as an emergency to speed the work and need not be published, the mere details of carrying out that purpose ought not to be denied the emergency or be required to be published.'

The Bureau is making an examination of the financial affairs of this village and the question is involved in a bond issue about to be offered for sale by said village.

Question: May ordinances and measures subsequent to the resolution of necessity in municipal improvement legislation be passed under the emergency privilege of Section 4227-3 G. G., and if so passed, need they be published?"

Section 4227-3 of the General Code, to which you refer, is as follows:

"Whenever the council of any municipal corporation is by law required to pass more than one ordinance or other measure to complete the legislation necessary to make and pay for any public improvement, the provisions of this act shall apply only to the first ordinance or other measure required to be passed and not to any subsequent ordinances and other measures relating thereto. Ordinances or other measures providing for appropriations for the current expenses of any municipal corporation, or for street improvements petitioned for by the owners of a majority of the feet front of the property benefited and to be especially assessed for the cost thereof as provided by statute, and emergency ordinances or measures necessary for the immediate preservation of the public peace, health or safety in such municipal corporation, shall go into immediate effect. Such emergency ordinances or measures must, upon a yea and nay vote, receive the vote of two-thirds of all the members elected to the council or other body corresponding to the council of such municipal corporation, and the reasons for such necessity shall be set forth in one section of the ordinance or other measure. The provisions of this act shall apply to pending legislation providing for any public improvement."

The case of *Shryock vs Zanesville,* 92 O. S. 375, which is referred to by the village solicitor, sustains the constitutionality of the initiative and referendum section of the General Code applying to municipalities, holding that council of a municipality is authorized to pass emergency ordinances necessary for the immediate preservation of the public peace, health and safety. The resolution there in question was the first step in the construction of a proposed improvement, and the rule is therefore settled that the first step, at least, is subject to a referendum, but upon being declared an emergency is not subject to a referendum and goes into immediate effect.

In the case of *Van Such vs. State,* 112 O. S. 688, to which the village solicitor also refers, is found the following language at page 689:

"It was held by this court in Shryock, Taxpayer, vs. City of Zanesville, 92 Ohio St., 375, 110 N. E., 937, that the council of a municipality is authorized to pass emergency ordinances necessary for the immediate preservation of the public peace, health and safety. Such ordinances do not require publication, and are not subject to the referendum but go into immediate effect."

These two cases, together with others which might be cited, clearly authorize the enactment of emergency measures by the council of a municipality. On the declaration of an emergency in an ordinance and its passage in pursuance of law, the ordinance goes into immediate effect by virtue of the express provisions of Section 4227-3 of the General Code.

The first part of your question is, however, whether ordinances and measures subsequent to the resolution of necessity in municipal improvement legislation may be passed as an emergency. The idea that the first only of a series of ordinances and resolutions pertaining to a particular improvement may be passed as an emergency is doubtless engendered by the language of Section 4227-3 of the General Code, heretofore quoted. The argument may be advanced that where the section uses the language "the provisions of this act shall apply only to the first ordinance or other measure required to be passed" in the course of the legislation necessary to make and pay for any public improvement, the remaining provisions of that section cannot be held to apply to such subsequent ordinances and measures. I do not feel that this interpretation of the language of the section is warranted, when reference is made to the provisions of the act. Obviously, the legislature intended to refer to the initiative and referendum provision. In other words, the intention is fairly clear to restrict the privilege of initiative and referendum to the first ordinance or resolution of the series in order to prevent the anomaly of having separate referendums on the various steps in the course of one proceeding.

I am of the opinion, therefore, that the authority to enact emergency measures is not confined by the language of the first sentence of Section 4227-3 to the first ordinance or other measure in the series necessary to complete the legislation to make and pay for any public improvements. It follows that the subsequent steps, such as the ordinance determining to proceed, etc., may, if council deems it necessary, be declared emergency measures and go into immediate effect.

Your second question is whether, in the event that ordinances or measures subsequent to the resolution of necessity may be passed as emergency measures, such ordinances and measures need be published.

This question would be of considerable difficulty were it not for the language of the Supreme Court in the case of *Van Such* vs. *State,* which I have quoted, supra. You will observe that the court there says that emergency ordinances do not require publication and are not subject to referendum and go into immediate effect. The reasons for the last two conclusions are obvious, but the court fails to enlighten us as to the process of reasoning by which it arrives at the conclusion that such ordinances do not require publication. We are left to conjecture as to what compelled the conclusion of the court. The fact that Section 4227-3 of the General Code specifically provides that emergency ordinances go into immediate effect is of considerable significance.

Section 4227 of the Code provides as follows:

> "Ordinances, resolutions and by-laws shall be authenticated by the signature of the presiding officer and clerk of the council. Ordinances of a general nature, or providing for improvements shall be published as hereinafter provided before going into operation. No ordinance shall take effect until the expiration of ten days after the first publication of such notice. As soon as a by-law, resolution or ordinance is passed and signed, it shall be recorded by the clerk in a book to be furnished by the council for the purpose."

Section 4228 of the Code provides for the manner in which publication shall be made.

You will observe that the effective date of ordinances of a general nature or providing for improvements is postponed until the expiration of ten days after the first publication of the notice. In other words, the requirements of publication and postponement of the effective date may possibly be said to be inseparable. The legislature in section 4227-3 of the Code provided that the emergency measure shall go into immediate effect, and this being a later enactment than Section 4277, General Code, it may be argued that the implied repeal as to the effective date carries with it also the implied repeal of publication, i. e, the two are not severable.

If it were not for the language of the Supreme Court, I should have considerable doubt as to the logic of this argument. Since, however, the court has categorically stated that emergency ordinances require no publication, and has not announced the grounds on which that conclusion is reached, I feel that the law must be regarded as settled, and consequently ordinances of an emergency character need not be published. I might point out, however, that the matter of the effective date of a measure has not necessarily any direct bearing upon whether or not publication thereof should be had. Nor can it be argued with much force that, because an ordinance is an emergency, it would be futile to publish it since it goes into immediate effect. The history of the pertinent sections of the Code are sufficient to refute such an argument. Statutes relating to publication of ordinances long antedate the constitutional and statutory provisions relative to the initiative and referendum. The object of publication clearly could not have been at that time to advise the public in order that it might take effective action with relation to the legislation. Prior to the initiative and referendum provision, the action of the legislative body was final. Yet there has been for many years provision for publication of ordinances, the obvious purpose of which was to keep the public advised as to what the law was. It is immaterial that people had no recourse from the enactment of the legislative body. They still had a right to be advised as to what action was being taken. It therefore can scarcely be said to follow that because an emergency ordinance is not subject to a referendum, it would be futile to publish the measure. The public still has the right to be advised as to what is going on. My conclusion might be otherwise if the expression of the Supreme Court holding referred to were not in existence. I feel bound by this language, however, and therefore am of the opinion that any emergency measure passed by a municipal council need not be published.

In passing, I might suggest that your question being broad and with relation to all ordinances and measures subsequent to the resolution of necessity in any kind of municipal improvement legislation, there are certain instances in which, for other reasons, no publication is necessary. In Opinion No. 524, heretofore rendered to your Bureau on May 23, 1927, the syllabus is as follows:

> "Municipal ordinances levying special assessments need not be published."

In that opinion it was also pointed out that Section 3914 of the General Code now provides that council ordinances and proceedings relating to the issuance of bonds and notes in anticipation of the collection of assessments do not require publication. It would therefore follow, irrespective of whether ordinances levying special assessments or ordinances providing for bonds or note issues in anticipation of the collection of assessments were made emergencies, that such ordinances would not require publication.

Whether other ordinances or other measures in the course of the legislative measures necessary to provide for a municipal improvement need be published, in the absence of the enactment of emergency measures, is not before me and I pass no opinion thereon.

Summarizing my conclusions, I am of the opinion that ordinances and measures enacted in the course of the legislation for a municipal improvement subsequent to the resolution of necessity therefor may be passed as emergency measures under authority of Section 4227-3 of the General Code, when in the sound judgment of council such emergency exists, and such ordinances or measures so passed do not require publication.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1010.

APPROVAL, BONDS OF BELLEVUE CITY SCHOOL DISTRICT, HURON AND SANDUSKY COUNTIES—$290,000.00.

COLUMBUS, OHIO, September 16, 1927.

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

1011.

COUNTY BOARD OF EDUCATION—POWER TO CREATE NEW SCHOOL DISTRICTS.

SYLLABUS:

1. *A county board of education may in its discretion create a new school district from territory lying within the territory embraced within an existing school district even though the existing school district had recently theretofore been created by combining two or more school districts or parts of districts.*

2. *In the absence of fraud, bad faith or the taking of such arbitrary, whimsical and unreasonable action as amounts to an abuse of discretion, the only limitation upon the power and discretion of a county board of education in the creation of new school districts, in addition to the fact that the territory comprising a school district must be contiguous, is the limitation contained in Section 4736, General Code, providing for a remonstrance by majority of the qualified electors residing in the territory affected by such order.*

COLUMBUS, OHIO, September 16, 1927.

HON. LESLIE S. WARD, *Prosecuting Attorney, Wauseon, Ohio.*

DEAR SIR:—This will acknowledge receipt of your communication as follows: