1450.

APPROVAL, BONDS OF DEFIANCE COUNTY, OHIO, IN AMOUNT OF $42,000 FOR CONSTRUCTION OF BRIDGE.

COLUMBUS, OHIO, July 23, 1920.

Industrial Commission of Ohio, Columbus, Ohio.

1451.

MUNICIPAL CORPORATIONS—REQUIRED TO GIVE FIRE AND POLICE PROTECTION THROUGHOUT ENTIRE CITY REGARDLESS OF WHETHER LANDS IN CITY ARE PLATTED OR UNPLATTED OR WHETHER STREETS OR ALLEYS DEDICATED TO PUBLIC USE AND ACCEPTED BY ORDINANCE—MUST ALSO SUPPLY WATER IMPARTIALLY TO ALL SECTIONS OF CITY—CERTAIN LIMITATIONS —DOES NOT HAVE EFFECT OF TAKING OVER OF STREETS AND ALLEYS WITHIN SUCH AREA FOR CARE AND CONTROL BY CITY—WHETHER OR NOT CITY LIABLE FOR CARE AND CONTROL OF STREETS AND ALLEYS IN EACH PARTICULAR CASE.

1. *The fact whether lands in a given area within a municipal corporation of Ohio are platted or unplatted, or whether dedication of streets or alleys shown on a plat of a given area within the corporation has been accepted by ordinance or otherwise, is immaterial to the matter of the municipality's affording fire and police protection, and furnishing a supply of water, within such area.*

2. *Municipal corporations in this state are under the implied duty of giving fire and police protection throughout the entire corporation and to all its residents, to such extent as council may find to be in accord with the financial resources of the corporation and its welfare as a whole. Such duty, however, may not be enforced against the corporation, directly or indirectly.*

3. *Municipal corporations in this state having water works systems are under a duty to supply water impartially to all sections of the corporation reasonably within the reach of the system, and insofar as permitted by the financial resources and needs of the corporation as a whole. The carrying out of this duty is within the sound discretion of the director of public service, subject to the prior appropriation by council of necessary funds. The duty may be enforced by mandamus.*

4. *The furnishing by the municipality of fire and police protection and a supply of water to a given area within the corporate limits, does not have the effect of a taking over by the municipality of streets and alleys within such area for care and control.*

5. *The platting of lands within a municipal corporation, and the use by the public generally of streets and alleys within the platted area, do not have the effect of a taking over by the municipality of such streets and alleys for care and control, in the absence of an ordinance of acceptance as mentioned in section 3723 G. C. If, however, in the absence of such ordinance, the municipality improves or repairs a section of such streets or alleys it thereby becomes liable for the care, control and keeping free from nuisance of the section it so improves or repairs. Whether it also becomes likewise liable as to sections of*

such streets or alleys in addition to the section improved or repaired, s a question of intention to be determined from the facts in each particular case.

COLUMBUS, OHIO, July 23, 1920.

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

GENTLEMEN:—You have requested the opinion of this department in connection with a statement of facts and inquiries submitted by the city solicitor of Steubenville to your bureau, as follows:

"Requests have been made by certain residents of the city of Steubenville, that it make certain improvements in two additions to said city, which were laid out and platted some years ago, but were not accepted by the city as is provided in section 3723. The reason for said council refusing to accept these additions, was, in a large measure, because of the conditions which surrounded these plats at that time—in fact some of the improvements now petitioned for, are the very same ones that council anticipated at that time, and, because of which it did not accept said plat, feeling that they would in that way, relieve the city from any liability, by reason of said conditions.

As far as I can learn from the records and other information, the only things that the city ever did in connection with these plats up to date, were to furnish water and give them police protection.

One of these additions, the proprietors paved at their own expense and in both of them, practically all the lots have been sold and houses built on them. The streets and other highways are used by the residents and by the public generally, just as other streets in the city.

The question now before council, is, whether or not the city is responsible for the repairing of said streets and whether they would be responsible for any damages for injuries that might be sustained by reason of these repairs not being made.

* * * * * * * * * * * * *

In order to be more concrete I shall place the questions that I would particularly like to have answered in shorter form as follows:

First: May a person lay out a plat in accordance with sections 3580 G. C. to 3586 G. C. and place the responsibility of repairing and looking after the streets and highways of that addition, upon the municipality, if the latter has not accepted the dedication as provided in G. C. 3723?

Second: If the answer to question one is in the affirmative, then what acts of the city, in its official capacity, or of the public generally, would be such that it would cast this burden of responsibility on the municipality?

Third: Assuming that the city council does not want to accept a proposed addition under General Code 3723, then, how can the municipality guard itself so that the responsibility of looking after the proposed plat should not in some other way be cast upon it?

Fourth: Where a plat is laid out in the city limits, does the city have to furnish the residents of that plat with police and fire protection, and furnish them with water?

Fifth: If the answer to four is in the affirmative, would these acts alone so bind the city that it would have to assume responsibility for the streets and plat generally?"

The inquiries may be considered together.

Section 3723, G. C. reads:

"No street or alley dedicated to public use by the proprietor of ground in any corporation, shall be deemed a public street or alley, or under the care or control of the council, unless the dedication is accepted and confirmed by an ordinance specially passed for such purpose."

This statute upon its face would seem to be to the point that no action of the municipal authorities short of the passage of an ordinance of acceptance and confirmation would be tantamount to a taking over by the corporation for care and control, of a street dedicated to public use. But the real purpose of the statute has been well stated by our supreme court in the case of Wisby vs. Bonte, 19 O. S. 238, whereof the second syllabus reads (the present section being then part of section 63 of Municipal Code):

"Section 63 of the municipal corporation act is not intended as a limitation upon the general powers of the corporation for opening and improving streets, but as a restriction to prevent proprietors, who may lay out ground into lots within the limits of the corporation, from vesting in the corporation the title to streets and alleys, and thus charging the corporation, without its consent, with the duty of keeping them open and in repair."

The statute quoted was again under consideration by the supreme court in Steubenville vs. King, 23 O. S. 610, wherein the court held as shown by the syllabus (the present section being then section 440 Municipal Code):

"1. A conveyance of land to the county commissioners for a county road, the acceptance of such grant by the commissioners, the opening of the road by their order, and its subsequent use as such by the public, and by the proper authorities, constitute it a legal public highway, notwithstanding the want of statutory proceedings for its establishment.

2. Where territory, including a public road connecting with the streets of a city, is annexed to the city, and the road continues to be used as a street or thoroughfare, it thereby becomes a 'public highway' of the city, within the meaning of section 439 of the municipal code (66 Ohio L. 222), although it has never been 'accepted and confirmed by an ordinance specially passed for such purpose,' as provided in section 440."

The court say in the course of the opinion at page 613:

"We suppose the object of section 440 was to prevent proprietors of lands within the city limits from establishing new streets or alleys by a mere paper dedication. This was in effect decided in Wisby vs. Bonte, 19 Ohio St. 238.

It can hardly be supposed that the legislature intended by section 440 to vacate, or withdraw from city control, all streets and thoroughfares of the city which had already been established without any 'ordinance specially accepting and affirming them as such.' This would be the effect of the construction contended for, if allowed. We suppose the provision was not intended to have any application to cases where streets are established as such by public use, and by acts of the city authorities improving them as such. If the road in question was a legal public highway at the time of its annexation to the city, we think the simple fact of annexing it to the city, and its continuous subsequent use as a street, constituted it a 'public highway' of the city. within the meaning of section 439 of the code, and subjected it to the control and care of the city authorities. That it *was* a legally estab-

lished public highway at and before its annexation, we entertain no doubt. Because the statutes have pointed out certain methods to be adopted for the establishment of public roads, it by no means follows that they can never be established by any other means. The grant of the owner made to the county commissioners, their acceptance of the grant, the opening and working of the road by the public authorities, and its use as such by the public, were sufficient to establish it a legal public highway, and its annexation to the city and continuous use as one of its streets, constituted it a street of the city."

In the earlier case of Fulton vs. Mehrenfeld, 8 O. S. 440, the supreme had held, as shown by first and sixth syllabi:

"1. A dedication of ground for public uses may be made, in Ohio, either under the statute or according to the rules of the common law.

6. To constitute a valid dedication of a street or highway at common law, there must be not only a *dedication* to public uses by the owner, but also an *acceptance* of such dedication by the public, and these may be shown by the acts and declarations of the parties, and the surrounding circumstances."

In an opinion of this department of date September 23, 1914, found in annual report, Attorney-General, 1914, Vol. II, p. 1272, it was held as shown by the headnote:

"Where a proprietor of grounds subdivides the same for sale and causes an accurate map or plat of such subdivision, designating therein the grounds laid out for streets and other public ways, and causes the same to be recorded in the offices of the recorder of the county in conformity to the provisions of section 3584, General Code, by virtue of the provisions of section 3585, General Code, such map or plat when recorded becomes a sufficient conveyance to vest in the municipal corporation wherein such grounds are located, the fee of the grounds so designated for streets or other public ways, yet said streets and other public ways so designated and dedicated do not become public streets or ways under the care and control of the council of the municipality, unless the dedication is accepted and confirmed by an ordinance especially passed for this purpose, in conformity with the provisions of section 3723, General Code."

The conclusion to be deduced from the foregoing is that while an owner of unplatted lands within a municipal corporation cannot, *by any act of his*, other than procuring the passage of an ordinance of acceptance and confirmation, cast on the corporation the burden of care and control of a street or alley laid out in connection with the platting of such lands, yet on the other hand the corporation may, by steps other than the passage of such an ordinance, take over the street or alley for care and control, may, so to speak, waive the protection afforded it by said section 3723. Will such waiver accrue through the furnishing by the city of fire and police protection, and of a water supply, to the owners and occupants of lands shown on the plat, and if not, what acts of the municipality will indicate such waiver?

The matter of acceptance by a municipality of dedication of streets or alleys should not be confused with that of annexation of territory; for these two matters have nothing in common. As to fire and police protection, the statutes so far as has been ascertained make no distinction between platted and unplatted lands. Under the head of "enumeration of powers," section 3617 G. C. confers general power on all municipal corporations to organize and maintain police and fire departments. Section 4393 reads in part:

"The council may establish all necessary regulations to guard against the occurrence of fires, protect the property and lives of the citizens against damages and accidents resulting therefrom and for such purpose may establish and maintain a fire department, provide for the establishment and organization of fire engine and hose companies, * * *."

Section 4374 reads:

"The police department of each city shall be composed of a chief of police and such inspectors, captains, lieutenants, sergeants, corporals, detectives, patrolmen and other police court officers, station house keepers, drivers, and substitutes, as are provided by ordinance or resolution of council."

Section 4378 reads:

"The police force shall preserve the peace, protect persons and property and obey and enforce all ordinances of council and all criminal laws of the state and the United States. The fire department shall protect the lives and property of the people in case of fire, and both the police and fire departments shall perform such other duties, not inconsistent herewith as council by ordinance prescribes. The police and fire departments in every city shall be maintained under the civil service system, as provided in this subdivision."

It thus appears that the whole matter of fire and police patrol limits is one primarily within the legislative discretion of council, and is not affected by questions of platted or unplatted lands and of accepting or refusing to accept a dedication of streets and alleys. The municipality is under the implied duty of affording the maximum of necessary fire and police protection throughout the entire corporation and to all its residents, so far as council may find consistent with the financial resources of the corporation, and its welfare as a whole. Such duty, however, since it grows out of the legislative and governmental powers of the municipality, is not one which the municipality may be compelled by legal steps to perform. In the case of Wheeler vs. Cincinnati, 19 O. S. 19, recovery against the city was sought for damages on account of the loss of plaintiff's house by fire, upon the ground that defendant city

"had failed and neglected to provide the necessary cisterns and suitable engines for extinguishing fires, in that quarter of the city in which his said house was situated, and that certain officers and agents had neglected and failed to perform their duties in regard to the extinguishing of said fire."

The supreme court held:

"The power conferred by the statute on cities of this state to organize and regulate fire companies, and provide engines, etc., for extinguishing fires, is, in its nature, legislative and governmental; and a city is not liable to individuals for damage resulting from a failure to provide the necessary agencies for extinguishing fires, or from the negligence of officers or other persons connected with the fire department."

This principle was the basis of a later decision by the supreme court in Blunk vs. Dennison Water Supply Co., 71 O. S. 250.

The doctrine of the Wheeler case was somewhat enlarged upon in the case of Frederick, Admx. vs. City of Columbus, 58 O. S. 538, wherein it was held that there

could be no recovery against a municipal corporation for negligent operation of fire department equipment by employes of the city. The Frederick case has been recently overruled by the supreme court in Fowler vs. City of Cleveland, 100 O. S. 158 (advance sheets, Ohio Law Bulletin, March 1, 1920). However, the following language from the majority opinion in the latter case makes clear that the conclusion therein is not to be taken as a departure from the general principle announced in the Wheeler case:

> "It is not the policy of government to indemnify persons for loss either from lack of proper laws or administrative provisions, or from inadequate enforcement of laws, or the inefficient administration of provisions which have been made for the protection of persons and property. The unwisdom and impracticability of such a system are easily apparent."

And that the power in municipalities to organize and regulate a police department, is likewise in its nature legislative and governmental, see Western College vs. City, 12 O. S. 375; Robinson vs. Greenville, 42 O. S. 625.

Coming to the matter of water supply: Judge Dillon in "Municipal Corporations," (5th edition) section 1303, after making reference to the fact that municipal corporations are considered to possess two classes of powers—(1) those which are granted for public purposes exclusively and are *legislative and governmental* in their nature, and (2) those which are granted for private advantage (though the public may derive a common benefit therefrom) in the exercise of which the corporation acts in a *private or proprietary* capacity, says:

> "No uniform rule can be applied to all the circumstances in which the municipality acts under power to furnish water or light, or to contract therefor. Thus, when it is sought to charge the municipality with responsibility for property destroyed through failure to exercise its power to furnish water for fire protection or for negligence in the exercise of the power, it has been repeatedly said that the grant of power must be regarded as exclusively for public purposes, and as belonging to the municipal corporation, when assumed, in its public, political, or municipal character. Similarly, in granting a franchise or privilege, or giving its consent to a public service corporation to use the streets and highways of the municipality for the purpose of laying its mains, its pipes, etc., the municipality exercises a delegated legislative power derived from the state, and cannot be regarded as acting solely in its so-styled private and proprietary capacity, although the object of the exercise of the power may be to enable the grantee of the franchise or privilege to perform a contract to furnish the municipality and its inhabitants with water or light. A further instance of the exercise of legislative authority in dealing with public service corporations is the exercise by a city of delegated authority to regulate the rates to be charged to the municipality and individual consumers for water or light. Such power is clearly legislative and governmental in its character, being intended for the prevention of abuses; and in the exercise of the power it is impossible to regard the municipality as acting in a private and proprietary capacity. But in other respects the municipality acts in what is, in many cases, called its private and proprietary capacity. Although it is probably impossible to lay down any rule by which it can be determined in all cases where its legislative, governmental, and discretionary functions end, and the so-called private and proprietary character of its acts begins, there are cases that hold that in executing and carrying into effect the powers conferred upon it by constructing and erecting its own water or lighting plant, in managing and operating the plant, and in the

furnishing and distribution of water or light to inhabitants and consumers, it acts or under certain circumstances will be considered to act in a proprietary and individual capacity rather than by virtue of its legislative and governmental functions. If the municipality obtains its supply of water or light by a contract with a public service corporation or an individual, it acts in its so-called private and proprietary capacity in negotiating and executing the contract, and in questions arising in the performance of the contract the municipality should be treated in the same manner as a private individual or corporation and is subject to the same general rules of law, restrictions, and responsibilities. It has been held that the acts of a municipality constructing, operating or maintaining water works or a lighting plant are not governmental, but are or may be acts in its proprietary or corporate capacity, and the municipality is or may be liable for damages caused by negligence in such construction, maintenance or operation, but the authorities are conflicting * * *."

The tendency of judicial opinion in Ohio is, so far as negligent construction, operation and maintenance of water works is concerned, to hold the corporation liable in damages on the theory that it is acting in its private and proprietary capacity (see cases as summarized at page 628 of opinion in Robinson vs. Greenville, *supra*), though, of course, for reasons already given, this principle does not extend to furnishing of water for protection against fire. (See Blunk vs. Dennison Water Supply Co. *supra*). But liability for negligence in connection with construction, operation and maintenance is not the controlling principle in the matter of furnishing a supply of water to a given area. That matter comes within the sound discretion of the director of public service, in that, subject to prior provision of funds by council that officer may proceed to the extension and enlargement of the water works system. (See sections 3955, et seq., 3939, et seq. and statutes as to powers generally of director of public service.) No provision of statute is found which makes it the special duty of the director to furnish water to an area upon acceptance of plat, nor which indicates that there is a priority as between platted and unplatted lands As is pointed out by Judge Dillon (Munic. Corp. 5th Edit., Sec. 1317):

"The organization supplying water or light, whether it be a municipal or a private corporation, is under a duty to consumers to supply the water or light impartially to all reasonably within the reach of its pipes, mains and wires. * * * But the right to a supply is not absolute. It is limited by the uses to which it is intended to be put and by the residence or business of the persons demanding a supply. It cannot be contemplated that the municipality or the public service corporation should be required to supply light or water for every conceivable purpose, but rather only for those ordinary and natural uses which are incident to the daily needs and wants of the municipality and its inhabitants. If the public interests require it, a public service corporation may be authorized by the municipali y, to remove its mains from a sparsely populated district for the purpose of relaying them in a more thickly populated district and improving the service thereby, although individual consumers who have already been supplied with water are thereby deprived of a supply * * *."

Judge Dillon adds (section 1317):

"For a failure or refusal without lawful cause to furnish a service of water or light the consumer is entitled to any of several remedies at his election The duty to furnish the service to an applicant may be enforced by mandamus * * *."

If in the absence of an ordinance accepting a plat,—or properly speaking, accepting the dedication of streets and alleys shown thereon,—the municipal authorities furnish to the district shown on the plat, police and fire protection, and a supply of water, are we to conclude that the municipality thereby takes over the streets and alleys for care and control? The answer is clearly in the negative. There is no logical relation between the care and maintenance of streets by the municipality, on the one hand, and the furnishing of fire and police protection and a water supply, on the other; nor have the courts of this state expressed a view that such matters are related However, it is quite clear in the light of such cases as Wisby vs. Bonte, and Steubenville vs. King, *supra*, that if the municipality actually enters upon the streets or alleys for the purpose of repairing or improving them, then, to say the least, a question of fact arises as to whether the municipality has taken over the streets and alleys for permanent care and control, notwithstanding non acceptance of plat. Hence, to protect itself against liability on account of such care and control, the least that the municipality may do is to refrain entirely from entering upon such streets and alleys for purposes of repair or improvement.

Mention should be made of the case of Dayton vs. Rhotehamel, 90 O. S. 175 The brief opinion in that case is to the effect that even the dedication of a street to public use and acceptance thereof by council, does not charge the municipality with the duty of keeping the street open, in repair and free from nuisance, in the absence of a further showing that the street has been improved or opened up to public travel, or the public invited in some way to make use of the same for such purpose; and that whether such showing has been made is a question of fact for the jury.

In accordance with the foregoing observations, answer to the inquiries submitted may be made by the following statement:

(1) The fact whether lands in a given area within a municipal corporation of Ohio are platted or unplatted, or whether dedication of streets or alleys shown on a plat of a given area within the corporation has been accepted by ordinance or otherwise, is immaterial to the matter of the municipality's affording fire and police protection, and furnishing a supply of water, within such area.

(2) Municipal corporations in this state are under the implied duty of giving fire and police protection throughout the entire corporation and to all its residents, to such extent as council may find to be in accord with the financial resources of the corporation and its welfare as a whole. Such duty, however, may not be enforced against the corporation, directly or indirectly.

(3) Municipal corporations in this state having water works systems are under a duty to supply water impartially to all sections of the corporation reasonably within the reach of the system, and insofar as permitted by the financial resources and needs of the corporation as a whole. The carrying out of this duty is within the sound discretion of the director of public service, subject to the prior appropriation by council of necessary funds. The duty may be enforced by mandamus.

(4) The furnishing by the municipality of fire and police protection and a supply of water to a given area within the corporate limits, does not have the effect of a taking over by the municipality of streets and alleys within such area for care and control.

(5) The platting of lands within a municipal corporation, and the use by the public generally of streets and alleys within the platted area, do not have the effect of a taking over by the municipality of such streets and alleys for care and control, in the absence of an ordinance of acceptance as mentioned in section 3723 G. C. If however, in the absence of such ordinance, the municipality improves or repairs a section of such streets or alleys, it thereby becomes liable for the care, control and keeping free from nuisance of the section it so improves or repairs. Whether it also becomes likewise liable as to sections of such streets or alleys in addition to the sec-

tion improved or repaired, is a question of intention to be determined from the facts in each particular case.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1452.

DITCHES—NEW DITCH CODE—SECTION 6495 G. C. (108 O. L. 926)—APPLIES TO JOINT COUNTY IMPROVEMENTS AS WELL AS TO SINGLE COUNTY IMPROVEMENTS—NOTICE PROVIDED BY SAID SECTION.

1. *Section* 6495, *G. C.* (*being section* 54 *of the New Ditch Code,* 108 *O. L.* (*Part I,* 926), *applies to the joint county improvements mentioned in said code* (*section* 6515, *et seq.*), *as well as to single county improvements.*

2. *The notice provided for in said section* 6495, *G. C. is, as to joint county improvements, to be given by the auditor of the county or counties the member or members of whose board or boards of county commissioners own lands shown to be affected by the improvement petition, to the judge of the common pleas court of such county; and such judge is to make the appointments mentioned in said section from disinterested freeholders of that county.*

COLUMBUS, OHIO, July 23, 1920.

HON. LEWIS F. HALE, *Prosecuting Attorney, Bellefontaine, Ohio.*

DEAR SIR:—The communication of recent date, signed by Hon. Robert E. Marshall, prosecuting attorney, Sidney, Ohio, Hon. Lewis F. Stout, prosecuting attorney, Wapakoneta, Ohio, and yourself, has been received, reading as follows:

> "Section 74 of the act to codify, consolidate and clarify the ditch laws passed on June 10, 1919, makes the first reference to an improvement proposed in two or more counties. Section 79 provides that 'if a petition is granted by a joint board of county commissioners, such board shall proceed under the provisions of this act for single boards of county commissioners to complete necessary surveys, schedules and records, make awards of damages to property or compensation for property taken, and ascertain the entire cost of the joint county improvement.'
>
> Section 54 provides: 'If one or more commissioners of a county are petitioners or own lands shown to be affected by an improvement petition, the auditor shall notify the judge of the common pleas court of the county, who shall within five days appoint as many disinterested free holders of the county as may be necessary to take the place of such interested members * * *.'
>
> Does section 54 provide for the appointment of free holders by the court to act in place of the commissioners who own lands shown to be affected apply to joint county improvements, and if so, what auditor must make the report to the court, and to what court must he report, and who can make the appointment?
>
> A petition is now pending before the board of county commissioners of Logan, Auglaize and Shelby counties and the questions herein submitted are urgent and vital."

The act to which you refer, commonly known as the New Ditch Code, appears