

15.

AUDITOR OF STATE—EXPENSES OF LEGISLATIVE COMMITTEE AUTHORIZED BY HOUSE JOINT RESOLUTION No. 2—MAY DRAW WARRANT WHEN—LEGISLATIVE COMMITTEE TO PRESIDENTIAL INAUGURATION, APPROPRIATION SPECIAL—APPROPRIATION BY JOINT RESOLUTION—EXPENSE FROM JOINT COMMITTEE FUND, ILLEGAL: MAY BE PAID FROM “COMMITTEES STANDING” FUND OR “OTHER” FUND.

SYLLABUS:

1. *The expenses of the committee authorized by House Joint Resolution No. 2 of the 92nd General Assembly may not be paid from the appropriation contained in the partial appropriation act, House Bill No. 33, from the item “F 9 Expenses Joint Committees,” and there appearing no other item of appropriation in such House Bill to provide for Ohio’s participation in the inaugural ceremonies of the President of the United States, such expenses may not be paid unless and until the General Assembly sees fit by act to appropriate for that purpose.*

2. *Payment of the expenses of the committee authorized by House Resolution No. 18 may lawfully be made from the appropriations contained in House Bill No. 33, designated “F 9 Committees (Standing)” or “F 9 Other.”*

COLUMBUS, OHIO, January 18, 1937.

HON. JOSEPH T. FERGUSON, *Auditor of State, Columbus, Ohio.*

DEAR SIR: This is to acknowledge receipt of your communication of January 15, which reads as follows:

“In reference to House Joint Resolution No. 2 under date of January 14th, 1937, we are in receipt of voucher requesting the payment of Five (5) round trip rail passages, pullman accommodations, hotel accommodations and transfer in connection with the above-mentioned House Joint Resolution at \$60.00 each, totaling \$300.00.”

We respectfully seek your official opinion as to the legality of the payment of this amount so stated in voucher referred to either from the Partial Appropriation, H. B. 33, or from any special appropriation of the Legislature.

The voucher referred to is hereto attached.”

In general, it may be stated that it is your duty under Section 243, General Code, to examine each voucher presented to you, and if you find the claim to be valid and legally due, and that there is money in the state treasury duly appropriated to pay it, you must then issue your warrant on the treasurer. It is likewise your duty to refuse to draw a warrant on the treasurer for any claim unless you find it to be a legal one, and that there is money in the treasury which has been duly appropriated to pay it. Another provision, Section 242, General Code, that no money shall be drawn out of the treasury except on warrant of the auditor of state, is a safeguard to the public funds against illegal claims; and the auditor of state is not concluded by the determination of the General Assembly, or either branch thereof, that the claim is a legal one.

Your letter does not indicate the basis of any doubt you may have as to the propriety or validity of the voucher or the statement attached thereto. I assume therefore that the question of legality relates to the constitutional authority and power of the House and Senate to adopt House Joint Resolution No. 2, a copy of which was obtained from the House bill clerk. The resolution reads as follows:

“WHEREAS, On the 20th day of January, 1937, the Honorable Franklin Delano Roosevelt will be inaugurated as president for his second term as president of the United States, in the city of Washington, District of Columbia; and

WHEREAS, It is fitting that the state of Ohio, the mother of presidents, be represented in its official capacity at said inauguration of the Honorable Franklin Delano Roosevelt as president of the United States, on the 20th day of January, 1937, in the city of Washington, District of Columbia; therefore be it

Resolved by the General Assembly of Ohio: That a committee of ten be appointed, five members of the Senate to be selected by the president of the Senate, and five members of the House of Representatives, to be selected by the speaker of the House of Representatives, to attend and represent the state of Ohio at said inauguration of the Honorable Franklin Delano Roosevelt as president of the United States, the expenses of said committee to be paid from appropriate funds of the Senate and House.”

The foregoing resolution is proper in form and I assume that same was adopted pursuant to the requirements of Article II, Section 17, of the Constitution of the State of Ohio, providing as follows:

“The presiding officer of each House shall sign, publicly in the presence of the House over which he presides, while the same is in session, and capable of transacting business, all bills and joint resolutions passed by the General Assembly.”

Likewise, that the adoption of the resolution was in conformity with the established rules of the House.

The legislature derives its law-making power from Article II, Section 1, of the Constitution, which reads as follows:

“The legislative power of the state shall be vested in a general assembly consisting of a senate and house of representatives * *.”

Legislative parliamentary procedure has long recognized the use of resolutions as a method of expressing the purpose and will of a law-making body; they are utilized mainly in aid of and supplementary to the enactment and passage of laws and statutes; in the obtaining of legislative information; the orderly regulation of its meetings and sessions; the memorializing of other legislative bodies; giving expression to matters pertaining to the industrial, social and economic order; and especially in the appointment and creation of various legislative committees for the study of and report upon matters relating to proposed legislation. Of course, resolutions, separate or joint, may only be utilized in connection with the fulfillment of legislative duties and within the constitutional powers of the law-making body.

The concluding paragraph of House Joint Resolution No. 2 recites: “the expenses of said committee to be paid from appropriate funds of the Senate and House.” Your attention is respectfully called to the provisions of Section 22 of Article II of the Constitution:

“No money shall be drawn from the treasury, except in pursuance of a specific appropriation, made by law; and no appropriation shall be made for a longer period than two years.”

The resolution is not clear in its designation of the particular fund from which the expenses of the committee are to be paid. However, it appears that these expenses are to be paid from an appropriation contained in the partial appropriation act, House Bill No. 33, designated as “F Joint Legislative Committees.”

Before proceeding further with a consideration of the fundamental question raised, the provisions of Article II, Section 31 of the Constitution should be noted. This section provides as follows:

“The members and officers of the General Assembly shall receive a fixed compensation, to be prescribed by law, and no other allowance or perquisites, either in the payment of postage or otherwise; and no change in their compensation shall take effect during their term of office.”

A superficial reading of this section may suggest to one that it has some bearing upon House Joint Resolution No. 2, but reference to the language of the resolution instantly discloses that the members of the select committees are not acting in their own behalf nor as members of their respective legislative bodies, but as a committee representing the State of Ohio in its official capacity at “said inauguration of the Honorable Franklin Delano Roosevelt as president of the United States.” The conclusion is inescapable that the designated joint committee is to act only as an agent and to represent the State of Ohio in its sovereign capacity at the inaugural proceedings. It necessarily follows that the quoted provisions of Section 31 as to allowance, compensation, perquisites, “either in the payment of postage or otherwise” have no bearing upon or application to “the expenses of said committee” as stated in the resolution. A clear illustration of the distinction herein made is indicated in the Opinions of the Attorney General for 1933, Vol. III, page 1903. Syllabus 2 of the opinion reads as follows:

“Members of the General Assembly may not lawfully be granted allowances or perquisites in addition to their fixed compensation.”

Syllabus 3 reads:

“The payment of personal expenses of members of the General Assembly incurred for board or lodging, while attending the regular or special sessions of that body may not lawfully be paid from an appropriation made for the purpose of meeting the necessary cost of conducting the business of the two houses of the General Assembly, such as clerk hire, stationery, office supplies, printing and the like.”

In the body of the opinion a clear distinction is made between the expenses of the General Assembly, as such, and the purely personal debts and obligations of the individual members.

This question of extra allowances was considered in the case of *State, ex rel. vs. Tracy, Auditor*, 128 O. S. 242, wherein the General Assembly had enacted House Bill No. 4, providing for the payment of

expenses of members of the General Assembly "at a rate, not to exceed four dollars per day for room and board, for each legislative day." Judge Stephenson, speaking for the court, arrived at the very logical conclusion that the payment indicated was not in fact an expense, but was in reality compensation:

"The legislator must have lived the week before he can get any money. Having lived the week, it is safe to assume that he paid for his living, and the \$4.00 per day goes to replace the dollars he has taken out of his pocket. It is compensation."

Reference was then made to the clear division between "Personal" and "Legislative" expenses:

"We are impressed with the distinction made by counsel between 'Personal Expenses of Members of the General Assembly' and 'Legislative Expenses of Special Sessions.' This distinction has been recognized in so many jurisdictions that we refrain from making the citations."

Under the terms of the present joint resolution, the withdrawal of public funds is not for the purpose of making compensation to the members of the committee. It is for "Legislative Expenses."

The sole remaining question for determination, then, is whether or not participation by the State of Ohio through a representative committee of the Ohio legislature at the inauguration of the President of the United States is a legislative expense which may be incurred by joint resolution of the General Assembly and payable from this specific appropriation, there being no appropriation item contained in the partial appropriation act covering such representation of the State of Ohio at this important occasion.

It should be observed at this point that the power of the General Assembly to appropriate money to pay the expenses of the committee involved through an appropriation act would obviously be sustained since we are here concerned with what is clearly a "public purpose." The courts of virtually every state have sustained the expenditure of public funds when applied to the furtherance of patriotic occasions and celebrations. I am of the opinion that the Presidential inaugural ceremonies referred to in the joint resolution constitute, possibly in the highest and noblest sense, a patriotic assemblage. The courts have formulated a test to determine the legality of expenditures of public funds for public or patriotic purposes. It is simple:

“Whether the subject-matter of the expenditure is of general interest to the people of the state, rather than merely to individuals.” (28 A.L.R. 1089, 47 A.L.R. 424).

The Supreme Court of the United States has extended and liberalized this test, and has held that even though a public event or occasion is not one of general public interest, yet, where the legislature has accepted that view, the courts will not interfere; that the expenditure is unwise or unnecessary, is immaterial, for as to that question the legislature is the final arbiter. *Jones vs. Portland*, 245 U. S. 217, 62 L.Ed. 252. The Supreme Court of California is but one of many courts of last resort holding that the promotion of patriotism is a proper exercise of governmental functions. *Board vs. Riley*, 208 Pac. 678. A text of recognized standing states the matter as follows:

“The power of the legislature to authorize the expenditure of public funds is not limited to relieving the material needs of the community, but extends to much wider fields. Thus it may appropriate money for monuments, statues, gates or archways, celebration of holidays and anniversaries, publication of town histories, parks, roads leading to points of fine natural scenery, decorations upon public buildings, or other public ornaments or embellishments, designed merely to promote the general welfare, either by providing for fresh air or recreation, or by inspiring sentiments of patriotism or of respect for the memory of worthy individuals. Further, the legislature has undoubtedly the power to authorize the expenditure of public money for fireworks, decorations and other like purposes in order to celebrate a holiday or the anniversary of some important historical, military or civil occurrence.” (26 Ruling Case Law 62).

The attitude of the courts of virtually all states wherein the question has been presented, adheres to the summary of powers outlined in the foregoing text. The California Supreme Court has held that it is settled beyond question that the promotion of patriotism, involving as it does the sense of self-preservation, is not only a public purpose, but the most elemental of public purposes. *Allied Architects Assn. vs. Payne*, 192 Cal. 431, 221 Pac. 209, 30 A.L.R. 1029.

As hereinabove indicated, however, I am not here concerned with the power of the legislature to appropriate by an appropriation act public funds for Ohio's participation in the inaugural ceremonies but rather with the question of whether or not moneys appropriated for the express purpose of “joint legislative committees” may be withdrawn by joint

resolution for this purpose—that is to say, whether or not Ohio's participation in these ceremonies constitutes joint legislative committee expense. The joint power of the two houses of the General Assembly, acting by joint resolution, in so far as it is limited in going beyond matters which are legislative, is analogous to the power of each single branch of the General Assembly when acting by resolution of the House or Senate alone. The General Assembly through resolution, joint or otherwise, may not expend the taxpayers' money except in matters affecting legislation "under consideration or in contemplation, or with reference to any alleged breach of its privileges or misconduct of its members." The power of either or both houses of the General Assembly acting through resolution is necessarily limited in these respects by the provisions of Article II, Section 8 of the Constitution, which are as follows:

"Each house, except as otherwise provided in this constitution, shall choose its own officers, may determine its own rules of proceeding, punish its members for disorderly conduct; and, with the concurrence of two-thirds, expel a member, but not the second time for the same cause; and shall have all powers necessary to provide for its safety and the undisturbed transaction of its business, and to obtain, through committees or otherwise, information affecting legislative action under consideration or in contemplation, or with reference to any alleged breach of its privileges or misconduct of its members, and to that end to enforce the attendance and testimony of witnesses, and the production of books and papers."

It is observed that prior to the adoption by the people in 1912 of this amendment to the Constitution, the separate houses of the General Assembly were limited in even this last named respect under the decision in the case of *State, ex rel, vs. Guilbert*, 75 O.S., 1. It must be remembered that the Constitution explicitly grants and defines the power of the branches of the General Assembly in so far as they may act by resolution and all powers which are not delegated are expressly reserved to the people. 25 O. Jur., 129, 130.

An opinion of this office appearing in Opinions of the Attorney General for 1917, Vol. I, page 206, is directly in point. The syllabus is as follows:

The general assembly may not by joint resolution authorize the payment of the expenses of a body, which is not a legisla-

tive committee, from the appropriation for the expenses of legislative committees.

A committee created under authority of a joint resolution to revise and codify a part of the laws of the state and to report to the governor, after the adjournment sine die, with authority to do work and incur expenses after such adjournment, is not a legislative committee."

In view of the foregoing, I am compelled to conclude that the expenses of the committee authorized by House Joint Resolution No. 2 of the 92nd General Assembly may not be paid from the appropriation contained in the partial appropriation act, House Bill No. 33, from the item "F 9 Expenses Joint Committees," and there appearing no other item of appropriation in such House Bill to provide for Ohio's participation in the inaugural ceremonies of the President of the United States, such expenses may not be paid unless and until the General Assembly sees fit by act to appropriate for that purpose.

It might be observed that should these expenses be incurred prior to appropriation reimbursement may be had therefor only pursuant to an appropriation act passed by two-thirds of the members elected to each branch of the General Assembly in accordance with Article II, Section 29 of the Constitution.

Under date of January 15, you have submitted an additional question as to your authority to pay the expenses of the committee authorized by House Resolution No. 18, the material portions of which read as follows:

"WHEREAS, The third general assembly will be held at the Mayflower hotel, Washington, D. C., Thursday, Friday, Saturday and Sunday, January 21-24, 1937, to deliberate upon important interstate problems requiring cooperative action by the states with each other, and with the federal government, and

WHEREAS, To such third general assembly will report the following interstate commissions and national associations:

1. Interstate commission on conflicting taxation.
2. Tax revision council.
3. Interstate commission on crime.
4. Interstate commission on social security.
5. Interstate commission on Delaware river basin.
6. American legislators' association.
7. National association of attorneys general.
8. National association of secretaries of state, and

WHEREAS, The aforesaid affiliates of the council of state governments are ready to present tangible recommendations, some in the form of model legislative measures, based on their studies during the interim since the assembly of 1935, and

WHEREAS, The third general assembly offers an opportunity through section meetings for the consideration by the delegates of other matters requiring cooperative action, and

WHEREAS, It is believed that substantial benefits would result from this state's representation at the third general assembly, and that such assembly offers a means of surmounting obvious difficulties arising in governmental activities due to the absence of facilities for conference between governmental units, and

WHEREAS, The House of Representatives of this state is invited to send delegates to this assembly—to be chosen as this body may determine—which delegation shall be entitled to one vote; therefore be it

Resolved, That the House of Representatives of Ohio hereby authorizes and instructs the speaker of the House to appoint five members as a delegation to the third general assembly, which convenes in Washington, D. C., on January 21, 1937. Such delegation shall be and is hereby instructed to return to this body and report the definite recommendations of the third general assembly, and is authorized to employ such clerical assistants as may be necessary; and be it further

Resolved, That the said delegation and their assistants be entitled to reimbursement for their reasonable expenses, which shall be paid out of the proper funds appropriated for the expenses of legislative committees upon presentation of itemized vouchers thereof, signed by the chairman of such delegation, * * * *."

It is perfectly obvious from a reading of the foregoing resolution that we are here concerned with a question involving an action of the House of Representatives concerning legislation "under consideration or in contemplation." The case is exactly analogous to that under consideration by this office in an opinion appearing in Opinions of the Attorney General for 1921, Vol. I, page 524. The then Attorney General was concerned with a Senate resolution appointing a special committee to investigate conditions in the Ohio Penitentiary, which resolution provided for the expenses of such committee. The resolution was upheld in this opinion, from which it is not necessary to here quote and with which I concur. The first branch of the syllabus reads as follows:

“The adoption of Senate Resolution No. 58 by the senate on May 27, 1921, was a constitutional exercise of the power conferred upon that body by section 8, Article II, Ohio Constitution.”

The resolution does not categorically state or set out the permissive language of Section 8, Article II, but it is my interpretation that “surmounting obvious difficulties” can only relate to legislative action under consideration or in contemplation.

I am advised that the expenses here under consideration have been charged to an appropriation contained in House Bill No. 33 designated as “Expenses, Joint Legislative Committee.” As to this, it is observed that House Bill No. 33 contains an item of appropriation designated as “F 9 Committees (Standing)”. It is obvious that this being a committee of a single branch of the General Assembly, its expenses are not properly payable from the appropriation for joint committees. If this may properly be considered as a standing committee, as was the case with the 91st General Assembly, under Senate Joint Resolution No. 52, then this item would be properly payable from such appropriation; otherwise, the item may undoubtedly be paid from the appropriation contained in such House Bill designated “F 9 Other,” to which, of course, transfers may be made by the Controlling Board, should this be necessary.

In view of the foregoing, it is my opinion that payment of the expenses of the committee authorized by House Resolution No. 18 may lawfully be made from the appropriations contained in House Bill No. 33 designated “F 9 Committees (Standing)” or “F 9 Other.”

Respectfully,

HERBERT S. DUFFY,
Attorney General.

16.

APPROVAL—TWO GRANTS OF EASEMENT TO LAND IN
BEAVER CREEK TOWNSHIP, GREENE COUNTY, OHIO.

COLUMBUS, OHIO, January 18, 1937.

HON. L. WOODDELL, *Conservation Commissioner, Columbus, Ohio.*

DEAR SIR: You have submitted for my examination and approval, two certain grants of easement executed to the State of Ohio by property owners in Beaver Creek Township, Greene County, Ohio, conveying