It is clear from the foregoing that if a sheriff receives, by way of allowance from the commissioners for the keeping and feeding of prisoners, more than the actual cost thereof, he receives it illegally and should account for it to the county treasury.

By the terms of Section 274, et seq., there is created a Bureau of Inspection and Supervision of Public Offices, with authority and power to inspect and supervise the accounts and reports of the offices of each taxing district in the State of Ohio, and report thereon. The said report should show any public moneys illegally expended and to whom said moneys were paid, and from whom moneys due to the taxing district are payable. When it is determined during said examination that moneys are due to a taxing district, a statement is made as to from whom such moneys are due. This is called, in the vernacular of the Bureau, a "finding for recovery". If it should be found that a sheriff has received more by way of allowance from the county commissioners for the keeping and feeding of prisoners in the county jail than the actual cost thereof, a "finding for recovery" should be made against the sheriff in favor of the county for this excess.

In specific answer to your question, therefore, it is my opinion that where one of your examiners has found that private personal profit has inured to a sheriff by reason of his receipt of allowances from the county for the keeping and feeding of prisoners in the county jail, the examiner should make a "finding for recovery" against the sheriff for the amount of such profit.

Respectfully,
EDWARD C. TURNER,
Attorney General.

3066.

MUNICIPALITY—TRANSFER OF FUNDS FROM ELECTRIC LIGHT TO GENERAL FUND UNLAWFUL.

SYLLABUS:

By reason of the provisions of Section 5625-13, *General Code, and the pronouncement of the Supreme Court of Ohio in the case of Cincinnati vs. Roettinger,* 105 *O. S.* 145, *funds may not lawfully be transferred from the electric light fund to the general fund of a municipality.*

COLUMBUS, OHIO, December 27, 1928.

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

GENTLEMEN:—Your recent communication reads:

> "Section 5625-9, G. C., paragraph g, 112 O. L. 395, provides that each subdivision shall establish a special fund for each public utility operated by a subdivision.
>
> Section 5625-13, G. C., 112 O. L. 397, provides in part:
>
> 'No transfers shall be made from one fund of a subdivision to any other fund, by order of court or otherwise, except that transfers may be made from the general to special funds established for purposes within the general purposes of the general fund, and from such special funds to the general fund; but no transfers shall be made from any such special fund to the general fund, except of moneys theretofore transferred from the general fund.'

Section 3799, G. C., repealed 112 O. L. 391, provided that a council of a municipal corporation could make transfers among funds raised by taxation, etc., and the Supreme Court, in the case of *Cincinnati* vs. *Roettinger*, 105 O. S. 145, decided that this section was in the nature of a limitation upon taxation and as applied to cities and villages under charter governments did not violate any of the sections of Article 18 of the Constitution, and operated to prevent the transfer of revenues from the water works to the general fund.

Section 15 of the Charter of the City of Shelby, reads:

'Money appropriated as hereinbefore provided shall not be used for purposes other than those designated in the appropriation ordinance; provided however that the council may from time to time appropriate or transfer such moneys so appropriated by the appropriation ordinance, by ordinance to such uses, or other fund or funds as will not conflict with any uses for which specifically such revenues accrued.'

The city of Shelby owns and operates an electric light and power plant, and surplus earnings are frequently transferred to the general fund of the city on authority of an ordinance of council.

In June or July, 1925, the Director of Finance of the City of Shelby refused to make transfers from the electric light fund to the general and safety fund, which were authorized by ordinance of council, after said Director had been advised of the decision of the Supreme Court in the Roettinger case. The Director of Law of the City of Shelby filed an action in mandamus in the Common Pleas Court to compel the Director of Finance to comply with the ordinance of council, and the court, in July, 1925, issued a peremptory writ against the Director of Finance directing him to make the transfer provided for.

In view of the Charter provisions of the City of Shelby, the decision of the Common Pleas Court, and the changes in the statutes governing funds and transfers thereof, may transfers be legally made from the electric to the general fund of the City of Shelby when provided for by ordinance of council ?

We are enclosing copy of a newspaper clipping in which the opinion of the court is given."

I have procured a copy of the opinion of the court to which you refer, which reads as follows:

"Relator, officially, seeks a peremptory writ of mandamus to compel the respondent, officially, to make a transfer of $3,500.00 from the Light Fund to the Safety Fund, and of $1,000.00 from the Light Fund to the General Fund, alleging that by authority of a provision of the charter of the City of Shelby its council is permitted by ordinance to direct such a transfer, and that by ordinance duly enacted it did so, and that Respondent has failed and refused to make such transfer, claiming that some citizen and taxpayer of the city of Shelby had objected thereto, although respondent refuses to disclose the identity of such taxpayer.

Realtor further says in his petition, that no objection to such transfer has ever been filed with any of the officials of the City of Shelby, and that no demand has ever been made on him to start proceedings to enjoin such transfer.

As the parties directly interested are familiar with the other allegations of the petition it is unnecessary to rehearse them herein.

The respondent's answer admits practically all of the allegations of the petition which are material to this contention and then concludes in form of a general denial. This apparently denies that he has refused and failed to make the transfer but from what is stated at hearing and a brief presented by respondent, in person, this allegation of the petition is also true, and the formal answer practically amounts to nothing. It does not state that it has complied with the requirement of the alternative writ nor show cause why it has not and should not do so.

However, the facts are, as disclosed at the time of hearing and submission—some state examiner who was working at Shelby, Ohio, acting on his own construction, or the construction of the State Auditor or State Bureau of Inspection and Supervision, of the case of City of Cincinnati, et al, vs. Roettinger, 105 O. S. 145, told the Respondent that such transfer would be illegal, and the Respondent, as a proper matter of personal safety to his official bond, (notwithstanding the written opinion of the Director of Law of Shelby) refused to make the transfer till the matter should be judicially determined.

It will be unnecessary for the purpose that this memoranda be extended in detail as to reasons for the Court's holding except to say that this Court agrees fully with the very able 'opinion' and brief filed by relator, upon the question involved, and adopts the same, by reference as this Court's basis for its finding and holding.

The Cincinnati case referred to is to be distinguished from the facts of the case at bar. It is the finding of this Court that under Section 15 of the Charter of the City of Shelby, the Council of such city if authorized by ordinance duly enacted to make such transfer and such section is not in conflict with the statutory law nor the Constitution of Ohio, and neither the statutes or constitution forbid such transfer.

It is therefore the order of this Court that a peremptory writ of mandamus shall issue directing the Respondent to make the transfer of funds as prayed for in the petition. The City of Shelby to pay the costs of this proceeding. Entry accordingly—Exceptions may be noted."

In considering your inquiry it will be noted that Section 3799 was the statute under consideration in the case to which you refer. Said section then provided:

"By the votes of three-fourths of all the members elected thereto, and the approval of the mayor, the council may at any time transfer all or a portion of one fund, or a balance remaining therein, except the proceeds of a special levy, bond issue or loan, to the credit of one or more funds, but there shall be no such transfer except among funds raised by taxation upon all the real and personal property in the corporation, nor until the object of the fund from which the transfer is to be effected has been accomplished or abandoned."

It is believed that the real question presented is whether the charter provision of the City of Shelby controls as to transfer of funds or whether the state law governs. It is thought that the repealing of Section 3799 and enactment of Section 5625-13, which you set forth, would not affect the situation. In other words, it is believed that if the same court were to pass upon the same question in view of existing law the result would be the same, as it is apparent the decision is based upon the proposition that under Section 3 of Article XVIII of the Constitution of Ohio the ordinance or charter provision controls over the state law.

Without attempting to review the numerous decisions of the Supreme Court dealing with the powers of municipalities under said constitutional provision, many of which are conflicting, it may be stated that no decision has been found specifically overruling the case of *City of Cincinnati* vs. *Roettinger*, 105 O. S. 145, to which you refer, and in which it was held, as disclosed by the second branch of the syllabus:

> "Section 3799, General Code, is in the nature of a limitation upon taxation, and as applied to cities and villages under charter governments does not violate any of the sections of Article XVIII of the Ohio Constitution and operates to prevent the transfer of revenues from the waterworks fund to the general fund."

Apparently, the conclusion above reached was based upon the proposition that the operation of a municipal waterworks plant involves the powers and authority of the state for levying taxes. The following is quoted from the body of the opinion of the Supreme Court above referred to:

> "* * *. Municipalities get their authority for levying taxes and raising revenues from the Legislature, and the Legislature must be held to have the power to place proper limitations thereon. * * *.
>
> * * *. It is important at this point to inquire into the nature of rates and charges which are in excess of an amount sufficient to pay the cost of the operation of the waterworks and to make provision for repairs, renewals, extensions, new construction, and interest and principal of debt in arising out of construction. While it is universally conceded that rates and charges not in excess of the amount necessary to meet such purposes are not classed as taxes, it does not follow that such excessive amount would not be classed as taxes. While it is quite well settled that charges for service and conveniences rendered and furnished by a municipality to its inhabitants are not taxes, yet where the charge is in excess of the entire cost of the service and convenience, the reason for the rule no longer prevails. A water rate exacted for actual consumption is merely the price of the commodity, and when in an amount which fairly compensates the cost can have no proper relation to those revenues which are expended for the equal benefit of the public at large, and it should not be placed in the same classification with burdens and charges imposed by the legislative power upon persons or property for the purpose of raising money for general governmental purposes. Taxation refers to those general burdens imposed for the purpose of supporting the government, and more especially the method of providing the revenues which are expended for the equal benefit of all the people. It is apparent that any effort on the part of any municipality to deliberately impose rates and charges for a water supply, not for the purpose of covering the cost of furnishing and supplying the water, but for the purpose of making up a deficiency in the general expenses of the municipality, and which cannot be met within the limits of taxation otherwise provided, is to that extent an effort to levy taxes, and, to the same extent, an effort to evade the statutory and constitutional limitations upon that subject. It requires no argument to show that the taxing power is a legislative power. *Lima* vs. *McBride*, 34 Ohio St., 338, 350, and *Board of Education* vs. *McLandsborough*, 36 Ohio St., 227.
>
> * * *

Is the Cincinnati ordinance in contravention of Section 3799, General Code?

That section makes provision for transfer of funds of municipalities, and the portion of same which applies to this transaction is as follows:

'But there shall be no such transfer except among funds raised by taxation upon all the real and personal property in the corporation, nor until the object of the fund from which the transfer is to be effected has been accomplished or abandoned.'

The language of that section seems entirely clear, and fits the controversy perfectly, unless the section is either inoperative or unconstitutional as being contrary to the home-rule provisions already discussed. The observations hereinbefore made relative to the effect of the home-rule provisions upon Section 3959 have equal force and application to the provisions of Section 3799, and for the same reasons as hereinbefore stated it must be held that Section 3799 is operative, constitutional and applicable to this controversy. It requires no argument to show that the revenues which might be raised by an increase of water rates would not create a fund 'raised by taxation upon all the real and personal property in the corporation.' It is equally certain that the 'object of the fund from which the transfer is to be effected' has not been accomplished while there are approximately eleven millions of dollars of bonds still outstanding.

* * *."

While in said case it appears that the city of Cincinnati in the adoption of its charter had provided for the continuing in force of the general laws relating to the government of municipalities, it is clear that the court based its conclusion upon the law as quoted in the branch of the syllabus heretofore set forth, as one of its reasons for affirming the judgment.

In the case of *East Cleveland* vs. *Board of Education*, 112 O. S. 607, the dissenting opinion of Chief Justice Marshall, which said dissenting opinion was concurred in by four other judges, cited with approval the Roettinger case, supra. The following is quoted from said opinion:

" * * *

In the case of *City of Cincinnati* vs. *Roettinger, a Taxpayer*, 105 Ohio St., 145, 137 N. E., 6, there was presented to this court the question whether the City of Cincinnati could increase the water rates, thereby raising a surplus of revenue, and thereupon transfer such surplus to the general fund of the city to be used for general governmental purposes. It was held by this court in that case that that could not be done. * * *"

Furthermore, the Supreme Court of Ohio in the case of *Board of Education of the City of Columbus* vs. *City of Columbus*, reported in 118 O. S. 295, and 160 N. E. 902, by a majority opinion, adopted by reference the dissenting opinion in the case of East Cleveland, supra, in the following language:

"* * *

The several members of this court entertain their respective views upon the legal questions involved, as expressed in the opinions published in that case, and the dissenting opinion in that case becomes the reasons of the five members of this court in support of the judgment of affirmance of the judgment in the instant case, and that opinion will therefore be adopted by reference and without repetition. * * *"

It is evident that by analogy the holding of the court in reference to a transfer of funds from the waterworks department to the general fund will apply to such a transfer from the municipal light fund to the general fund. The authority to operate such public utilities springs from Section 4 of Article XVIII of the Ohio Constitution, and in the power granted there is no distinction between a waterworks and a municipal light plant. It will be further observed that Section 3799 was repealed because of the enactment of Section 5625-13, which latter Section applies to all subdivisions of the state. The section last mentioned clearly does not authorize a transfer such as you mention. It must be concluded that there is no essential distinction, in so far as your question is concerned, between the funds derived from a municipally operated electric light plant and a waterworks plant.

By reason of the foregoing, it is my opinion that until such time as the Supreme Court has made a different pronouncement upon the specific question, your department should be guided thereby.

Of course, the decision in the mandamus case in the Shelby County Common Pleas Court, to which you refer, definitely disposes of the particular question and is the law of the specific case which was considered by said court. However, there is nothing to prevent the question being raised as to subsequent actions, and, of course, the question may be carried to the higher courts for determination.

You are specifically advised that by reason of the provisions of Section 5625-13, General Code, and the pronouncement of the Supreme Court of Ohio in the case of *Cincinnati* vs. *Roettinger,* 105 O. S. 145, funds may not lawfully be transferred from the electric light fund to the general fund of a municipality.

Respectfully,
EDWARD C. TURNER,
Attorney General.

3067.

APPROVAL, ABSTRACT OF TITLE TO LAND OF CHARLES S. SEITZ AND ALICE B. SEITZ IN EDEN TOWNSHIP, SENECA COUNTY, OHIO.

COLUMBUS, OHIO, December 28, 1928.

HON. CHARLES V. TRUAX, *Director of Agriculture, Columbus, Ohio.*

DEAR SIR:—You have submitted an abstract of title certified by V. A. Bennehoff under date of December 15, 1928, covering the following described premises:

> "Situate in the Township of Eden, County of Seneca and State of Ohio and known as Commencing at the southwest corner of the Mohawk Country Club in the northeast quarter of Section Seven (7) Eden Township, Seneca County, Ohio, said point being located upon the center line of the Mohawk Road; thence north eighty-six degrees east (N. 86° 9′ E.) two hundred eighty-seven (287) feet; thence south sixteen degrees forty minutes east (S. 16° 40′ E.) one hundred seventy-three and five-tenths (173.5) feet; thence south twenty-three degrees east two hundred eighteen and five-tenths (218.5) feet; thence south twenty-one degrees thirty minutes west (S. 21° 30′ W.) one hundred thirty-one and two-tenths (131.2) feet; thence south seventy-four degrees thirty minutes west (S. 74° 30′ W.) one hundred