

712.

MUNICIPALITY—FURNISHING WATER TO SCHOOLS—DISTRICTS IN WHICH CHARGE MAY AND MAY NOT BE MADE FOR SUCH SERVICE—CONSTITUTIONALITY OF SECTION 3963, GENERAL CODE, DISCUSSED.

SYLLABUS:

1. *In the Second Appellate District, Section 3963, General Code, in so far as it provides that water shall be furnished for school purposes by municipally owned waterworks, free of charge, is unconstitutional and void, and must be so treated by all the municipalities of that district. In the Eighth and Ninth Appellate Districts, the statute is valid, and must be so administered.*

2. *In view of the language used by Chief Justice Marshall in his opinion in the case of Board of Education of the Columbus School District vs. City of Columbus, 118 O. S., 285, municipal administrative officials in the first, third, fourth, fifth, sixth and seventh Appellate Districts should consider Section 3963, General Code, as being valid, until such time as it is held to be otherwise by a court of competent jurisdiction.*

COLUMBUS, OHIO, August 7, 1929.

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

GENTLEMEN:—This will acknowledge receipt of your letter of recent date, which reads as follows:

“Opinion No. 2126, page 1218, Opinions of the Attorney General for 1928, relates to the power of municipal corporations to compel boards of education to pay for water furnished by such municipal corporations. Our understanding of the opinion is that that portion of Section 3963 relating to water for public school buildings is not applicable in any municipal corporation in view of the decision of the Supreme Court in the case of *Board of Education vs. City of Columbus*, Case No. 20903, decided in 1928.

It appears that this view of the matter, or rather the Bureau’s understanding of the opinion in question, has not been sustained by the Attorney General’s department and it seems advisable to the Bureau to request a review of the matter.”

The 1928 opinion, referred to in your letter, is perhaps misleading, in that it is not restricted to those municipalities affected by the holding of the Supreme Court, in the case of *Board of Education of the City School District of Columbus vs. City of Columbus*, 118 O. S., 295, as it should be.

In the Columbus School case, the Supreme Court held that that portion of Section 3963, General Code, which prohibits a city or village, or the inhabitants thereof, from making a charge for supplying water for the use of the public school buildings, or other public buildings in such city or village, is a violation of the rights conferred upon municipalities by Section 4, of Article XVIII of the Constitution of Ohio, and is unconstitutional and void.

The syllabus of the case is general in terms, and it would appear upon consideration of the syllabus alone, that the rule there laid down applies to all municipalities in the State. That syllabus, however, should be read in the light of the facts before the court, and the opinion of the court therein, in the course of which opinion, on page 299, Chief Justice Marshall said:

"In the Second Appellate District, Section 3963 is unconstitutional and void, and must be so treated by all the municipalities of that district. In the Eighth and Ninth Appellate Districts the statute is valid, and must be so administered. In the other six appellate districts, municipalities may not know whether that section is valid and applicable to municipalities within their jurisdictions until the question has been submitted to the various Courts of Appeals of those districts, but all municipalities in those districts may be assured that whatever judgments are rendered by their respective Courts of Appeals will be affirmed by this court until such time as either the constitutional provision is abrogated or changes occur in the personnel of this court."

You will observe that the inquiry, in response to which the 1928 opinion was written, after referring to the holdings of the Supreme Court in the Columbus School case, *supra*, and in the case of *Euclid vs. Camp Wise Association*, 102 O. S. 207, submitted for answer the following question:

"Is the above decision applicable in all Ohio municipalities which have, or have not adopted a charter?"

The opinion was no doubt written with this inquiry in mind, and, inadvertently, was not limited in its application to the municipalities to which the holding of the Supreme Court applied. As has been noted, that decision, in the light of the cause submitted and the language of Chief Justice Marshall, quoted above, is restricted in its application to municipalities in the Second Appellate District and, in my opinion, the 1928 opinion referred to, should be likewise restricted. To that extent, the said opinion should be modified.

Inasmuch as municipalities in the first, third, fourth, fifth, sixth and seventh Appellate Districts may not know whether Section 3963, General Code, is valid and applicable to municipalities within their respective jurisdictions until the question has been submitted to the various Courts of Appeals of those districts, as stated by Chief Justice Marshall, it is my opinion that administrative officials should look upon the statute in the light of the well known principle, that statutes are presumed to be constitutional, until held by a court of competent jurisdiction to be otherwise, and act accordingly.

Administrative officials have no right to speculate on what the courts will hold with reference to questions involving the constitutionality of statutes, and for that reason should follow the mandate of the Legislature until the courts hold the Legislature's action to be void.

The courts in two Appellate Districts have already held the statute, in its application to the furnishing of water for school purposes, by municipally owned waterworks, free of charge, to be constitutional, and one Court of Appeals has held otherwise.

Because of the unique provision of the Ohio Constitution, contained in Section 2, of Article IV thereof, to the effect that the Supreme Court may not hold a statute to be unconstitutional except by the concurrence of all but one of the members of the court, or upon affirmance of the decision of a Court of Appeals which has held the statute to be unconstitutional, and the fact that the Supreme Court, as now constituted, is composed of two members who are of the opinion that the statute is constitutional and five members that it is unconstitutional, the Courts of Appeals in the several Appellate Districts are constituted courts of last resort on the question, and all municipalities, in districts where the Courts of Appeals have not passed upon the question, may be assured that whatever judgments are rendered by their Courts of Appeals will be affirmed by the Supreme Court. Until such Courts of Appeals do

pass on the question, administrative officials have no other guide for their conduct than the statute itself.

I am therefore of the opinion that in the Second Appellate District, Section 3963, General Code, is unconstitutional and void. In the Eighth and Ninth Appellate Districts the statute is valid, and must be so administered. In the other six Appellate Districts, municipalities should look upon the statute in the light of the principle that statutes are presumed to be constitutional until held to be otherwise, and that until the Courts of Appeals of these several districts pass upon the question, municipal administrative officials in those districts should consider Section 3963, General Code, as being constitutional, and act accordingly.

Respectfully,  
GILBERT BETTMAN,  
*Attorney General.*

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713.

APPROVAL, FINAL RESOLUTION ON EXTRA WORK CONTRACT—  
FAYETTE COUNTY.

COLUMBUS, OHIO, August 7, 1929.

HON. ROBERT N. WAID, *Director of Highways, Columbus, Ohio.*

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714.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR SALE OF ABANDONED MAD RIVER FEEDER CANAL LANDS IN THE CITY OF DAYTON, MONTGOMERY COUNTY—CITY OF DAYTON.

COLUMBUS, OHIO, August 7, 1929.

HON. RICHARD T. WISDA, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—You have submitted for my examination and approval certain findings and proceedings made and conducted by you in your official capacity as Superintendent of Public Works and as director of said department, relating to the sale of certain parcels of abandoned Mad River Feeder Canal Lands in the city of Dayton, Ohio, to said city; and with said findings and proceedings of your department you have likewise submitted for my examination and approval a form of a resolution to be adopted and signed by the Governor, the Attorney General and by you as Superintendent of Public Works of Ohio and as Director thereof, providing for and authorizing the sale of said property to the city of Dayton, Ohio, and authorizing and directing the execution by the Governor of a deed therefor.

The parcels of abandoned Mad River Feeder Canal Lands to which said findings, proceedings and resolution relate is hereby described as follows: