on domestic and commercial consumers of electrical energy without at the same time levying a like tax on industrial users, the differential between the types of users was disturbed and that a reduction of rates to domestic and commercial consumers without a like deduction to industrial consumers was justified.

I am therefore of the opinion that:

1. Municipalities owning and operating electric power plants may not, by ordinance or otherwise, assume the three per cent federal tax on electrical energy consumed by domestic and commercial consumers levied by Section 616 of the Revenue Act of 1932 and not collect the same from the consumer, such tax being an obligation of the consumer.

2. When the ultimate cost of electrical energy furnished by municipally owned electrical power plants to certain classes of consumers is increased by reason of a tax levied by the federal government or by any other cause, which increased cost is not suffered by all classes of consumers of electrical energy furnished by such municipally owned utility, such municipality may, by proper legislation, so amend its schedule of rates as to re-establish a fair differential between the different classes of consumers, which may or may not be equivalent in amount to such tax; in so doing the municipality should take into consideration all changed conditions of the different classes of consumers.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4639.

LIABILITY INSURANCE—COUNTY NOT LIABLE FOR INJURIES TO THIRD PERSONS FROM STEAM BOILERS IN COURT HOUSE—COUNTY COMMISSIONERS UNAUTHORIZED TO TAKE OUT INSURANCE ON SUCH.

SYLLABUS:

1. *The expenditure of public funds by a board of county commissioners to pay the premium on a policy of insurance purported to indemnify the said commissioners and the county which they represent, for public liability and property damage growing out of accidents which may occur as an incident to the operation of steam boilers used for the heating of a court house or a county home is unwarranted and unauthorized.*

2. *Neither a board of county commissioners, nor the county which it represents, is liable in damages for injuries to third persons caused by the explosion or the use of steam boilers operated for heating a county court house or the buildings of a county home.*

COLUMBUS, OHIO, September 22, 1932.

HON. JOSEPH J. LABADIE, *Prosecuting Attorney, Ottawa, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion which reads as follows:

> "The Commissioners of Putnam County request to know whether or not they are required to carry Public Liability & Property Damage Insurance on the steam boilers which the county operates for heating

both the Putnam County Court House and the Putnam County Poor Farm.

They are of the impression that the operation of boilers at these places is a governmental function for the benefit of the public and that if anything should happen resulting in injury to anyone, no liability to the county would result. They are now carrying insurance for such protection. Would you please advise me briefly whether or not any liability would follow in case of an accident, by which some person or persons were injured?"

A county is not a body corporate, but rather a subordinate political livision, an instrumentality of government, clothed with such powers and such only as are given by statute, and liable to such extent and such only as the statutes prescribe. *Portage County* vs. *Gates,* 83 O. S., 19.

At common law, neither counties nor county commissioners were liable for negligence. Liability, if any, is statutory.

In an early case decided by the Supreme Court of Ohio in 1874 it was held that the board of county commissioners of a county is not liable in its quasi corporate capacity in an action for damages for an injury resulting to a private party by its negligence in the discharge of its official functions unless that liability be fixed by statute. *Hamilton County* vs. *Mighels,* 7 O. S., 109.

The decision of the Supreme Court in *Brown County* vs. *Butt,* 2 Ohio, 348, to the effect that a county is liable to a sheriff for not providing a jail where the sheriff has been subjected to an escape was specifically overruled in the Hamilton County case cited above.

The reasons for the rule of law applied in the Hamilton County case are stated by the Supreme Court in the case of *Dunn* vs. *Brown County Agricultural Society,* 46 O. S., 93, in the following language:

"There is a class of public corporations, sometimes called civil corporations, and sometimes quasi corporations, that, by the well-settled and generally accepted adjudications of the courts, are not liable to a private action in damages, for negligence in the performance of their public duties, except when made so by legislative enactment. Of this class are counties, townships, school districts, and the like. The reason for such exemption from liability is that organizations of the kind referred to are mere territorial and political divisions of the state, established exclusively for public purposes connected with the administration of local government. They are involuntary corporations, because created by the state, without the solicitation, or even consent, of the people within their boundaries, and made depositaries of limited political and governmental functions, to be exercised for the public good, in behalf of the state, and not for themselves. They are no less than public agencies of the state, invested by it, of its own sovereign will, with their particular powers, to assist in the conduct of local administration, and to execute its general policy, with no power to decline the functions devolved upon them, or withold the performance of them in the mode prescribed, and hence, are clothed with the same immunity from liability as the state itself."

The court of appeals for Columbiana county made a distinction between cases in which a duty is imposed by law upon county commissioners, and those where the duty is self-imposed, holding that, while they could not be

held liable for negligence in the former case, except as provided by statute, they might be held liable in the latter, even though there was no statute expressly imposing such liability. And this court held that the commissioners, as a board of managers, are liable for negligence in maintaining a children's home under the provisions of Sections 3077 et seq. and Sections 3109 et seq. of the General Code. *Crawford* vs. *Columbiana County,* 1 O. App., 54. The supreme court, however, reversed this decision on the authority of *Commissioners* vs. *Mighels,* 7 O. S., 109, and *Commissioners* vs. *Marietta Transfer & Storage Company,* 75 O. S., 244. *Joint District Board of County Commissioners of Stark and Columbiana Counties et al.* vs. *Crawford,* 90 O. S., 433.

The rule of non-liability of county commissioners for negligence has been modified by Section 2408, General Code, to the extent that such boards are made liable in their official capacity for damages received by reason of their negligence or carelessness in not keeping in repair certain roads and bridges. This statute, however, imposes no liability on boards of county commissioners for carelessness or negligence in the performance of any other duties than those incident to the keeping in repair of roads and bridges.

In the case of *Montgomery* vs. *Board of County Commissioners of Erie County,* 25 O. App., 440, suit had been instituted against the board of county commissioners for injuries received by workmen in repairing a tower clock on the court house. It was alleged that these injuries were the direct and proximate result of the negligence and carelessness of the board of county commissioners. It was said by the court:

> "At common law boards of county commissioners were not liable for injuries resulting from negligence. Liability has been created in certain cases by the terms of Section 2408, General Code, but the provisions of that section have no application to the present case."

On the strength of the foregoing authorities, I am led to believe that no liability would exist on the part of Putnam County or the Commissioners of Putnam County if an accident should occur in connection with the operation of steam boilers operated for heating the Putnam County Court House and the building at the Putnam County Home.

That being the case, any expenditure of public funds for public liability and property damage insurance on account of these steam boilers would be a useless and unauthorized expenditure of public funds.

Inasmuch as the commissioners of the county would not be legally liable for the results of an accident growing out of defective boilers maintained at the court house and county home or for negligence or carelessness in the maintenance and operation of these boilers, they cannot be said to have an insurable interest in the risk covered by a policy of insurance purporting to indemnify them for public liability and property damage which might grow out of an accident resulting from such defects or carelessness. It is said in Corpus Juris, Vol 36, page 1059:

> "The necessity of an insurable interest to support the contract of insurance (public liability insurance) is applicable to the same extent as it is in the case of ordinary insurance; and the interest necessary to support the contract is of the same nature. Insured in an employers' liability policy has an insurable interest in the safety of those whose accidental personal injury is made the foundation of his claim

to indemnity, since the happening of such an accident will be of disadvantage to him, and will subject him to direct pecuniary loss, for which such policies afford him a useful and desirable means of indemnity." (Words in parenthesis ours.)

In circumstances such as you describe, the county commissioners or the county which they represent, would not be subject to any direct pecuniary loss so far as the public or third parties are concerned, if an accident should occur, growing out of the use of these boilers, and for that reason there is no basis for indemnity or for a contract of insurance purporting to indemnify the commissioners or the county for injuries to the public or to property of third persons.

By "public liability and property damage insurance" is meant, I take it, indemnity for injuries to third persons and property other than that owned by the county itself. I do not assume in this opinion, to pass on the question of whether or not a board of county commissioners may lawfully insure against losses incurred by reason of injuries to property owned by the county.

I am therefore of the opinion that the expenditure of public funds to pay the premium on a policy of insurance of this nature is improper and unauthorized.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4640.

PAYMENT OF TAXES — COUNTY TREASURER MAY NOT RECEIVE GENERAL REAL ESTATE TAXES WITHOUT PAYMENT OF SPECIAL ASSESSMENTS.

SYLLABUS:

The term "taxes" as used in section 2655, *General Code, as amended in the enactment of Amended Senate Bill No.* 326 *by the* 89th *General Assembly, includes special assessments; and under the provisions of this section county treasurers are not permitted to receive payment of general taxes on real estate without at the same time receiving payment of installments of special assessments on such property certified to the county treasurer, unless the collection of such special assessments has been legally enjoined.*

COLUMBUS, OHIO, September 22, 1932.

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

GENTLEMEN:—This is to acknowledge the receipt of your communication in which you call my attention to the case of *State, ex rel. Brown,* vs. *Cooper, Treasurer,* 123 O. S. 23, and request my opinion as to whether the word "taxes" as used in section 2655, General Code, as amended in the enactment of Amended Senate Bill No. 326 by the 89th General Assembly, includes assessments, and whether this section of the General Code as amended is to be construed to mean that no person shall be permitted to pay less than the full amount of taxes and assessments charged and payable on real estate, where the collection of a par-