

the board could not do this clerical work himself, nor is there any reason why the board could not accept such clerical assistance as might be given to it free of charge. If the clerk of the board of education performed this work for the sinking fund commissioners without extra pay, it would clearly be within the powers of the commissioners to accept his services. There is nothing incompatible between a clerkship of a board of sinking fund commissioners for a school district and clerkship for the board of education. The salary for a clerk of the sinking fund commissioners, if any is to be paid, should be fixed by the board.

In specific answer to your questions I am of the opinion:

1. There is no authority for the abolition of the board of sinking fund commissioners of a school district except that contained in Section 2295-14, General Code. By force of the terms of this section, a board of sinking fund commissioners of a school district is automatically abolished when all bonded indebtedness of the district incurred prior to January 1, 1922, is paid.

2. The clerk of the board of education of a school district may lawfully act as clerk of the board of sinking fund commissioners of the district, without extra pay.

3. A salary for the clerk of the board of sinking fund commissioners of a school district may be fixed by the said board.

Respectfully,

JOHN W. BRICKER,

Attorney General.

832.

LIBRARY ASSOCIATION—MAY CONTRACT TO RENDER LIBRARY SERVICE TO COUNTY AND MUNICIPALITY—COUNTY UNAUTHORIZED TO ESTABLISH BRANCHES IN CONJUNCTION WITH SUCH ASSOCIATION—SEVERABLE CONTRACT MAY BE ENFORCED AS TO VALID PART.

SYLLABUS:

1. *A library association which is the owner of a library and a building in which to house the same, and is partly maintained by taxes levied by a municipality and a county, is not such a library as is intended by Section 4005-1, General Code.*

2. *The board of county commissioners of a county may contract with a library association or other organization owning or having the full management or control of a library or a board of trustees appointed by authority of law and having the management or control of a library for the free use of the people of the county, notwithstanding the fact that said library association, organization or trustees have already contracted to furnish free library service to a municipality. The library must be maintained for the free use of all the residents of the county.*

3. *Where a contract has been entered into by a municipality or a board of county commissioners with the library association or other organization owning or having the full management or control of a library for the free use of said library for all of the people of a municipality or of the county, the amount*

agreed upon for the maintenance of said library is to be paid direct to said library association or other organization.

4. *Sections 2454, 2455 and 2456, General Code, do not extend to the county commissioners of a county power or authority to contract with a library association or other organization having the control of or management of a library, to establish branches or substations throughout the county, but does not inhibit the distribution of the library books to the people of the county through the assistance of other libraries in the county.*

5. *The valid part of a contract, consisting of several promises and several covenants, part of which are ultra vires and void and part valid, can be enforced as to the valid part, when the contract is executed and it is possible to separate the valid part from the void or illegal part, and the valid part can be established without the medium of either the illegal contract or illegal consideration.*

COLUMBUS, OHIO, May 16, 1933.

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

GENTLEMEN:—This will acknowledge your favor of recent date in which you inclose Articles of Incorporation of the Library Association of Sandusky, the Constitution of such Association and its By-Laws; also the proposal of Andrew Carnegie to build a library building; the agreement of the City Council to appropriate \$3,000.00 per year for the maintenance of the library; a contract made between the Commissioners of Erie County and the Library Association, and submit ten questions in connection with the operation of such library and the levy of taxes by the county for the support of the same, and request a written opinion as to the questions contained in this communication.

The Articles of Incorporation as inclosed, are as follows:

“Third: The purpose for which the corporation is formed is the establishment of a free library, the books of which shall be accessible to the Members and to aid by such means as may be in its power, to increase of a larger free intellectual life in the community.” Date of Articles November 5, 1895.

The following is a copy of the proposal and appropriation of Andrew Carnegie and of Ordinance Number 134 of the City Commission of Sandusky, Ohio:

“Skibo Castle, Oct. 7, 1899—If Sandusky will give three thousand (3,000) Dollars a year to maintain a public library, I shall give fifty thousand (50,000) dollars to build and equip one. All of this fifty thousand (50,000) dollars must be used for library and equipment, and not one cent for maintenance.”

“Whereas, Andrew Carnegie proposes to give fifty thousand (50,000) dollars for the purposes of building and equipping a public library in the City of Sandusky, which proposition is now on record in the office of the city auditor, upon condition that the said city of Sandusky appropriate three thousand (3,000) dollars per year for the maintenance of said library, therefore, for the purpose of maintaining a public library in the City of Sandusky after the same has been erected and equipped at a cost of not less than fifty thousand (50,000) dollars there shall be

and hereby is appropriated yearly from the general fund of the city the sum of three thousand (3,000) dollars, the first payment of three thousand (3,000) dollars to be made to the trustees of said public library when said public library shall have been erected and fully equipped, as proposed by said Andrew Carnegie. (1899 Dec. 18 C-423).

I, Beatrice Snyder, Clerk of the City Commission of the City of Sandusky, Ohio, do hereby certify that the above is a true and correct copy of section 134 of an ordinance entitled 'An Ordinance embracing the General Ordinances, revised and codified, of the City of Sandusky, passed and in force and effect October 1, 1906.'

Beatrice Snyder,
Clerk of the City Commission."

The first five articles of the Constitution and By-Laws of the Library Association of Sandusky, Ohio, are as follows:

"Article I. The name of this association shall be the Library Association of Sandusky, Ohio.

Article II. The purpose for which this association is formed is the establishment and maintenance in the City of Sandusky of a free public library and reading room, for the dissemination of knowledge and the promotion of a broader and freer intellectual life in said city; and, so long as the Commissioners of Erie County, Ohio, shall contribute to the maintenance of said library under contract with said association, shall also be free for the use of all the inhabitants of said county; always subject to such reasonable rules and regulations as the Board of Trustees of said Association from time to time may adopt.

Article III. Any resident of Sandusky of 21 years of age and of good moral character shall be eligible to membership in said association; and may become and be such member, by the yearly payment in advance of a membership fee of two dollars and the signing of the Articles of Incorporation and the Constitution of said Association; said dues shall be paid to the Treasurer of said Association and shall constitute a Contingent Fund to be expended upon the orders and at the discretion of the Board of Trustees.

Article IV. The Association shall hold its annual meeting each year on the First Tuesday in January, at which meeting the members shall elect twelve of their number as a board of Trustees for the ensuing year and until their successors shall be elected and qualified. During the subsistence and term of any contract between the Commissioners of Erie County and said Board of Trustees whereby said Commissioners shall agree to contribute to the maintenance of said library, not less than one and not more than three residents of Erie County residing outside the corporate limits of Sandusky and having other qualifications of membership shall be elected to said Board of Trustees. The members of the Board of Trustees shall be ex-officio members of said Association and be subject to the same dues, and entitled to the same privileges as other members. Vacancies in said Board may be filled by appointment of said Board at any meeting thereof, such appointee to hold office until the next annual meeting of the Association.

Article V. The officers of the Board of Trustees, consisting of a

President, Vice President, Recording Secretary, Corresponding Secretary and Treasurer, shall be elected by ballot at a meeting of the Board, which shall follow the annual meeting of the Association, and the officers of the Board of Trustees shall be the officers of the Association.”

The first six and last clauses of the contract between the Library Association of Sandusky, Ohio, and the Board of County Commissioners of Erie County, Ohio, are as follows:

“Whereas, the Library Association of Sandusky, Ohio, is the owner of a Library in said city in Erie County, Ohio, and has full management and control thereof, and,

Whereas, it is desired on the part of said library association to extend the free use of said library to all the people in Erie County, Ohio, by contract with the Board of County Commissioners of Erie County, Ohio, under authority of section 2455 of the General Code of Ohio, and,

Whereas, the Board of County Commissioners of Erie County, Ohio, has provided a levy upon all the taxable property of Erie County, Ohio, sufficient to yield the sum of \$6000.00 annually under authority of Section 2456 of the General Code by reason of a contract with the Library Association, which has automatically expired and it is therefore necessary to enter into a new contract in order to give the people of Erie County, Ohio the free use of the library of said Library Association. Now, therefore, this agreement, Witnesseth:

In consideration of the Library Association of Sandusky, Ohio extending to all of the people of Erie County, Ohio the free use of its library located in the City of Sandusky, Erie County, Ohio, and giving and granting to all of the people of Erie County, Ohio, the right to use and read all books, periodicals, and other printed matter, which said Library Association maintains as a part of its library and giving to all of the people of Erie County the benefit of their system in making investigations and service in assisting to locate books and other printed matter within their jurisdiction and maintaining its library by employing necessary clerks and librarians and keeping its system in an efficient state so as to render the people of Erie County prompt and competent service and placing throughout Erie County sub-stations where people in such localities in such county may come and obtain books, periodicals and other printed matter and where they may be given access and free use of the entire library of said association and its system, and maintaining at all times a suitable library as now exists during the lifetime of this contract, all of which the said Library Association of Sandusky, Ohio agrees to do, the Board of County Commissioners of Erie County, Ohio, agrees during the life of this contract to levy a tax annually at their June session sufficient to yield the sum of \$6000.00 under the authority of section 2456 of the General Code, and cause said sum to be paid semi-annually to the said Library Association for the purpose of maintaining and providing said library and making the same available for the use of all the people of Erie County, Ohio, as herein provided.

It is mutually agreed between the said Library Association and the said Board of County Commissioners that in the event more or less money is required than the said \$6000.00 for the purpose for which the sum is levied the said Board of County Commissioners may in its discretion increase or decrease said amount by levying of a tax on all the taxable property of Erie County in such sum as they deem advisable, and the said Library Association shall at all times on after the First day of March, 1925 during the continuance of this contract, maintain a department known as a Children's Department for the use of all children of Erie County, Ohio for which purpose the said Board of County Commissioners shall provide a levy upon all the taxable property of Erie County, Ohio, to net a revenue of not less than \$1000.00 which shall be in addition to the sum mentioned aforesaid, which shall be paid to the said Library Association along with the other funds provided for under this contract, and said sum shall be used by the said Library Association exclusively to purchase and catalogue juvenile books for and distribute the same to the children in Erie County Village and rural school districts, except to those children attending the school in Milan Rural School District, as the said Milan Rural School District has a library of its own, and said library association agrees in lieu of furnishing the children of said district juvenile books as aforesaid, it will turn over and pay each year to the Board of Trustees of the library maintained in said Milan Rural School District such part of said \$1000.00 as is paid as taxes by the said Milan Rural School District. The said Library Association agrees that one-half of the books purchased with the \$1000.00 shall be selected by the Erie County Superintendent of Schools and that in the event of the termination of this contract all books purchased from the Children's Department fund each year as may be levied by the Board of County Commission shall become the property of the Board of County Commissioners of Erie County, Ohio, subject to the use of the said Erie County Superintendent of Schools for the use among the children of the village and rural school districts of Erie County, Ohio.

It is mutually understood that in each annual report to be made by the said Library Association to the Board of County Commissioners as hereinafter provided, a complete list of books purchased by it in the Children's Department shall be submitted to the said Board of County Commissioners for record, and that in the event the said \$1000.00 should not become available for the use during the period of any one year during the continuance of this contract by reason of insufficient levy or otherwise, then the said Library Association agrees to use \$500.00 of the other funds received by it under this contract for the Children's Department as herein provided.

It is further agreed between the parties hereto that this contract may be altered or amended only in writing duly signed by both of the parties hereto and attached to this contract and that the said Library Association shall give bond payable to the State of Ohio for the use and benefit of the Board of County Commissioners of Erie County, Ohio in a sum equal to the amount levied by the said Board of County Commissioners in any one year for the use of said Library Association as aforesaid, conditioned that the said Library Association shall use and pay out

said moneys for the purposes herein specified and account for its distribution in writing annually to the Board of County Commissioners."

The Library Fund Association, which was to receive the fund from Andrew Carnegie for the purpose of executing and equipping the library, received the \$50,000.00 from Andrew Carnegie, purchased a lot and built a building thereon for housing the library, with said fund, and later, in 1900, conveyed said property to the Library Association of Sandusky, Ohio, which association is now the owner of and in control of said Library. The following recital was inserted in the deed to the Library Association:

"Now therefore be it resolved, that the President and Secretary of this association be hereby ordered, directed and empowered to execute and deliver a deed of General Warranty therein, conveying in fee simple for educational free library and reading room purposes only, the real estate above described to such person, persons or corporation as Mr. Andrew Carnegie shall designate.

And whereas, afterwards to wit Feb. 14 1900 the Library Association of Sandusky, Ohio was designated as the corporation to which said property should be conveyed."

The following remarks were inclosed with your letter in regard to the management and conducting of said library:

"The 'Library Association of Sandusky, Ohio' is the same Library Association which is now operating the library under the charter from the state, as mentioned in the first statement made on the initial page of these facts. This is as full statement of facts concerning the building and erecting the library as is necessary for the purposes of the inquiry we shall hereafter make.

Under the Carnegie grant the city has been appropriating a sum of money each year, in \$3000.00 or excess for the maintaining of the library. It is apparent that while the library is serving the public, that it is a private and not a public library, except that it furnishes free library services to the county and city. The city levies a tax for its maintenance, and then upon all the taxable property of the county, including the city also pays a tax for its support; this then requires the citizens of the city to pay twice for this library service; as to the past year all of this amount has not been contributed by the city; it having agreed to furnish as stated \$4500.00, only \$1500.00 of which has been paid.

We find under section 4004 G. C. that power is given municipalities, upon complying with other provisions of the law, to erect and maintain a municipal library. Said section also provides for the appointment of trustees of such library. We also find that a municipality may contract with a library 'maintains in perpetuity a public library' for the use of the library, for the benefit of the inhabitants of the municipality. See Sec. 4005-1 G. C.

This section provides that the trustees appointed under section 4004 is to enter into such contract. In this particular instance no such a board of trustees seem to be appointed.

Section 2455 provides for the county commissioners to enter into an agreement with a library association for free library services to all the residents of the county, and the county commissioners to maintain and provide such library.

Section 2456 provides for a levy of a tax for its maintenance. That the fund shall be known as the 'library fund.'

Section 2976-15 provides that the fund shall be in the custody of the county treasurer, and directs that it shall be disbursed upon requisition of the board of trustees, certified by the president and secretary of said board.

Several decisions relative to this library have been submitted by the Attorney General, one No. 4520 under date of July 25, 1932, and the other No. 4860 of January 6, 1933, but the particular question we have before us has not been touched upon in either opinion, and as there are several interested parties seeking information The County Superintendent of Schools who seems to have been concerned in the contract with the county commissioners; the Milan School District Library, The Berlin Heights School District Library, the Vermilion School District Library and the Sandusky Library Association."

The ten questions for which you request an opinion are as follows:

"(1) Is the library in question, 'The Library Association of Sandusky, Ohio,' a public library, within the meaning of section 4005-1 G. C.?

(2) Can such library under said section and section 2455 G. C. contract with both the city of Sandusky and the county of Erie for library services under said sections, or does the contract under section 2455 preclude a contract with the city of Sandusky?

(3) Can the funds be turned over to the library association upon a requisition of the board of trustees of the association, certified to by its president and secretary, or does section 2976-15 mean to have the fund remain in the county treasury and paid out only upon appropriation by the county commissioners under the provisions of section 5625-29 G. C.?

(4) If it is to be paid out upon appropriation, or otherwise have the county commissioners the authority to designate in its contract that said library shall furnish to each school district juvenile books for the use in such school districts, or in other words are the commissioners only empowered to contract with the library free library service for the inhabitants of the county, and the manner or mode shall be within the discretion of the trustees of the library association?

(5) Is the enclosed contract legal as entered into by the county commissioners with the library association?

(6) If portions of said contract are illegal, are other portions thereof binding, or is it to be regarded as an entire contract and the whole contract void?

(7) If the library association cannot contract with both the city and county, under the facts stated, and the Carnegie agreement and the ordinance of the city are in point of time before the agreement with the county, which of said parties can contract, as the building is occupied under the Carnegie agreement?

(8) Can the county commissioners designate in their contract with the association that such association shall establish a branch at each of the above named libraries, to-wit:—Milan Library, Berlin Heights Library and The Vermilion Library, and leave said local libraries to designate what books they desire to have placed therein or must such question be left to the contracting library?

(9) Would the contracting library have authority to expend any of the money so received from the county by appropriation or otherwise by issuing a warrant in favor of each local library for so much money, leaving the local library board the power to administer such money so paid to them?

(10) Can the contracting library establish branches thereof in each of the local libraries, and contribute towards the expenses of such local library?"

Bates' Revised Statutes, 1897 Edition; Section 1692-37, in full force and effect at the time of the passing of Ordinance Number 134 of the City Council of Sandusky, Ohio, provided that municipalities could establish and maintain free public libraries and reading rooms and could receive donations and bequests of money or property for the same in trust or otherwise.

Section 4002-45, Section 7, of Bates' Revised Statutes, provided that:

"In case a free public library has already been established in any city or incorporated village, and duly incorporated and organized, the council may levy a tax for its support as provided in this act, without change in the organization of such library association, and the sum so raised shall be paid to the officer or officers duly authorized to receive the same, and shall be under the control of said library association; provided, that if at any time such library association ceases to exist or from any reason fails to provide a free circulating library as required by the provisions of this act, the books and other property accumulated from the proceeds of the levy herein authorized shall become the property of the city or village and be subject to the control of the council as herein provided."

The Library Association of Sandusky, Ohio, was incorporated November 5, 1895, and its charter provided that it was formed to establish a free library, the books of which shall be accessible to the members and to aid by such means as may be in its power to increase a larger free intellectual life in the community. The statutes in effect at that time permitted such an association to accept a bequest for the building of a library or the maintenance thereof. This Library Association accepted the gift of Andrew Carnegie, made on October 7, 1899, in which he provided,

"If Sandusky will give \$3,000.00 a year to maintain a public library, I shall give \$50,000.00 to build and equip one and all of this \$50,000.00 must be used for library and equipment, and not one cent for maintenance."

On December 18, 1899, the City Council of Sandusky, Ohio, passed Ordinance No. 134, which provided, for the purpose of maintaining a public library in the City of Sandusky, after the same has been erected and equipped at a cost of not less than \$50,000.00 there shall be and hereby is appropriated yearly from the General Fund of the City, the sum of \$3,000.00, the first payment of \$3,000.00 to be made to the trustees of said public library when said public library shall have been erected and fully equipped as proposed by said Andrew Carnegie. This formed a contract between Andrew Carnegie to furnish the \$50,000.00, and

the Library Fund Association, which later, under the direction of Andrew Carnegie, conveyed said library to the Library Association of Sandusky, Ohio. The passage of the ordinance by the City Council of Sandusky, Ohio, also formed a contract between the City of Sandusky and the Library Association of Sandusky, to provide the sum of \$3,000.00 a year for its maintenance and support. Later, Section 4002-45 of Bates' Statutes was repealed and Section 1536-934 was enacted, which was subsequently divided into Sections 4004, 4005, 4006 and 4019 of the General Code. Section 4019 reads as follows:

"The council of each city may levy and collect a tax not to exceed one mill on each dollar of the taxable property of the municipality each year, and pay it to a private corporation or association maintaining and furnishing a free public library for the benefit of the inhabitants of the municipality, as and for compensation for the use and maintenance thereof. Without change or interference in the organization of such corporation or association, the council shall require the treasurer of such corporation or association to make an annual financial report, setting forth all the money and property which has come into its hands during the preceding year, and the disposition thereof, together with recommendation as to its future necessities."

This section was repealed on April 5, 1923, by House Bill No. 344, 110 Ohio Laws, page 407, and in its place Section 7632 was enacted, which is substantially the same as Section 4019. This section provides that the council of any municipality may contract with the library trustees of any library, appointed by authority of law or of any private corporation or library association maintaining a free public library situated within or outside the taxing district, to furnish free library service to all the inhabitants of such taxing districts and may levy a tax therefor. The county auditor shall certify the amount collected to the proper officers of the taxing district who shall forthwith draw his warrant for such amount on the treasurer of such district, payable to the proper officer of such library. These statutes provide for direct payment to the library association after the tax has been levied and collected, as provided in Ordinance No. 134, and the contract with the Library Association and Andrew Carnegie. In this particular instance, the library remained under the custody and control of the Library Association of Sandusky, Ohio, which has continued to elect its own trustees and manage and control said library, no trustees having ever been appointed for said library, as provided in Section 4004 of the General Code. Section 4004 of the General Code provides for the erection and equipment, and the custody, control and administration of free public libraries established by municipal corporations and provides for the appointment of the trustees by the mayor of the municipality, to manage and control said library.

Section 4005, General Code, provides for the powers and duties of said trustees. Section 4005-1 is as follows:

"In any municipality where there is or may hereafter be a library organization created by will or otherwise for the purpose of maintaining in perpetuity a public library, and which organization is endowed and owns and maintains a library, the trustees mentioned in General Code, section 4004, may issue bonds as provided for in General Code, sections 4007 to 4013, both inclusive, for the purpose of providing a building or

buildings for such library and furnishing the same and to pay the cost and expense thereof.

The erection, equipment, maintenance and control of such building or buildings shall be vested in the trustees mentioned in General Code, section 4004, and said trustees may enter into an agreement in writing with such library organization whereby said library organization may occupy all or a part of such building or buildings, and conduct, operate and maintain therein a free public library, the period of each such agreement to be not less than ten nor more than twenty-five years. Such library organization shall administer, operate and control such library in accordance with said agreement and the terms of the trust creating such organization, providing the same is free to all the inhabitants of the municipality, and if deemed necessary by the council of any such municipality, it may levy a tax and contribute to the expense of maintaining such library under the provisions of General Code section 4019. And said trustees mentioned in General Code section 4004 may enter into a similar agreement with any historical or other educational association whereby a part of said building or buildings may be used by such organization for the housing and displaying of its property and effects, providing the same is free to all the inhabitants of the municipality"

An analysis of this section would indicate that this section was enacted for the purpose of providing a means of furnishing a building to house a library, which might be owned and controlled by a library organization created by will or otherwise, for the purpose of maintaining in perpetuity a public library and which organization is endowed and owns and maintains a library.

The Library Association of Sandusky owns and maintains a library and has a building in which to house the same and while such library was furnished the building by Andrew Carnegie, and the maintenance thereof is provided by the City of Sandusky, and the County of Erie, yet it could not be said to be an endowed library organization, and therefore, does not come within Section 4005-1 of the General Code.

Specifically answering your first question, "Is the library in question, 'The Library Association of Sandusky, Ohio,' a public library, within the meaning of section 4005-1 G. C.?", it is my opinion that the Library Association of Sandusky is not such an organization as is provided by Section 4005-1 General Code.

The establishment of a free county public library is provided for by Sections 2454, 2455 and 2456 of the General Code, and the answer to the most of your inquiries depends upon the interpretation to be given these three sections which, being part of the same section when originally enacted and all of Section 891-A Bates' Revised Statutes are in pari materia and should therefore be construed with reference to each other. Section 2454, General Code, reads:

"The County Commissioners may receive a bequest or a gift of a building or of money or property wherewith to construct a building for or to furnish and equip a county public library. They may accept the gift of a library or of its use for a term of years or permanently, and may agree on behalf of such county to provide and maintain such library."

Section 2455, General Code, reads:

"A library association or other organization, owning or having the full management or control of a library, or a board of trustees appointed by authority of law and having the management or control of a library free to the whole or a part of a county, may contract with the county commissioners for the use thereof by the people of such county."

Section 2456, General Code, reads:

"A county accepting such bequest or gift, or entering into such agreement, shall faithfully maintain and provide such library. At their June session each year, the commissioners thereof may levy a tax not to exceed a half mill on each dollar of taxable property in such county. The fund derived from such levy shall be a special fund, known as the 'library fund' and shall be used only for the purposes contemplated in this section."

The Court, in *Peter vs. Parkinson, Treasurer*, 83 O. S., on page 49, said:

"While in a sense the board of commissioners is a representative and financial agent of the county, its authority is limited to the exercise of such powers only as are conferred upon it by law."

The Court, in *Jones, Auditor vs. Commissioners*, 57 O. S. page 189, held:

"The board of county commissioners represents the county, in respect to its financial affairs, only so far as authority is given it by statute."

The Court, in *Elder vs. Smith, Auditor, et al.*, 103 O. S., at page 370, said:

"It has long been settled in this state that the board of county commissioners has such powers and jurisdiction, and only such, as are conferred by statute."

Sections 2456 et seq., provide for the levy of a tax and such statutes must be strictly construed in favor of the taxpayer. *Straub vs. Hilker*, 24 O. A. 90; *Board of Education vs. Briggs*, 114 O. S. 415; *Caldwell vs. State*, 115 O. S. 458.

The authority granted the board of county commissioners in Sections 2454 et seq., is limited to acquiring a library or the construction, furnishing and equipping of a county public library.

Sections 2455 et seq., permit any library association or organization or legally appointed board of trustees, which owns or has the full control or management of a library which is free to the whole or a part of the county, to contract with the county commissioners for the use of it by the people of the county. This section enables a legally appointed board of trustees of a municipal library or any library association owning or having the full management and control of a library which is free to the residents of a municipality or township, to enter into a contract with the board of county commissioners for the free use of the library for the people of the county and under the preceding section, the board of county commissioners is granted authority to enter into such a contract.

Section 2456, General Code, requires the county entering into a contract for the use of a library as provided for in Section 2455, General Code, to faithfully maintain and provide such library, and makes provision for the levying of a tax for its maintenance.

A strict construction of these three sections limits the commissioners to the contracting for the use of a library or the establishment of one for the use of

the people of the county. No authority, however, is granted by these three sections to a board of county commissioners to establish branch libraries throughout the county or to aid or assist other libraries in the county financially or otherwise. The library must be for the use of the people of the county and the money raised for its maintenance is provided exclusively for that purpose. The library association or legally appointed board of trustees of the library contracted with, may manage and supervise the library for the commissioners.

Sections 2976-13 and 2976-15 General Code, would seem to grant authority for the establishment of branch libraries and reading rooms throughout the county and for aiding other libraries in the county and for the distribution and expenditure of the library fund provided for by levy of taxes. However, these sections are a part of House Bill No. 364 passed May 27, 1915, Volume 105-106 Ohio Laws. Section 7 of this Bill provides:

“The provisions of this act shall not apply to county libraries heretofore organized and now being conducted under such organization.”

The library in question was organized and operating under such organization at the time of the enactment of these sections and hence they do not apply to this particular library. The Library Association of Sandusky, Ohio, was incorporated November 5, 1895, for the apparent purpose of receiving title to and managing and controlling the library provided for by the donation of Andrew Carnegie. To this Library Association, the City of Sandusky, Ohio, by the act of its Council on December 18, 1899, became obligated to annually contribute the sum of Three Thousand Dollars (\$3,000.00) towards its maintenance. This association has continued to function as a private library association and as such, provided in its constitution “for the free use of said library by all the residents of Erie County, Ohio, so long as the board of county commissioners shall contribute to the maintenance of said library under contract with the Association,” always subject to such reasonable rules and regulations as the board of trustees of such Association may from time to time adopt. This Library Association, as provided for by Section 2455, General Code, offered the use of the library to the county as a county public library, which offer was accepted by the board of county commissioners of Erie County, Ohio, and a contract entered into for the use of said library by the people of Erie County, Ohio. Annual contracts have since been entered into providing for the continued use of said library by the people of Erie County and providing for the payment of a share of the maintenance by the county, the amount being specifically stated in the contracts. Such an arrangement makes the City of Sandusky liable in the sum of Three Thousand Dollars (\$3,000.00) under Ordinance No. 134 of its City Council and the county responsible for the sum agreed upon for its share of the maintenance and being definite amounts provided for by contract, are to be paid to the Library Association and disbursed by it. The amounts, however, would need be included in the annual appropriation measure passed by the several taxing authorities as provided for by Section 5625-29 General Code. Such an arrangement as is provided for by this particular library not only enables the City of Sandusky to comply with its agreement made at the time of the proposal of the donation by Andrew Carnegie, but provides for a more complete library service for both the City and the people of the county, the county providing for and maintaining the extra expense and service incurred in extending the benefits of the library to the people of the county. The contract entered into on July 7, 1924, between the Library Association of Sandusky and the board

of county commissioners of Erie County, contains a provision in its first section for the "placing throughout Erie County substations where people in such localities in such county may come and obtain books, periodicals and free use of the entire library of said Association." In the second section of said contract provision is made for the payment of an additional thousand dollars which "shall be used by the said Library Association exclusively to purchase and catalogue juvenile books for and distribute the same to the children in Erie County, village and rural school districts, except to those children attending the school in Milan Rural School District, as the Milan Rural School District has a library of its own and said Library Association agrees, in lieu of furnishing the children of said district, juvenile books as aforesaid, it will turn over and pay each year to the board of trustees of the library maintained in said Milan Rural School District, such part of said One Thousand Dollars (\$1,000.00) as is paid as taxes by the said Milan Rural School District." This contract also provides for part of the juvenile books, at the termination of the contract, becoming the property of the board of county commissioners of Erie County, subject to the use of them by the Superintendent of schools for the use among the children of the village and rural school districts of Erie County, Ohio. The board of county commissioners of Erie County exceeded the authority granted it by law in entering into a contract containing the above provision, the board of county commissioners being limited by law to the contracting for a library for the use of the people of the county, and its maintenance, and have no authority to provide for the purchase of books to be used under the direction of a superintendent of schools or to provide for the return of taxes collected for library purposes to any particular part of the county. In the *State of Ohio vs. Griggsby et al.*, 6 O.N.P. at page 204, the Court said:

"Speaking of county commissioners, while officers, are acting within the scope of their lawful powers, their acts, though erroneous, or ill-advised, are binding until set aside by some authority entitled to sit in review. On the other hand, where officers go beyond the just limits of their jurisdictional powers, their acts become null and void."

The Court in *Widoe vs. Webb*, 20 O. S., at page 435, said:

"The concurrent doctrine of the text-books on the law of contracts is, that if one of two considerations of a promise be void merely, the other will support the promise; but that if one of two considerations be unlawful, the promise is void. When, however, for a legal consideration, a party undertakes to do one or more acts, and some of them are unlawful, the contract is good for so much as is lawful, and void for the residue. Whenever the unlawful part of the contract can be separated from the rest it will be rejected, and the remainder established. But this cannot be done when one of two or more considerations is unlawful, whether the promise be to do one lawful act, or two or more acts, part of which are unlawful."

This exception to the general rule has become well established in Ohio, so that in executory contracts where there can be a severance of the void or the illegal part, according to the above rules, so that the void or illegal part can be separated from the valid part, the valid part may be enforced, but if the legal and illegal parts of the promise are inseverable, the entire contract fails. The rule for determining as to the divisibility of a void or illegal contract, is set forth in Section 167 of Ohio Jurisprudence, Volume 9. "The test in determining whether

one transaction is independent of the other, is whether the case for the plaintiffs can be made out without the medium of either the illegal contract or the illegal consideration; if the right can be so established, then the agreements are severable and the plaintiff may recover." While the contract with this Library Association might be termed ultra vires and illegal, yet, it is severable under the above rules and it would seem that that part of the contract which had been executed and provides for the furnishing of free library service to the people of Erie County in consideration of the sum of \$6,000.00 is enforceable.

Section 3 of the Articles of Incorporation of the Library Association of Sandusky reads as follows:

"Third: The purpose for which the corporation is formed is the establishment of a free library, the books of which shall be accessible to the members and to aid by such means as may be in its power, to increase of a larger free intellectual life in the community."

Article II of the Constitution of the said Library Association reads as follows:

"The purpose for which this association is formed is the establishment and maintenance in the City of Sandusky of a free public library and reading room, for the dissemination of knowledge and the promotion of a broader and freer intellectual life in said city; and, so long as the Commissioners of Erie County, Ohio, shall contribute to the maintenance of said library under contract with said association, shall also be free for the use of all the inhabitants of said county; always subject to such reasonable rules and regulations as the Board of Trustees of said Association from time to time may adopt."

Section 10 of Section 8623-8, General Code, provides that the articles shall constitute an agreement by the directors and officers with the corporation that they will confine the acts of the corporation to those acts which are authorized by the statement of purposes and within such limitations and restrictions as may be imposed by the articles. Section 146 of Ohio Jurisprudence, Volume 10, states that a by-law is defined as a rule of a corporation for its government; the term is used to designate the orders and regulations which the corporation as a legal entity, has power to make and by which it governs its own actions and concerns and the rights and desires of its members among themselves. Section 605 of the same text, states:

"It is said that the power of a corporation depends on its charter, and the laws of the state where it is organized; that all corporations hold their origin and existence to legislative enactments."

In Ohio, the charter of a corporation consists of the laws under which it is incorporated and organized and the general corporation act, and other laws to which it is subject and the articles of incorporation filed by the incorporators. Formerly, the powers and authority of Ohio corporations were construed with the greatest strictness. Section 607, 10 Ohio Jurisprudence, states:

"The modern doctrine is to consider corporations as not only having such authority as is specially granted by the act of incorporation, but also such as is necessary for the purpose of carrying into effect the powers expressly granted. In other words, corporations, in addition to

the powers expressly granted, have by necessary implication power to do whatever is necessary to carry into effect those granted, and to accomplish the purpose of their creation, unless the particular act is forbidden by the law or charter. This rule is applied with a view of promoting the legitimate objects of the corporation, rather than with intent so to hedge it about as to obstruct the practical attainment of the corporate purposes, or embarrass the corporate business."

Section 608 of the same text, provides that:

"The articles of incorporation constitute a contract with the state that the corporation will not abuse or misuse the rights and privileges granted, and there is a further obligation, implied and not expressed, that the artificial being thus created will not go beyond the powers granted, and attempt to exercise other rights and privileges.

The chief ground upon which rests the principle that corporations are not permitted to contract beyond the legal limits of their powers are the interest of the public that the corporation shall not transcend the authority conferred upon it by law, and the interest of the stockholders that the company and its property shall not be subjected to risks not provided for in its charter, and not contemplated or undertaken by them when they subscribed for the company's stock."

The charter of said Library Association provides for the establishment of a free library and not a chain of libraries nor such a library as would have power to aid and assist other libraries in the community. The constitution also provides for the establishment of a library in the City of Sandusky and provides for its free use to the residents of Erie County. The wording of the charter and the constitution does not indicate any intention of the officers or members of the association that the purpose of the library should include the establishment of a chain of libraries throughout Erie County nor of the library aiding and assisting financially or otherwise, other libraries which may be located in the county.

The Legislature has seen fit to provide for the establishment of district libraries in other sections of the General Code but has not extended the authority of ordinary local libraries to aid and assist other libraries in the county.

However, there appears to be no statute law which inhibits the distribution of the books of this particular library to the people of the county through the aid and assistance of the schools or other libraries of the county, the title and ownership of the books thus distributed remaining in the parent library and the distribution being made under its rules and regulations.

Answering your second question specifically, "Can such library under said section and section 2455 G. C. contract with both the city of Sandusky and the county of Erie for library services under said sections, or does the contract under section 2455 preclude a contract with the city of Sandusky?", it is my opinion that the Library Association of Sandusky, Ohio, is not prevented by Section 2455 General Code, from contracting with the county of Erie for the use of said library for the people of Erie County under said section subsequent to its having contracted with the City of Sandusky for like services for the City of Sandusky.

Specifically answering your third question as follows: "Can the funds be turned over to the library association upon a requisition of the board of trustees of the association, certified to by its president and secretary, or does

section 2976-15 mean to have the fund remain in the county treasury and paid out only upon appropriation by the county commissioners under the provisions of section 5625-29 G. C.?", it is my opinion that Section 2976-15, General Code, does not apply in this particular case, this section having been enacted subsequent to the organization and operation of the library by the Library Association of Sandusky, Ohio, and the entering into the contract with the City of Sandusky and the County of Erie, which contracts with the City of Sandusky and the County of Erie provided for a special sum to be paid for the maintenance of this library, would require the taxing authorities to make the necessary appropriation as provided for by Section 5625-29, General Code. The payment of these sums would, however, be made direct to the Library Association of Sandusky, Ohio.

In specific answer to your fourth question, "If it is to be paid out upon appropriation, or otherwise, have the county commissioners the authority to designate in the contract that said library shall furnish to each school district juvenile books for the use in such school districts, or in other words are the commissioners only empowered to contract with the library free library service for the inhabitants of the county, and the manner or mode shall be within the discretion of the trustees of the library association?", it is my opinion that the county commissioners have authority only to contract for free library service for the inhabitants of the county, the manner and mode of furnishing such service being within the discretion and control of the trustees of the Library Association, such Association being a private association and having the control and management of said library.

Specifically answering your fifth question, "Is the enclosed contract legal as entered into by the county commissioners with the library association?", and your sixth question, "If portions of said contract are illegal, are other portions thereof binding, or is it to be regarded as an entire contract and the whole contract void?", it is my opinion that the contract entered into on January 2, 1924, by the Library Association of Sandusky, with the board of county commissioners of Erie County, Ohio, is illegal and ultra vires for the reasons already stated. But that part of the contract which has been executed and provides for the free use of said library for all the residents of Erie County, is enforceable under the exceptions to the rule that ultra vires acts or contracts are void.

Question Number Seven is answered in my opinion to Question Number Two.

Specifically answering your eighth question, "Can the county commissioners designate in their contract with the association that such association shall establish a branch at each of the above named libraries, to wit: Milan Library, Berlin Heights Library and The Vermilion Library, and leave said local libraries to designate what books they desire to have placed therein or must such question be left to the contracting library?", it is my opinion that the board of county commissioners of Erie County, Ohio, are without authority of law to provide in their contract with the Library Association of Sandusky, Ohio, for the establishing of a branch of said library at the Milan Library, Berlin Heights Library and the Vermilion Library.

Specifically answering your ninth and tenth questions, "Would the contracting library have authority to expend any of the money so received from the county by appropriation or otherwise by issuing a warrant in favor of each local library for so much money, leaving the local library board the power to administer such money so paid to them?", and "Can the contracting library establish branches thereof in each of the local libraries, and contribute towards the expenses of such local library?", it is my opinion that the Library Association of Sandusky,

Ohio, is not clothed with sufficient authority to enable it to establish branches throughout Erie County nor to permit it to aid and assist financially or otherwise other libraries in the county.

Respectfully,
 JOHN W. BRICKER,
Attorney General.

833.

CITY COUNCIL—MEMBER MAY NOT SERVE AS TRUSTEE OF COUNTY CHILDREN'S HOME—ACCEPTANCE OF LATTER AUTOMATICALLY TERMINATES FORMER—OPINION NO. 1187, Vol. 1, page 636—1918 OPINIONS OF ATTORNEY GENERAL AFFIRMED AND FOLLOWED—PUBLIC OFFICE AND PUBLIC EMPLOYMENT DISTINGUISHED.

SYLLABUS:

1. *A city councilman may not hold the public employment of trustee of a county children's home at the same time.*
2. *A member of a city council who accepts the public employment of trustee of a county children's home, ipso facto forfeits his office of city councilman. Second paragraph of syllabus of Opinion No. 1187, rendered May 4, 1918, reported in Opinions of the Attorney General for 1918, volume 1, page 636, affirmed and followed.*

COLUMBUS, OHIO, May 17, 1933.

HON. PAUL V. WADDELL, *Prosecuting Attorney, St. Clairsville, Ohio.*

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

“As Prosecuting Attorney there has been brought to my attention the matter of the appointment of a member of a city council being appointed as a member of the board of trustees of the County Children's Home.

May I have an opinion from you as to whether or not the holding of these two offices is incompatible under section 4207? Would also like to have your opinion as to whether or not the acceptance of the job as member of the board of trustees of the County Children's Home automatically forfeits the office of city councilman to which he was duly elected. The position of trustee of the County Children's Home pays no salary.

P. S. We note that township trustee and trustee of County Children's Home are compatible. Ohio Attorney General Opinions, Vol. 1, 1930, page 650. This seems very similar to our situation.”

I shall assume that the city involved in your request has no charter. Section 4207, General Code, mentioned in your communication, reads as follows: