Upon consideration of the home rule provisions of the Constitution, in the light of the many and varied decisions of courts on the subject, I am of the opinion that the administration of municipal government in this State must be conducted in the manner provided for by general laws, until a new delegation or distribution of the powers granted to municipalities is made by charter provision which it may adopt, although there are some expressions of the Supreme Court which would seem to support the opposite view.

It is therefore my opinion, in specific answer to your question, that it is not within the power of the council of a non-charter city to create by ordinance a municipal air port board to control the operations of the municipal air port and administer the affairs of the municipality with reference thereto, the Legislature having provided by general laws that all public utilities in cities should be managed and supervised by the Director of Public Service, and in villages by a Board of Trustees of Public Affairs.

Respectfully,
GILBERT BETTMAN,
Attorney General.

827.

RAILROAD COMPANIES—STREET, SUBURBAN, INTERURBAN AND STEAM—EFFECT OF AMENDMENTS IN HOUSE BILL NO. 22.

SYLLABUS:

Effect should be given to the provisions of Sections 5472, 5473, 5477 *and* 5478, *General Code, as amended by House Bill No. 22, enacted by the 88th General Assembly, in reporting and determining the gross earnings of each street, suburban or interurban railroad company and of each railroad company for the year ending June* 30, 1929, *for the purposes of ascertaining the measure upon which the excise taxes imposed by Sections* 5484 *and* 5486, *General Code, are to be charged by the Auditor of State; and said public utilities are not required to report or pay excise taxes on earnings accruing from the operation of busses operated by said public utilities during said year.*

COLUMBUS, OHIO, September 4, 1929.

The Tax Commission of Ohio, Wyandotte Building, Columbus, Ohio.

GENTLEMEN:—This is to acknowledge receipt of your recent communication, which reads as follows:

> "Referring to House Bill No. 22 which was passed at the last session of the Legislature and which bill amends Sections 5472, 5473, 5477 and 5478 of the General Code, relating to the excise tax on street, suburban and interurban railroad companies and railroad companies, your opinion is requested upon the following:
>
> This bill was approved by the Governor on April 25th and becomes effective on this date, July 24th.
>
> Under the provisions of Sections 5472 and 5473, street, suburban and interurban railroads and steam railroads make report of their entire gross earnings, including all sums earned or charged whether actually received or not, for the year ending on the thirtieth day of June.

Under the provisions of Section 5477, the commission shall on the first Monday of October ascertain and determnie the gross earnings of each railroad company for the year ending June 30th and under the provisions of Section 5478 the commission shall on the first Monday of October ascertain and determine the gross earnings of each street, suburban and interurban railroad company for the year ending June 30th.

On June 30th, 1929, the date as of which street, suburban and interurban railroad companies and steam railroads make report and which report is for the year ending on the 30th day of June next preceding, the above mentioned House Bill 22 was not effective, but on the first Monday of October, as of which date the commission must ascertain and determine the gross earnings of street, suburban and interurban railroad companies and steam railroad companies for the year ending on the 30th day of June next preceding, the above-mentioned House Bill 22 is effective.

Will you kindly advise us at your earliest possible convenience whether street, suburban and interurban railroad companies and steam railroad companies which operate busses in connection with the operation of the interurban railroad, street railroad, suburban railroad or steam railroad company as a part of the utility must report the earnings derived from the operation of the busses in the report to be made to the Tax Commission for the year 1929 which report is for the year ending on the 30th day of June next preceding, *and*

Will you kindly advise whether the commission in making its determination on the first Monday of October must include the earnings derived from the opreation of the busses, *and*

Will you kindly advise whether the said street, suburban and interurban railroad companies and steam railroad companies will be required for the year 1929 to pay the excise tax upon the earnings derived from the business of carrying and transporting persons or property, or both, as a common carrier for hire in motor propelled vehicles not operated or driven on fixed rails or track, which earnings under the provisions of the above-mentioned bill are excluded."

The sections of the General Code referred to in your communication relate to the excise taxes imposed upon street, suburban or interurban railroad companies, and upon railroad companies, as public utilities, respectively, by Sections 5484 and 5486, General Code; and said sections of the General Code amended by House Bill No. 22, likewise referred to in your communication, form in part the procedure provided by law for ascertaining and determining the amount of the excise tax on each of such public utilities subject to such excise tax.

Section 5470, General Code, provides that each street, suburban and interurban railroad and railroad company, shall, annually, on or before the first day of September, under the oath of the person constituting such company, if a person, or under the oath of the president, secretary, treasurer, superintendent or chief officer in this state, of such association or corporation, if an association or corporation, make and file with the commission a statement in such form as the commission may prescribe. It is provided by Section 5471, General Code, that such statement shall contain the information therein prescribed as to the name and nature of the company, the location of its principal office and the names and postoffice addresses of the officers of the company therein mentioned. Section 5472, General Code, prior to its amendment by House Bill No. 22 provided that in the case of each railroad company, such statement should also contain the entire gross earnings of the company, including all sums earned or charged, whether actually received or not, for the year ending

on the 30th day of June next preceding, from whatsoever source derived, for business done within the state, excluding therefrom all earnings derived wholly from interstate business or business done for the federal government; and that such statement should also contain the total gross earnings of such company for such period in this state from business done within this state. Section 5473, General Code, before its amendment by said act, made the same provisions as to the statement to be filed by each street, suburban and interurban railroad company. Section 5477, before its amendment by said House Bill No. 22, provided that on the first Monday of October, the Tax Commission shall ascertain and determine the gross earnings of each railroad company whose line is wholly or partially within the state, for the year ending on the 30th day of June next preceding, excluding therefrom all earnings derived wholly from interstate business or business done for the federal government, and that the amount so ascertained by the Tax Commission should be the gross earnings of such railroad company for such year. Section 5478, General Code, before its amendment by said act, made the same provisions with respect to the ascertainment of the gross earnings of each street, interurban or suburban railroad company for the year ending on the 30th day of June next preceding.

Section 5484, General Code, provides as follows:

> "In the month of November, the Auditor of State shall charge, for collection from each street, suburban and interurban railroad company, a sum in the nature of an excise tax ,for the privilege of carrying on its intra-state business, to be computed on the amount so fixed and reported to him by the commission as the gross earnings of such company on its intra-state business for the year covered by its annual report to the commission, as required in this act, by taking one and two-tenths per cent of all gross earnings, which tax shall not be less than ten dollars in any case."

Section 5486, General Code, applicable to railroad companies, is identical in its provisions with Section 5484, General Code, above quoted, except that the excise tax imposed upon each railroad company is four per cent of its gross earnings as computed by the Tax Commission for the year covered by its annual report. From the statutory provisions above noted, read in connection with those of Section 5417, it is quite clear that each street, suburban and interurban railroad company and each railroad company is required to report all of its gross earnings from the intra-state business done by it under its corporation powers, not expressly excluded, whether such earnings are from the operation of the utility itself or from any other business done by it. *Sandusky Gas and Electric Co.* vs. *State,* 114 O. S. 479. The amendatory provisions of Sections 5472 and 5473, as enacted by said House Bill No. 22, require that there shall be excluded from the statement or report required of said public utilities respectively by Sections 5472 and 5473, General Code, in addition to all earnings derived wholly from interstate business or business done for the federal government, "all earnings derived from the business of carrying or transporting persons or property, or both, as a common carrier for hire in motor propelled vehicles not operated or driven on fixed rails or track;" and likewise by the amendment of Sections 5477 and 5478, General Code, there are excluded from the consideration of the Tax Commission in determining the gross earnings of said respective public utilities, all earnings derived from the business of carrying and transporting persons or property, or both, as a common carrier for hire in motor propelled vehicles not operated or driven on fixed rails or track.

The question presented in your communication is whether the amendatory provisions, carried into Sections 5472, 5473, 5477 and 5478, General Code, by the amendment of said sections in said House Bill No. 22, apply to reports or statements to be

hereafter filed by said public utilities on or before September 1, 1929, with respect to the gross earnings of said public utilities for the year ending June 30, 1929, and to the determination to be made by the Tax Commission on October 1, 1929, with respect to the gross earnings of said public utilities for said year. House Bill No. 22 was passed April 6, 1929, approved by the Governor April 25, 1929, and filed in the office of the Secretary of State April 27, 1929. Although the sections of the General Code amended by this act relate to the matter of excise taxes imposed on street, suburban and interurban railroad companies and on railroad companies and provide the means for ascertaining the measure by which such taxes are ascertained and imposed by Sections 5484 and 5486, General Code, said sections do not in themselves provide for tax levies within the terms of Section 1d of Article II of the State Constitution which provides that "laws providing for tax levies * * * shall go into immediate effect;" and House Bill No. 22, amending said Sections 5472, 5473, 5477 and 5478 of the General Code did not, therefore, go into effect until July 26, 1929. However, said act and the sections of the General Code amended thereby are now in effect, and the amendatory provisions of said sections will apply to the statement or report hereafter to be filed by each street, suburban and interurban railroad and by each railroad company under the provisions of Sections 5472 and 5473 respectively of the General Code, as to the gross earnings of said respective public utilities for the year ending June 30, 1929, unless it can be said that the application of the amendatory provisions in Sections 5472 and 5473, General Code, to the reports of said respective public utilities as to the gross earnings for the year ending June 30, 1929, would give such amendatory provisions a retroactive operation and effect in violation of Section 28 of Article II of the State Constitution which provides that "the General Assembly shall have no power to pass retroactive laws." The same observation may be made with respect to the application of the provisions of Sections 5477 and 5478, General Code, as amended, to the determination by the Tax Commission of the gross earnings of said public utilities for the year ending June 30, 1929.

If the excise taxes imposed by Sections 5484 and 5486 were taxes on the gross earnings of each street, suburban and interurban railroad company, and on each railroad company during the year ending June 30, for the privilege of doing business as a public utility during such year, and if the effect of the amendment of the sections of the General Code here under consideration were to increase the taxes to be paid by each such public utility on its gross earnings accruing out of business done by it in the year ending June 30, 1929, there is no question but that such operation of the amended statutes would be retroactive in its nature within the inhibition of the constitutional provision above quoted. *Safford* vs. *Insurance Co.*, 119 O. S. 332; *Airway Electric Appliance Corp.* vs. *Archer,* 279 Fed., 878, 881; *Dodge* vs. *Nevada National Bank,* 109 Fed. 726, 730; 48 C. C. A. 626; *Smith* vs. *Dirckx,* 283 Mo. 188; 11 A. L. R. 510; *Metz* vs. *Hagerty,* 51 O. S. 521. However, it seems clear that the excise taxes imposed upon each street, suburban and interurban railroad company, and upon each railroad company by Sections 5484 and 5486 respectively of the General Code are not assessed on the gross earnings of such public utilities for the year ending June 30, 1929, for the privilege of doing business during said year, but that the gross earnings of such public utilities during the year ending June 30 'are used as a measure of the privilege to be enjoyed during the succeeding year, which is the thing taxed." *Opinions of Attorney General,* 1918, Vol. 1, 707, 709; *Annual Report of Attorney General,* 1914, Vol. II, 1697. In the case of *Express Co.* vs. *State,* 55 O. S. 69, the court having under consideration the excise tax act of May 14, 1894, 91 O. L. 237, and responsive to the contention of the Express Company that "the act should not be construed, and cannot constitutionally be construed, as authorizing an assessment on the gross receipts for the year ending May 1, 1894", in its opinion in this case, said: "The tax is not laid on the gross receipts for the year 1894, but those receipts

are taken as the standard by which to determine the amount of excise tax to be paid for doing business in the state for the year 1895."

The question presented in your communication calls for a consideration and determination of the further question as to what constitutes a retroactive law within the meaning of Section 28 of Article II of the State Constitution, in its application to a situation such as is here presented. In the case of *Miller* vs. *Hixson, Treasurer,* 64 O. S. 39, it was held:

> "A statute which imposes a new or additional burden, duty, obligation or liability, as to past transactions, is retroactive, and in conflict with that part of Section 28, Article II of the constitution which provides that 'The General Assembly shall have no power to pass retroactive laws'."

In the case of *Safford* vs. *Insurance Co.,* supra, it was held:

> "A statute which creates a new obligation in respect to transactions or considerations already past is violative of Article II, Section 28 of the state constitution, which forbids the enactment of retroactive laws by the General Assembly."

The Supreme Court further held that:

> "To so interpret and apply Section 5433, General Code, as amended May 11, 1927 (112 O. L., 429), increasing the tax upon business done by foreign insurance companies in this state from 2½ to 3%, as to exact such additional tax for the privilege of doing business in 1926, would render such provision retroactive in effect."

The court further in its opinion in this case said:

> "The power of taxation conferred upon the legislative branch of the government is broad and comprehensive, but even such legislation is included within the limitation imposed by the constitutional provision expressly denying the power to pass retroactive laws. The terms 'retroactive' and 'retrospective' are synonymous, and are used interchangeably. The definition of that term announced by Justice Story has been heretofore approved by this court in *Rairden* vs. *Holden, Admr.,* 15 Ohio St., 207, and *Commissioners* vs. *Rosche Bros.,* 50 Ohio St., 103, 33 N. E., 408, 19 L. R. A., 584, 40 Am. St. Rep., 653. It is as follows:
>
> 'Every statute which takes away or impairs vested rights, acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective.'
>
> As attempted to be enforced by the Superintendent of Insurance, the amended law would exact an increased charge of one-half of one per cent for the privilege of doing business during the previous year, a privilege fully exercised and enjoyed, and for which the price to be charged had been fixed and announced in advance. A law which provided for the exaction of an additional automobile license fee for the preceding year would be quite analogous, and surely no one would contend that such would not fall within the class of retroactive legislation. To add such new additional charge for a privilege subsequent to the expiration of the period covered thereby would clearly be unfair and unjust, and legislation of that character has frequently

been held invalid, or operative only prospectively, by the courts of those states which have a constitutional provision such as ours forbidding legislation retroactive in character; and in those states having no such constitutional inhibition a retroactive effect is not given a law unless required by its terms.

The amended act before us with the increased privilege tax applied as proposed would clearly result in creating 'a new obligation * * * in respect to transactions or considerations already past' and render the same invalid. Support for our conclusion that such application of the statute is violative of the constitutional inhibition against retroactive laws, and therefore invalid, may be found in the following decided cases in this state: *Douglass* vs. *City of Cincinnati,* 29 Ohio St., 165; *Spangler* vs. *City of Cleveland,* 35 Ohio St., 469; *City of Cincinnati* vs. *Seasongood,* 46 Ohio St., 296, 21 N. E., 630; *Metz* vs. *Hagerty, Aud.,* 51 Ohio St., 521, 38 N. E., 11; *Miller* vs. *Hixson, Treas.,* 64 Ohio St., 39, 59 N. E., 749. In the opinion of the case last cited, at page 51 (59 N. E., 752), is language quite pertinent to the case in hand:

'The General Assembly having the power to enact laws, and * * * having enacted laws with certain limitations, and persons having conformed their conduct and affairs to such state of the law, the General Assembly is prohibited, estopped, from passing new laws to reach back and create new burdens, new duties, new obligations, or new liabilities not existing at the time.'"

However, with respect to the question presented in your communication, it is obvious that the operation of the amendatory provisions of Sections 5472, 5473, 5477 and 5478, General Code, excluding earnings of a street, suburban or interurban railroad company or of a railroad company accruing out of the business of transporting persons or property by motor vehicles in determining the gross earnings of such public utilities for the year ending June 30, 1929, as a measure of the tax to be charged against such public utilities by the Auditor of State under the provisions of Sections 5484 and 5486, General Code, will be to reduce the amount of excise taxes which would otherwise be chargeable against such public utilities. The amendatory provisions of these sections of the General Code do not come within any possible definition of the term "retroactive laws". The only effect of such amendatory provision, if applied in determining the gross earnings of such public utilities for the year ending June 30, 1929, will be to impair the right of the State to excise taxes which would be otherwise collectible from such public utilities; but this result does not work any violation of the constitutional provision against the enactment of retroactive laws. In 12 Corpus Juris, at p. 1087, it is said that, "The state may constitutionally pass retroactive laws, impairing its own rights, and may impose new liabilities with respect to transactions already past on the state itself." Or, as stated in 6 Am. and Eng. Ency. of Law, p. 940, "The state may constitutionally pass retrospective laws impairing her own rights." This is only another way of saying that a statute the only retrospective operation and effect of which is to impair rights of the state itself, is not a retroactive law within the meaning of the constitutional provision inhibiting the enactment of such laws.

It follows therefore that effect should be given to the provisions of Sections 5472, 5473, 5477 and 5478, General Code, as amended by said House Bill No. 22, in reporting and determining the gross earnings of each street, suburban or interurban railroad company and of each railroad company for the year ending June 30, 1929, for the purpose of ascertaining the measure upon which the excise taxes imposed by Sections 5484 and 5486, General Code, are to be charged by the Auditor of State under the authority of said sections last above mentioned. By way of specific answer to

your questions as the same are stated in your communication, I am of the opinion that each and all of the same should be answered in the negative.

Respectfully,
GILBERT BETTMAN,
Attorney General.

828.

DISAPPROVAL, BONDS OF CITY OF NILES, TRUMBULL COUNTY, OHIO—$9,122.50.

COLUMBUS, OHIO, September 4, 1929.

Re: Bonds of City of Niles, Trumbull County, Ohio, $9,122.50.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—The transcript of proceedings relative to the above issue of bonds discloses the fact that the ordinance authorizing these bonds was passed July 6, 1929. This ordinance provides that these bonds shall mature annually beginning April 1, 1930.

Under the provisions of Section 2293-12, General Code, the first installment of these bonds should be not earlier than September 1, 1930, nor later than August 1, 1931. The notice of the sale of these bonds published pursuant to the provisions of Section 2293-28, General Code, set forth the maturities as provided in the bond ordinance. Pursuant to such notice the bonds were sold and after their award the council passed a resolution reciting that the date of the first installment of these bonds was erroneous and that therefore bond No. 1 of the issue in the amount of $1,000.00 authorized to mature April 1, 1930, "be and the same is withdrawn from the sale and is ordered to be mutilated and destroyed." This resolution further provides that the remainder of the issue in the amount of $8,122.50 be delivered to the purchaser, leaving bond number 2 as the first installment due April 1, 1931.

The action of council subsequent to the sale of these bonds amounts to not only a change of first maturity after advertisement and sale, but also a change of the principal amount of the issue after advertisement. The legal notice published pursuant to the provisions of Section 2293-28, General Code, provided for the sale of bonds in the amount of $9,122.50, maturing serially beginning April 1, 1930. There has been no compliance with the provisions of Section 2293-28, General Code, relative to bonds in the amount of $8,122.50, maturing serially beginning April 1, 1931. Notwithstanding this fact, it appears that your commission has purchased bonds in the amount of $9,122.50. In view of the above, I am accordingly compelled to advise you not to purchase these bonds.

Respectfully,
GILBERT BETTMAN,
Attorney General.