complain because it is required to secure the public against an unauthorized use of those powers. If it should not desire to meet the requirements imposed upon trust companies, it need not organize as such. It ought not to require the superintendent of banks to determine each time it exercises a trust function that it has a deposit up, or insist that whenever it completes the trust it may withdraw its deposit. Such course would require constant supervision which to my mind is a strong argument in favor of the conclusion which I have reached.

Respectfully,
JOHN G. PRICE,
Attorney-General.

966.

STATE DEPARTMENT OF HEALTH—HUGHES AND GRISWOLD ACTS CREATING CITY HEALTH DISTRICT BOARDS OF HEALTH ABOLISHED MUNICIPAL BOARDS OF HEALTH ESTABLISHED PRIOR TO PASSAGE OF SUCH ACTS.

The Hughes and Griswold acts (house bills 211 and 633), creating city health district boards of health, abolished municipal boards of health established prior to the passage of such acts under section 4404 G. C.

COLUMBUS, OHIO, January 28, 1920.

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

GENTLEMEN:—Acknowledgment is made of the receipt of your recent request for the opinion of this department as follows:

> "We are enclosing you herewith copy of ordinance, which the council of the city of Newark contemplate passing, and are quoting from a letter from the clerk of council of Newark, as follows:
>
> 'I am enclosing an ordinance we wish to pass. Our solicitor says that under house bill 633 (Griswold act) all city boards of health cease to be unless re-appointed by the mayor. Is this a fact? * * * Can we under the new law appoint a new board and can we have all new appointments made, such as clerk, food inspector, sanitary officer, etc. Can I get the information by Thursday so the ordinance may be passed on the 19th. * * *'
>
> We have written the clerk of council that this is a deep question which will require a written opinion, and we respectfully ask a written opinion in answer to his questions."

The questions raised by your correspondent, involves the status of city boards of health and their employes, established under section 4404 G. C., prior to the passage of the Hughes and Griswold acts, so-called, by the present general assembly.

The former act is found in 108 O. L. (part 1), 236, being designated as sections 1261-16 et seq., 1245 et seq., and 4404 et seq. It was passed April 17, 1919, and became effective in part August 12, 1919, while section 29, the repealing section, became effective January 1, 1920.

The latter act (H. B. 633) was passed December 18, 1919, as an emergency measure and was filed in the office of the secretary of state January 2, 1920, at which time it went into effect.

Preliminary to a particular consideration of section 4404, and to obtain the proper

perspective in construing it, it is deemed advisable to consider the history and purpose of this and other related sections. The protection and promotion of public health intimately concerns the public welfare and to that end, at an early date, the state, in the exercise of its police power, delegated some of its power to municipal corporations and townships, providing for the creation of municipal and township boards of health, which boards were a part of the municipal and township government, and to which in a large measure was committed the matter of local sanitation subject to certain powers reserved to the state through the instrumentality of the state board of health.

As stated by the supreme court in Board of Health against Greenville, 86 O. S., 25,

> "In granting to a municipality certain powers to be exercised for the benefit of the public health of that municipality the state has not relinquished its authority and control of this important particular over any of the territory comprised within the limits of the state. * * * The health of the inhabitants of the city is still a matter of concern to the state and of such vital concern that the general assembly has not thought proper to commit it exclusively to the control and discretion of men who may or may not have any particular ability or experience in sanitary affairs."
>
> * * *
>
> At the risk of digression, this opinion may be further quoted as indicating that the changed social and business conditions referred to later have been noted by the courts:
>
> "Cities are no longer enclosed by stone walls and separate and apart from the balance of the state. The sanitary condition existing in any one city of the state is of vast importance to all the people of the state, for if one city is permitted to maintain unsanitary conditions that will breed contagious and infectious diseases, its business and social relation with all other parts of the state will necessarily expose other citizens to the same diseases."

Section 4404, since the adoption of the municipal code, is found in chapter 2, relating to municipal boards of health, and, prior to the enactment of the Hughes law read as follows:

> "The council of each municipality shall establish a board of health, composed of five members to be appointed by the mayor and confirmed by council who shall serve without compensation and a majority of whom shall be a quorum. The mayor shall be president by virtue of his office. But in villages the council, if it deems advisable, may appoint a health officer, to be approved by the state board of health who shall act instead of a board of health, and fix his salary and term of office. Such appointee shall have the powers and perform the duties granted to or imposed upon boards of health, except that rules, regulations or orders of a general character and required to be published, made by such health officer, shall be approved by the state board of health."

It may be noted here that the council is authorized and directed to establish a municipal board of health. It is common knowledge that in many municipalities, with the increase and congestion of city population, the matter of sanitation was neglected and under the strain of unusual epidemics, the health administration was inefficient and from time to time additional statutes were enacted to secure greater efficiency in such matters, as pointed out in the Greenville case, above referred to.

Examples of this are found in sections 4406 and 1249 et seq. 4406 provided that if the council failed for sixty days to establish such board of health, the state board

could step in and appoint a health officer. Sections 1249 et seq. provide for action on the part of the state board with reference to the improvement and extension of water works in certain cases where the municipal board of health refuses or fails to act.

In 1912 the municipal home rule amendment was adopted as sections 1 to 14 of article 18. Section 3 of that article is as follows:

> "Municipalities shall have authority to exercise all powers of local self government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

In the case of State ex rel. Toledo vs. Lynch, 88 O. S., 344, 345, the court holds that the determination of which officer shall administer the government of a municipality and which one shall be appointed and which elected, is local and municipal in character. In this case the court quoted with approval the holding in the case of State ex rel. Duniway vs. City of Portland, 133 Pac. Rep., 62, where it is said:

> "Municipal elections and the choice of municipal officers, are matters of purely municipal concern, and, as to these, the people of the city have ample power to legislate, subject only to the restrictions heretofore noted."

No amendment of section 4404 was made after the adoption of the home rule amendment until the acts now under consideration, and it may be questioned if the effect of this adoption was probably that section 4404 was no longer operative where charter cities created other agencies, performing the functions of a municipal health board. In view of the holding of the court in the Greenville case, as to the character of the function of the state board of health under modern conditions, it may be questionable if in all its phases the sanitation of a municipality can be said to be entirely local. However, it is deemed unnecessary to further discuss or finally decide this question.

The Hughes act was intended as a comprehensive health code, introducing some new features in health administration and making radical changes in the former laws; the state no longer dealt with municipalities, as such, directly, but created municipal health districts whose boundary lines were the same as the municipalities. This is evidenced by the first sentence of section 1261-16, which shows the division of the state and the purposes for the division, in this language:

> "For the purpose of local health administration, the state shall be divided into health districts."

All cities having a population of 25,000 or over constituted municipal health districts, while the municipalities and townships outside such municipal health district constituted a general health district for each county. Provision was made, however, for municipalities between ten and twenty-five thousand population becoming a separate health district, when in the opinion of the state department of health it is

> "furnishing * * * a sanitary administration equal to that to be provided in the district under the provisions of this act."

Provision was also made for the union of a municipal health district and a general health district into a joint district, subject to the approval of the state commissioner of health of the working agreement for health administration in such joint district. After such union the board of health of the municipal health district within the combined area was to perform all the duties required of a general health district board of health. So that under this provision, in case of such union, the territorial jurisdiction of the municipal health district board was increased.

It is thus apparent that all cities were not affected alike by this act. The board of health established in old section 4404 was a municipal board, while the board created and to be established by the Hughes act, was a municipal health board. In the division of the state for health purposes, the district was made the unit and city and county lines were adopted for its territorial definition.

What might be termed a new quasi-political subdivision was created somewhat analogous to school districts, or, so far as a city of the required population was concerned, it might be said that it then had a dual interlocking capacity. It constituted a municipal health district and its city council was empowered to establish a municipal health district board of health, while the duty and method of raising the necessary funds for this health district was not changed by the act, showing the interdependent character of the district and the municipality. The idea of separate identity is further indicated by the fact that by section 1261-38 the treasurer and auditor of the city are specifically designated as the treasurer and auditor of the health district.

Section 4404, as contained in the Hughes act, reads:

> "The council of each municipality constituting a municipal health district, shall establish a board of health, composed of five members to be appointed by the mayor and confirmed by the council who shall serve without compensation and a majority of whom shall be a quorum. The mayor shall be president by virtue of his office. Provided that nothing in this act contained shall be construed as interfering with the authority of a municipality constituting a municipal health district, making provision by charter for health administration other than as in this section provided."

It must be noted here that the subject of the first sentence of this section is changed from "the council of each municipality." as it was before, to "the council of each municipality *constituting a municipal health district,*" but the rest of the statute is the same excepting the provision for charter municipalities making different provisions for health administration. Original section 4404 was repealed and there was no saving clause with reference to existing municipal boards of health. The effect of the repeal of a statute in the absence of constitutional limitations or saving provisions, is, as stated in 36 Cyc., 1234, "as if it had never existed and of putting an end to all proceedings under it." However, where the effect is practically that of amending the original section repealed, the matter of the old statute carried into the new statute suffers no break in its continuity, so there is no magic in the name which the legislature may give to the new act, whether it is termed an amendment or repeal that will defeat an otherwise evident intention. The question then is, was it the intention to abolish the municipal boards of health? Technically it would seem that such was the intention. The new board is not a municipal board, but a municipal district board There can now be no such body known as the municipal board of health.

That a distinction between the district board of health and the old municipal board of health existed in the legislative mind, is evidenced by this language in section 1261-15:

> "The district board of health *hereby created* shall exercise all the powers and perform all the duties now conferred and imposed by law upon the board of health of *a municipality.*"

The language used here, "the district board hereby created," to distinguish from the old board, cannot be overlooked, nor is this all; it continues "and all such powers duties, procedures * * * shall be construed to have been transferred to the district board of health by this act." Here is a distinction not merely in name, but a transferring from and divesting of the old board of all its powers and duties. Nor

can it be said that the old board was appointed by a municipality constituting a municipal health district, for at the time of their appointment it was not such a municipality because it did not and then could not constitute such a district. It should be noted, however, that the appointing power, the duties and qualification of the board, so far as this section goes, are the same. It must be remembered also that in this new scheme of health administration old section 4404, as it stood originally, had to be materially changed because of the classification of cities and to conform with the home rule amendment provisions.

Leaving section 4404 for the present, other sections of the act may be considered. Section 4405 had provided for the state to appoint a health officer if the city council failed to appoint a board of health. This provision is carried into the new act in this language:

> "If any such municipality fails or refuses to establish a board of health."

Here the reference is to "such municipality," that is, a municipality constituting a municipal health district, as provided in the preceding section. It is suggested that the words "constituting such district" mean such a municipality constituting such a district at the time the act went into effect.

Some idea of the prospective operation of the organization part of the new act is shown in reference to organization of municipal health districts in section 1261-39 in this language:

> "When any general or municipal health districts have been duly organized as provided by this act."

Other changes may be pointed out and roughly grouped under two heads:

1. The increase of state control, and
2. Additional powers conferred on district boards.

Under the first head we have:

(a) The power of the state commissioner of health to initiate charges against the members of "the board of health of a * * * municipal health district" and power given the public health council to remove members of such board. See section 1261-25.

(b) The state commissioner of health must approve the contract for joint health administration in cases of union, as provided in section 1261-20.

(c) The contract for furnishing laboratory service to a district board of health by section 1261-27 must be approved by the state commissioner of health.

(d) By section 1261-28 the district board must use due diligence in carrying out the orders and regulations of the state department of health in connection with the quarantine and prevention of the diseases therein referred to.

(e) Section 24 provides for a subsidy from the state to the district in an amount equal to one-half the amount paid by the district board of health for certain purposes. This subsidy is entirely contingent upon the approval of the state commissioner of health.

(f) In section 1261-43 the state department of health is authorized to provide for annual conferences of district health commissioners and to compel their attendance at a school of instruction to be conducted by the state department of health at Columbus, at the expense of the health district.

Under the second head we have:

(a) Increased power and authority granted by section 1261-26, whereby it is made the duty of each district board of health "to study and record the prevalence of disease within its district; * * * to provide for the medical and dental supervision of school children * * *, to provide for the inspection of schools, public institutions, * * * correctional and penal institutions * * * hotels and other places where food is manufactured * * * sold or offered for sale, and for the medical inspection of persons employed therein;".

(b) In section 1261-27 provision is made for carrying on of laboratory work.

(c) In section 1261-28 authority is given for providing for the free treatment of certain diseases and the establishment and maintenance of clinics for such purpose.

(d) Section 1261-33 authorizes the district board to establish detention hospitals for cases of communicable diseases and to provide for the support and maintenance thereof.

(e) Provision is made in section 1261-29 for the free distribution of antitoxin for the treatment of diphtheria and for the establishment of sufficient distributing stations to render such antitoxin readily available in all parts of the district."

Without quoting further from this act, it is deemed sufficient to state that the accumulated effect of the changes referred to lead to the belief that it was the intention in this act to make radical changes in the health administration of the state and that municipal health boards were abolished and municipal health district boards created in their place.

In the Griswold act the Hughes act was amended as to classification of cities and in other minor matters. The Griswold act was passed as an emergency, the emergency being stated in section 4 of the act to exist "by reason of the fact that under a recent decision of the supreme court of the state the present health laws of this state are probably in conflict with the constitution, and further by the fact that existing sanitary laws cannot be enforced by reason of the financial situation in many taxing districts and the public health will be endangered by failure to *provide immediately a system of health protection.*"

However, despite the legislative expression that the Hughes act was probably unconstitutional, it must be remembered that until a law is judicially determined and declared to be unconstitutional, it stands as a valid law

Probability falls short of the degree of certainty as to the unconstitutionality of the law that is required, as stated by the supreme court in Miami County vs. Dayton, 92 O. S., 216:

> "Before a court is warranted in declaring a legislative act unconstitutional, it must clearly appear that the statute is obviously repugnant and irreconcilable with some specific provision or provisions of the constitution. If there be a reasonable doubt as to such conflict, the statute must be upheld."

Section 4404 in this last act reads:

> "The council of each city *constituting a city health district,* shall establish a board of health, composed of five members to be appointed by the mayor and confirmed by the council, to serve without compensation, and a majority of whom shall be a quorum. The mayor shall be president by virtue of his office. Provided that nothing in this act contained shall be construed as interfering with the authority of a muncipality constituting a muncipal health district, making provision by charter for health administration other than as in this section provided."

While as pointed out the legislative expression as to the probable uncertainty of the Hughes act is not conclusive on that question, but is to be considered merely as a statement of the emergency, yet it should also be borne in mind that the essential features of the Hughes act, above pointed out, are in the main carried into the Griswold act and the decision of the supreme court, referred to in the emergency clause, viz., the city of Elyria vs. Vandemark, case No. 16301, decided September 9, 1919, bearing entirely on the effect of classification of cities by population on the uniform operation of law, provision in the constitution, shows that one of the purposes, if not the main purpose, was to amend the Hughes law in this particular, viz., that no classification of cities was attempted. However, it does appear clear that while the infirmities of the Hughes act were considered, there was no disposition to abandon the principal ideas of the Hughes bill and restore the old municipal health boards.

Considering the history, character and purpose of these last two acts, and after careful examination of all of their sections, the conclusion is reached that their effect was to abolish municipal health boards and in place thereof to create and have established district health boards.

It is noted that the further question is asked as to the status of the appointees under the old boards, but it is believed that in view of the necessity for an early determination of the question already discussed, this question may properly be made the subject of a separate opinion.

Respectfully,
JOHN G. PRICE,
Attorney-General.

967.

APPROVAL, TRANSCRIPT OF PROCEEDINGS FOR SALE OF OHIO CANAL LANDS IN CITY OF NEWARK, LICKING COUNTY, OHIO.

COLUMBUS, OHIO, January 28, 1920.

HON JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—Receipt is acknowledged of your letter of January 22nd, enclosing, in duplicate, transcript of the proceedings of your department with respect to sales of the following Ohio canal lands in the city of Newark, Licking county, Ohio:

(a) 12048 sq. ft., more or less, sold to the Midland Shoe Company; appraisement $1,986; selling price, 1,490.

(b) Tract lying between north line of Church street in the city of Newark and south line of first alley north of said street and parrallel thereto, sold to Harry D. Baker and George R. Baker; appraisement $2,053.33; selling price $1,540.

I have carefully examined your proceedings as shown by the transcript and find the same correct and in accordance with law, and I am, therefore, returning the duplicate copies with my approval of the two sales attached.

Respectfully,
JOHN G. PRICE;
Attorney General.