In view of what has been said herein, I entertain considerable doubt as to the soundness of said court opinion to the effect that an ordinance of a permanent nature may not be passed with the aid of the mayor in case of a tie vote by members of council. Sections 4224 and 4255, hereinbefore referred to, were enacted in the same form in the same act, in so far as the question being considered herein is concerned, by the 75th General Assembly in an act to provide for the organization of cities, villages, etc., 96 O. L. 20. However, in the opinion of the Attorney General, found in Opinions, Attorney General, 1925, page 563, and cited in the 1928 opinion of the Attorney General hereinbefore mentioned, it was held in substance that the village mayor cannot cast the deciding vote when the votes of the members of council tie upon a resolution or ordinance of the village when such action involves the expenditure of money. That opinion proceeds upon the theory, apparently, that there may be certain actions that can be taken by resolution in which a mayor may cast the deciding vote in case of a tie. Said opinion pointed out that when a contract is involved, the same should be authorized by ordinance, which undoubtedly affected the conclusion reached. It is apparent that the two sections may be harmonized by holding, as was held in *Wuebker* vs. *Hopkins, supra,* that in certain cases where action is taken not of a permanent character, a mayor may cast the deciding vote in case of a tie, and in other cases where ordinances are required to be passed to disclose the action of council on matters of a permanent nature, etc., a mayor may not cast the deciding vote.

Former decisions of the courts and rulings of the Attorney General are not in accord upon the question, and in view of the specific holding of the court in the case above mentioned, it is believed that the same should be followed unless and until some equal or higher authority has given a different expression upon the subject.

Based upon the foregoing, it is my opinion that:

1. When the council of a village casts a tie vote upon a resolution or ordinance involving the employment of an attorney and fixing his compensation under the provisions of Section 4220 of the General Code, the mayor of such village may cast the deciding vote.

2. Under the authority of the case of *Wuebker* vs. *Hopkins,* 29 O. App. 386, when council takes action of a general or permanent nature, the same should be done by ordinance, and a majority of council must concur therein, and in case of a tie the mayor cannot cast the deciding vote.

Respectfully,
GILBERT BETTMAN,
Attorney General.

293.

EASEMENT—GRANTED TO ELECTRIC LIGHT COMPANY BY STATE OFFICER WITHOUT STATUTORY AUTHORITY— INVALID—NO ESTOPPEL TO DENY VALIDITY IN ABSENCE OF RATIFICATION BY LEGISLATURE.

SYLLABUS:

Where an officer or agent of the state without statutory authority therefor assumes to grant to an electric light and power company the right, easement and privilege of erecting a transmission line and the necessary poles and fixtures thereof in and across lands of the state under the control and management of such officer or agent,

in consideration of the agreement of such electric light and power company to furnish without charge electric light and power for the use of an activity of the state likewise under the control and management of such officer or agent, such agreement is invalid for want of power on the part of such officer or agent to enter into the same on behalf of the state, and for the reason that there is no consideration supporting the agreement of the electric light and power company to furnish without charge such electric light and power; and in the absence of a ratification of such agreement by the Legislature the other party to such agreement is not estopped to deny the validity of the same.

COLUMBUS, OHIO, April 11, 1929.

HON. HAL H. GRISWOLD, *Director of Department of Public Welfare, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your recent communication which reads as follows:

"Under date of January 22, 1929, you transmitted to this department a contract made between your predecessor, Edward C. Turner, and the Mutual Electric Company of Athens, requesting that I certify the copy to the Auditor of State. I do not understand from the law the exact status of the proposed certification. This department has had nothing whatever to do with the making of the contract and therefore has no knowledge of any facts to which it could certify. There is a further question with relation to this contract upon which I would like your legal advice.

It appears that while legislation was pending authorizing the execution of this contract the Mutual Electric Company by some sort of arrangement with the superintendent of the institution entered upon the grounds and erected its lines. Under date of May 3, 1923, before the law became effective the company wrote to Dr. Berry, Superintendent of the Athens State Hospital, as follows:

'With reference to the high tension transmission line which we contemplate building across the State Hospital Farm in accordance with the terms and provisions of Senate Bill No. 7, passed in the last session of the Legislature, we understand that an agreement will be entered into covering the occupancy of said premises by this company, as soon as the statutory period has elapsed.

During the term of said agreement, we will furnish without charge sufficient electrical energy to operate the motors and lighting equipment at the dairy barn on said farm, provided, however, that we will not be required to furnish any capacity in excess of 25 K. W. Said energy is to be 2300 volt, 3 phase, 60 cycles.'

From that date until the present the Mutual Electric Company has been furnishing power and light according to this agreement.

Kindly advise me, first: Was the agreement entered into between Dr. Berry and the company and subsequently put into effect by both parties a valid and binding agreement. Second: Does the fact that the company has received the entire consideration from this agreement now estop it from setting up any lack of authority on the part of Dr. Berry that might have existed at the time of the agreement. Third: In case the agreement is now enforceable will the execution of the proposed agreement as submitted relieve the Mutual Electric Company from its obligation under the original agreement.

The terms of the letter of May 3, 1923, seem to be absolutely unequivocal. The company now seems to be under the impression that this agreement to furnish light and power referred only to the interim between the date when the lines were constructed and the date when the contract authorized by the law had been consummated."

Amended Senate Bill No. 7, referred to in your communication was an act passed by the General Assembly under date of March 19, 1923, 110 O. L. 273, granting to the Mutual Electric Company and to its successors and assigns, the right and privilege to construct, operate and maintain an electric transmission line in, upon and across said lands of the state located in Athens Township, Athens County, Ohio, the same being lands owned and used in connection with the Athens State Hospital. By the terms of said act the rights and privileges therein provided for were to be formally granted to the Mutual Electric Company, its successors and assigns, by deed or other proper instrument to be signed by the governor; and the consideration for the grant of said right and privilege was to be such sum of money as might be agreed upon by the Mutual Electric Company and the Attorney General. Said Amended Senate Bill No. 7 upon its enactment was filed in the office of the Secretary of State, April 19, 1923, and became effective July 18, 1923.

From a communication relating to the above matter directed to this department by one J. B. P., general manager of the Southern Ohio Electric Company, successor in name and interest to the Mutual Electric Company, under date of July 31, 1928, it appears that after the passage of said act the Mutual Electric Company desiring to construct said transmission line in and over the lands of the state before the effective date of said act, said J. B. P., the general manager, made application for permission so to do to the director of public welfare, who by virtue of his office had control of the Athens State Hospital and the lands connected therewith. From this communication it appears that the Director of Public Welfare was not willing to grant this permission unless the Mutual Electric Company would contract to furnish free electric service to the dairy barns connected with the Athens State Hospital; that said J. B. P. was not willing to enter into this agreement on behalf of his company, but owing to the insistence of the Director of Public Welfare and the existence of circumstances making it necessary for the Mutual Electric Company to get said transmission line installed at the earliest possible date, said J. B. P. was constrained to enter into said agreement, which was evidenced by a proposition made by him as general manager of the Mutual Electric Company to Dr. John H. Berry, Superintendent of the Athens State Hospital under date of May 3, 1923, which proposition was in words and figures as stated in your communication.

Pursuant to this agreement the transmission line of the Mutual Electric Company was set up and installed in, upon and across the Athens State Hospital lands and in accordance with said agreement the Mutual Electric Company and its successor, the Southern Ohio Electric Company, has from August 21, 1923, up to the present time, furnished electricity to the Athens State Hospital for use in lighting the dairy barns at said institution and operating motors therein used.

No deed has yet been executed granting said easement, right and privilege to the Mutual Electric Company or to its successors or assigns, nor was any agreement entered into by and between the Mutual Electric Company or its successor, the Southern Ohio Electric Company, and the Attorney General, with respect to the amount to be paid to the State of Ohio as the stated consideration for the grant to said company or its successor, of the right and easement to establish said transmission line in and upon said lands, until the execution of the contract between my predecessor, Hon. Edward C. Turner, and the Southern Ohio Electric Company, under date of January ——, 1929, which contract I forwarded to you under date of January 22, 1929, with the request that you certify a copy of the same to the Auditor of State as required by the provisions of the act above referred to.

The first question presented in your communication is one with respect to the validity of the contract evidenced by the proposal of the Mutual Electric Company to Dr. John H. Berry, and which was subsequently put into effect by the parties. As to this question, I have no hesitation in holding that said contract and agreement

was wholly invalid by reason of the total lack of authority on the part of the Director of Public Welfare or the Superintendent of the Athens State Hospital to make the same. Although said Amended Senate Bill No. 7 granting to the Mutual Electric Company and to its successors and assigns the right to establish and maintain this transmission line upon execution and delivery of the governor's deed therefor, had been passed, said act was not in effect; and no rights accrued to said company under the same at the time it entered into the agreement to furnish free electric service for use at the dairy barns of the Athens State Hospital.

An act of the Legislature speaks and operates only from the time when, under the constitution or the terms of the act itself, the same becomes effective as a law. *The Patterson Foundry & Machine Company* vs. *The Ohio River Power Company,* 99 O. S. 420.

It is entirely clear that no officer or agent of the state has any power to grant any rights, easements or privileges in lands of the state to any person for private advantage unless the right to do so has been expressly conferred by law. *State ex rel.* vs. *Railway Company,* 37 O. S. 157, 174.

Nor, as I see fit, is the invalidity of said contract as against the state affected by way of estoppel or otherwise by the fact that the same was acted upon by the parties. Before an estoppel to assert the invalidity of a contract of a public officer arises, it must appear that some benefit has been received or detriment incurred by the other party in reliance upon a contract executed under *apparent power. Rogers* vs. *City of Cincinnati,* 10 Ohio Appeals, 238.

In the case of *City of Mount Vernon* vs. *The State of Ohio ex rel. Berry,* 71 O. S. 428, 448, it was said that: "It may be accepted as the law that there can be no estoppel where there is an entire absence of power."

In this case it is quite clear that there was not any apparent power or authority upon the part of the Director of Public Welfare or the Superintendent of the Athens State Hospital to enter into this contract. This being true, no rights whatever can be asserted against the state, by reason of said contract. And said contract being invalid as against the state in the absence of a ratification thereof upon its part, the same is likewise invalid as against the other party.

As was said by the court in the case of *Portland Cement Company* vs. *Oregon Paving Company,* 33 Ore. 307, 321: "The contract is invalid by reason of the lack of power to enter into it, and, if invalid as to one of the contracting parties, it is also invalid as to the other."

See also Dillon on Municipal Corporations (5th Ed.) Vol. II, Secs. 791, 792.

Although the contract here in question was invalid by reason of the want of authority of the officers and agent of the state to make the same, said invalid agreement was and is one that the state could ratify and thereby make effective as beween the state and the Mutual Electric Company.

In the case of *State* vs. *Executor of Buttles,* 3 O. S. 309, 322, the court in its opinion said:

> "When the agents of the state exceeded their authority, the state had its option to ratify their acts or repudiate the contract they had made in its name; but when it elected to ratify, it assumed all the obligations of the contract from its inception, and was entitled to all its benefits. If the state could have lawfully made the contract at the time and under the circumstances it was made, it could lawfully adopt the one made in its name by those who assumed to act as its agent."

Further in its opinion the court in this case said:

> "In short, any contract that an individual, or body corporate or politic,

may lawfully make, they may lawfully ratify and adopt, when made in their name without authority; and when adopted, it has its effect from the time it was made, and the same effect as though no agent had intervened."

In this connection it appears to be quite clear that no action has been taken by the State of Ohio ratifying the agreement here in question.

In the case of *Yeager* vs. *Tuning,* 79 O. S. 121, it was held:

"The right of an owner of an estate to erect and maintain, or to cause to be erected and maintained, a line of telephone poles over the estate of another for the benefit of the former is an easement. An easement can be created only by deed or prescription."

It thus appears that what the Director of Public Welfare and the Superintendent of the Athens State Hospital assumed to confer upon the Mutual Electric Company when they gave said company the right and privilege of constructing its transmission lines in and across the lands of the State of Ohio at the Athens State Hospital was an easement, an interest in real estate which can be granted only on the authority of the Legislature itself. Inasmuch as only the Legislature of the state had the power to grant this authority in the first instance, it alone could ratify the agreement here in question. Touching this point, the court in the case of *The State* vs. *Executor of Buttles,* supra, which was an action by the State of Ohio on a writing obligatory executed by one Joel Buttles and seven other persons to secure the repayment of $100,000 loaned without authority by the Ohio Canal Fund Commissioners to the Columbus Insurance Company, said:

"It is proper, however, we should say, that this contract could have been ratified only by the General Assembly. That body alone had power to have made the loan, at the time it was made, and to have bound the state by the contract; and the ratification of a contract already made, requires no less power. No officer or agent could have done it, because no officer or agent could have made the contract."

If we had before us an action in which the State was attempting to enforce in a court of law or equity the agreement here in question, the presumption would arise from the fact that such action was instituted that the State had ratified said agreement. *State* vs. *Executor of Buttles,* supra. This presumption would not be conclusive, and it would still be open to The Southern Ohio Electric Company as the successor of the Mutual Electric Company, to show that the agreement had not been ratified by the Legislature, the only authority of the State competent to ratify such an agreement.

By way of specific answer to the first question presented in your communication, I am of the opinion that upon the considerations above noted and discussed, the agreement here in question is invalid as against The Mutual Electric Company and its successor, The Southern Ohio Electric Company, as well as against the state.

In this connection it is to be noted that neither the Director of Public Welfare nor the Superintendent of the Athens State Hospital at the time of said agreement possessed or controlled any valuable right in the property of the state at said institution which they or either of them could confer upon The Mutual Electric Company as a consideration for its agreement to furnish free electric current for use at the dairy barns of said institution; and said agreement is likewise invalid as a contract for this reason.

In this respect the case here presented is identical in principle with that under

consideration in the case of *Farmer et al.* vs. *The Columbiana County Telephone Company, 72* O. S. 526. In that case the city of Salem assumed to grant to one Thayer, the assigner of the telephone company, the right to construct telephone lines along the streets and public ways of the city, by and through an ordinance of the council of said city, which ordinance provided for the maximum rates to be charged subscribers for telephone service and further provided for certain free telephone service to be furnished by said Thayer, his successors or assigns. The ordinance was accepted by Thayer; and thereafter the system of telephone lines and a telephone exchange was constructed and operated by the telephone company as the successor and assigns of said Thayer. For a period of time the telephone company operated in accordance with the provisions of the ordinance as to the telephone rates to be charged subscribers and as to free telephone service to be furnished under said ordinance. Thereafter the telephone company having refused longer to furnish telephone service at the rates provided in said ordinance or to furnish the free service therein provided for, an action was commenced by certain subscribers as well as by the city for a mandatory injunction compelling and requiring the telephone company to comply with the provisions of the ordinance as to the rates to be charged by it and as to the free service to be furnished by said telephone company.

The Supreme Court held that inasmuch as the telephone company obtained its right and power to construct its telephone lines along the streets and public ways of the city by grant of authority therefor by the Legislature, the city of Salem had no valuable rights in its streets and public ways which it could confer upon the telephone company or its assignor as a consideration for the agreement of the telephone company or its assignor to furnish telephone service at the rates prescribed in said ordinance, or to furnish the free service therein provided for.

The court further held that said telephone company was not estopped to question the validity of said contract either as against the telephone subscribers or the city of Salem. The court in its opinion in this case, among other things said:

> "It follows from what has preceded that the municipality possessed nothing in the way of a valuable right to bestow upon the company. Hence the promises of the company to do what it was not, and could not by the city be required to do, was a naked promise, without consideration. It therefore fails as a contract, and it is difficult to see how Farmer & Getz could take advantage of a nude pact to raise an estoppel, a pact to which they were in no wise parties, or privies in the eye of the law, and against a party with whom they had no contract or other legal relations whatever themselves. It seems reasonably clear that the petition of plaintiffs below did not state a cause of action."

With respect to the right of the city of Salem to maintain the action, the court in its opinion said:

> "Any attempt to obtain advantage to itself, by free service or otherwise, or to such portion of the public as might want to avail itself of the telephone service, was manifestly against the letter as well as the spirit of the statute, and cannot in law, or in equity, constitute a predicate for an estoppel. It asks to stand upon its own illegal contract, and asks a court of equity to compel the other party to stand upon and perform it. In other words, the city asks a court of equity to decree specific performance, by mandatory injunction, of a contract which, admittedly, it had no power to make, and which the statute forbids. As it seems to a majority of the court, the proposition cannot be maintained upon any established rule known to courts of equity."

If, in the case here presented, The Mutual Electric Company to serve some purpose of its own, had obtained this agreement by indirection, deceit or other element of estoppel, the defense of want of consideration for the agreement on its part to be performed, would not perhaps be available to it or to its successor in name and interest, The Southern Ohio Electric Company. There is nothing, however, in the fact and circumstances attending the making of this agreement which even remotely suggests any element of equitable estoppel or estoppel by conduct on the part of The Mutual Electric Company. And said company and its successor now maintaining and operating said transmission line are not estopped to claim that the agreement on the part of The Mutual Electric Company to furnish free electricity for use in the dairy barns at the Athens State Hospital was and is without consideration. *Macklin* vs. *Home Telephone Company,* 1 Circuit Court (N. S.) 373; 70 O. S. 507.

For this reason as well as for the reason that the State has not ratified said unauthorized agreement, your second question is answered in the negative.

The conclusions here reached with respect to the first and second questions presented in your communication, makes any consideration or discussion of your third question unnecessary.

With respect to the contract executed by and between the Attorney General and The Southern Ohio Electric Company fixing the compensation to be paid by the company for the privilege of constructing and maintaining its transmission lines in and upon the lands of the state, the Athens State Hospital, and which contract is now in your possession, your only duty in the premises is to certify the same to the Auditor of State as required by the act of the General Assembly above referred to.

Respectfully,

GILBERT BETTMAN,

Attorney General.

294.

TAX AND TAXATION—MOTOR VEHICLE LICENSE AND GASOLINE TAXES—DISCUSSION OF SPECIFIC AUTHORIZED AND UNAUTHORIZED USES OF MUNICIPALITY'S PORTION OF RECEIPTS.

SYLLABUS:

1. *The cost of posts and wire mesh for repairing safety fences along the sides of streets and roadways and the cost of repairing loading platforms constructed in streets for the use of street car passengers may be paid from the funds arising from the motor vehicle license and gasoline tax receipts.*

2. *The proceeds of such taxes may not be used for the purposes of cleaning streets or removing ice and snow.*

3. *The cost of removing right angle curbs at street intersections and installing circular curbs may properly be paid from said tax receipts.*

COLUMBUS, OHIO, April 12, 1929.

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

GENTLEMEN:—Acknowledgment is made of the receipt of your recent communication reading as follows:

"May a municipality's portion of the motor vehicle license and gasoline tax receipts be legally used for the following purposes: