

nesses qualified to testify. Obviously your board is in a much better position to decide this question than this department, whose decision would of necessity have to be based upon such information as the members of your board and other qualified experts could furnish.

If your board should determine that aspirin is a pharmaceutical preparation not similar to those classified in the fourth exception of Section 12707, *supra*, this department will of course cooperate in the preparation of the necessary evidence and will represent the state in a proper case should you see fit to prefer charges under the sections of the Code above set forth.

I have not commented on the first three exceptions contained in Section 12707, *supra*, because a discussion thereof is deemed unnecessary.

From what has been said in reply to your communication it is my opinion that :

1. The sale or dispensing of aspirin by one who is not a legally registered pharmacist or a legally registered assistant pharmacist employed in a pharmacy or drug store under the management or control of a legally registered pharmacist, constitutes a violation of Section 12706 of the General Code, (1) unless the defendant was a physician supplying his patient with such medicine, or (2) unless he was a retail dealer and aspirin is a patent or proprietary medicine, or (3) unless aspirin be a household remedy similar to the other preparations named in the fourth exception contained in Section 12707, General Code, and the aspirin sold was compounded by a legally registered pharmacist and put up and sold in bottles or boxes bearing the label of such pharmacist or a wholesale druggist, with the name of the article and directions for its use on each bottle or box.

2. Whether or not aspirin be a household remedy similar to the other preparations named in the fourth exception of Section 12707, General Code, is a question of fact to be determined from the evidence including the testimony of experts qualified to testify.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1047.

MUNICIPAL CORPORATION—MAY EXPEND PUBLIC FUNDS FOR
BUSSES—MAY SELL BONDS.

SYLLABUS:

A municipal corporation may expend public funds for the acquiring of busses to be used in the operation of a system of transportation for passengers or freight, within the municipality, and funds may be procured therefor by the sale of bonds subject to the same statutory requirements and limitations as is provided for and imposed upon the issuing of bonds for other municipal purposes, including Sections 2293-1 and 2293-2, General Code.

COLUMBUS, OHIO, September 23, 1927.

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

GENTLEMEN :—This will acknowledge receipt of your recent communication requesting my opinion, which reads as follows :

"Section 3939, G. C., as amended in House Bill No. 1, O. L. 112, provides that each municipal corporation, in addition to other powers conferred by law, shall have power to acquire, construct, etc. certain improvements. It will be noted that this section as amended does not provide that bonds may be issued.

Section 2293-2, G. C., as enacted in House Bill I, O. L. 112 reads:

'The taxing authority of any subdivision shall have power to issue the bonds of such subdivision for the purpose of acquiring or constructing any permanent improvement which such subdivision is authorized to acquire or construct. But no subdivision or other political taxing unit shall create or incur any indebtedness for current operating expenses, except as provided in Sections 2293-3, 2293-4, 2293-7 and 2293-24 of the General Code. The estimate of the life of permanent improvements proposed to be acquired, constructed, improved, extended or enlarged from the proceeds of any bonds shall be made in any case by the fiscal officer of the subdivision and certified by him to the bond-issuing authority and shall be binding upon such authority.'

On April 16th, 1926, by letter the Attorney General advised that:

'Acknowledgment is made of your communication inquiring whether a village by ordinance may authorize the purchase of a bus and employ a driver, etc., to be used for the transportation of school children and residents of the village.

Article VIII of the Constitution gives absolute and plenary powers to a village to either operate utilities or contract for public utility service. Such operation is excluded from the jurisdiction of the Public Utilities Commission.'

Question 1: May a municipal corporation expend its funds for the purpose of purchasing a bus to be used in transporting school children and citizens from place to place in the corporation?

Question 2: May a municipal corporation legally issue bonds for the purpose of providing funds with which to purchase a bus?"

Article XVIII, Sections 4 and 5 of the Constitution of Ohio respectively read in part as follows:

Section 4. "Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service
* * *"

Section 5. "Any municipality proceeding to acquire, construct, own, lease or operate a public utility, or to contract with any person or company therefor, shall act by ordinance and no such ordinance shall take effect until after thirty days from its passage. If within said thirty days a petition signed by ten per centum of the electors of the municipality shall be filed with the executive authority thereof demanding a referendum on such ordinance it shall not take effect until submitted to the electors and approved by a majority of those voting thereon. The submission of any such question

shall be governed by all the provisions of Section 8 of this article as to the submission of the question of choosing a charter commission."

Article XVIII, Section 12, reads as follows:

"Any municipality which acquires, constructs or extends any public utility and desires to raise money for such purposes may issue mortgage bonds therefor beyond the general limit of bonded indebtedness prescribed by law; provided that such mortgage bonds issued beyond the general limit of bonded indebtedness prescribed by law shall not impose any liability upon such municipality but shall be secured only upon the property and revenues of such public utility, including a franchise stating the terms upon which, in case of foreclosure, the purchaser may operate the same, which franchise shall in no case extend for a longer period than twenty years from date of the sale of such utility and franchise on foreclosure."

Sections 2293-1 and 2293-2, General Code, as contained in House Bill No. 1, enacted by the 87th General Assembly, provide in part as follows:

Sec. 2293-1. "This act shall be known as 'The Uniform Bond Act'. The following definition shall be applied to the terms used in this act:

* * * * *

(e) 'Permanent improvement' or 'improvement' shall mean any property, asset or improvement with an estimated life or usefulness of five (5) years or more including land and interests therein, and including reconstructions, enlargements and extensions thereof having an estimated life or usefulness of five years or more. Reconstruction for highway purposes shall be held to include the resurfacing but not the ordinary repair of highways.

(f) 'Current operating expenses' and 'current expenses' shall mean the lawful expenditures of a subdivision, except those for permanent improvements, and except payments for interest, sinking fund and retirement of bonds, notes and certificates of indebtedness of the subdivision."

* * * * *

Sec. 2293-2. "The taxing authority of any subdivision shall have power to issue the bonds of such subdivision for the purpose of acquiring or constructing, any permanent improvement which such subdivision is authorized to acquire or construct. But no subdivision or other political taxing unit shall create or incur any indebtedness for current operating expenses, except as provided in Sections 2293-3, 2293-4, 2293-7 and 2293-24 of the General Code. The estimate of the life of permanent improvements proposed to be acquired, constructed, improved, extended or enlarged from the proceeds of any bonds shall be made in any case by the fiscal officer of the subdivision and certified by him to the bond-issuing authority and shall be binding upon such authority."

The term public utilities has been variously defined. The term itself implies projects the products of which are for public use. It has been held that the furnishing of water, light, heat and amusement to a limited extent to the inhabitants of a municipality are such public uses as merit the expenditure of public funds therefor, the courts of some states going so far as to say that the construction and maintenance of public halls for public gatherings and the renting of them to such private concerns

as may desire to use them are in furtherance of a public purpose. Other courts have held that the construction and maintenance of opera houses, coal yards, brick plants and plumbing establishments are not such public enterprises as merit the expenditure of public funds.

It is said in *State, ex rel. vs. Toledo*, 48 O. S. 112, at page 134:

"It would be exceedingly difficult to lay down any general principle, or construct any formula, by which each case, as it arises, may be assigned to the one or the other side of the line. There are, however, certain objects, the promotion of which, by reason of their being treated as of general necessity, has been decided to be a public use or purpose. *Thus, it is now the well settled doctrine throughout the several states, that the business of public highways, turnpikes, bridges, canals, and other public means for travel and for the transportation of goods, are a public use within the constitution.* The objects and business of aqueduct and water-works companies, for the supply of cities and their inhabitants with water, are a public use. * * * The sewerage of a city is also held to be a public use." (Italics the writer's.)

Without enlarging on the elements that go to make an enterprise a public utility, it is sufficient to say that the transportation of passengers and merchandise by individuals or corporations is universally recognized as such a use as may constitute the object of a public utility, and that individuals or associations who use the public highways and hold themselves out as public carriers of passengers or freight are engaged in the operation of a public utility and as such are amenable to the laws and regulations applicable to a public utility.

It seems clear therefore that Article XVIII, Section 4, of the Constitution of Ohio authorizes municipalities to expend public funds for the acquiring of busses to be used in the operation of a passenger transportation system within its limits, and I concur in the views of my predecessor in office, set forth in his letter to you of April 16, 1926, referred to and quoted in your communication.

There are no statutory provisions authorizing or limiting the securing of funds by a municipality for the purpose of acquiring or operating a public utility other than the general provisions of law relating to the incurring of indebtedness and taxation. Such funds are to be secured in the same manner as funds necessary for the carrying out of any other proper activities of the corporation.

Authority is given by Section 2293-2, *supra*, to municipalities to issue bonds for the purpose of acquiring or constructing any permanent improvement as defined by the act. By virtue of this section bonds may be issued for the acquiring or construction of a public utility if the property to be acquired comes within the definition of a permanent improvement and such bonds may be issued either with or without a vote of the people if within the limitations of the net indebtedness of the corporation as defined in Section 2293-4, General Code. No bonds may be issued by a municipality for the payment of current expenses except as provided in Sections 2293-3, 2293-4, 2293-7 and 2293-24, General Code, none of which exceptions include such provisions as expenses incident to the operation of a public utility.

Mortgage bonds may be issued as authorized by Article XVIII, Section 12, of the Ohio Constitution, which bonds may be issued beyond the general limit of bonded indebtedness prescribed by law.

I am therefore of the opinion that:

1. A municipal corporation may expend its funds for the purpose of purchasing busses to be used in the transportation of its citizens within the corporation.

2. A municipal corporation may issue bonds for the purpose of providing funds with which to purchase busses to be used as a part of a transportation system within the municipality providing said busses come within the definition of a permanent improvement as defined in Section 2293-1 of the General Code, that is, if the estimated life or usefulness of such busses be five years or more.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1048.

BOARD OF EDUCATION—NO LIABILITY INCURRED AT OTHER THAN
DULY AUTHORIZED MEETING—CONTRACT OF EMPLOYMENT FOR
LEGAL SERVICES—SPECIFIC CASE.

SYLLABUS:

1. *No liability is incurred by a board of education by reason of action taken by the members of the board at other than a duly authorized meeting.*

2. *The provisions of Section 5660 and 5661, General Code, apply to a contract of employment by a board of education for legal services; and in the absence of compliance with the provisions of these sections, a board of education has no authority to pay attorney fees incurred by one of its members in defending an action for malicious prosecution instituted against him as an individual by one who had been prosecuted at the instance of the board member, even though the prosecution had been authorized by all the members of the board as individuals, and had grown out of the theft of school property under control of the board.*

COLUMBUS, OHIO, September 23, 1927.

HON. E. A. BROWN, *Prosecuting Attorney, Circleville, Ohio.*

DEAR SIR:—This will acknowledge receipt of your communication in which you request my opinion as to the liability of a rural board of education for attorney fees incurred by one of its members in employing an attorney to defend a suit for malicious prosecution instituted against him as an individual by a person who had been prosecuted for burglary on the affidavit of the board member against whom the suit for malicious prosecution was brought.

It appears that a garage on the school property had been broken into on several occasions and property belonging to the school had been stolen. Upon investigation, the members of the board had an informal meeting and authorized one of their number to lay the matter before the prosecuting attorney, who, acting on the information presented to him, prepared an affidavit which the board member signed, and one D. M. was arrested and bound over to the grand jury on the charge of burglary. It later developed that the information presented to the board was not entirely reliable and the grand jury failed to indict, whereupon suit for malicious prosecution was instituted against the board member and he was put to the expense of employing counsel to defend the suit.