ment and a certificate of lien filed under the provisions of Section 11656, General Code.

I am returning herewith the abstracts and instruments enclosed with your communication.

Respectfully,
HERBERT S. DUFFY,
Attorney General.

2777.

TAXES AND TAXATION — MUNICIPALITIES — OPERATING UNDER CHARTER OR GENERAL LAWS — MAY LEVY EXCISE TAX FOR POOR RELIEF IF STATE HAS NOT INVADED FIELD — CONSTITUTIONAL PROVISIONS — SURPLUS FUNDS OF MUNICIPALLY OWNED PUBLIC UTILITY MAY BE TRANSFERRED FOR POOR RELIEF — EXCEPTION — SURPLUS WATERWORKS FUNDS.

SYLLABUS:

1. *Municipalities, whether operating under charter or general laws, may levy excise taxes for poor relief purposes, providing the state has not invaded the field of such excise taxation.*

2. *The Constitution does not prohibit the General Assembly from authorizing municipalities to levy excise taxes or personal property taxes upon property not taxed by uniform rule according to value, when the state has invaded the field, but municipalities would be limited in the exercise of power so conferred in that such local taxes when added to any such state levies must have some reasonable relation to value of the right, privilege, franchise, or property so taxed.*

3. *Excepting surplus waterworks funds, which are required by Section* 3959, *General Code, to be used for waterworks purposes, surplus funds of a municipally owned public utility may be transferred for poor relief purposes under Sections* 5625-13a, *et seq., General Code. City of Niles vs. Ice Corp.,* 133 *O. S.* 169, *Ohio Bar, January* 24, 1938.

COLUMBUS, OHIO, August 1, 1938.

HON. FRED ELSASS, *Clerk, House of Representatives, Columbus, Ohio.*

DEAR SIR: This is to acknowledge receipt of your recent communication certifying to this office a copy of resolution of the House of Representatives requesting my opinion upon the following two questions:

"First, whether the legislative authority of a municipality, regardless of its form of government, has power under the constitution of the State of Ohio, to levy local taxes to raise funds for poor relief, if such taxation be confined to subjects, rights, privileges and interests not now taxed by the State of Ohio; and

Second, whether an act designed to enable the legislative authority of a municipality to levy local taxes for poor relief in fields already occupied or pre-empted by the State of Ohio, would be constitutional if enacted into law, especially in view of the pronouncement of the supreme court of Ohio, in the Cincinnati cases reported in volume 112, Ohio state reports, at page 493."

With respect to your first question, municipalities are defined as "subdivisions" within the meaning of the term as used in the Uniform Tax Levy Law (Section 5625-1, General Code). Section 5625-3, General Code, being one of the sections of such law, provides in the first sentence thereof as follows:

"The taxing authority of each subdivision is hereby authorized to levy taxes annually, subject to the limitation and restrictions of this act (G. C. §§5625-1 to 5625-39), on the real and personal property within the subdivision for the purpose of paying the current operating expenses of the subdivision and the acquisition or construction of permanent improvement."

Taxes levied for current operating expenses are included in the levy for current expenses, the purpose and intent of which is defined by Section 5625-5, General Code, as including "amounts required for the carrying into effect of any of the general or special powers granted by law to such subdivision * *". In view of the fact that municipalities are given the express power of affording poor relief by Sections 4089 to 4096, both inclusive, of the General Code, there is little doubt but that the legislative authority of a municipality under the present law may levy taxes on the "real and personal property" within such municipalities, subject to the limitations of the Uniform Tax Levy Law, for the purpose of poor relief.

Your first inquiry is predicated upon the condition that such taxation be confined to subjects, rights, privileges and interests not now taxed by the state and specifically you desire to know whether or not such power exists regardless of the form of government of the various municipalities. It is assumed that your inquiry is based upon the power of municipalities, either so-called home rule cities or those operating

under general laws, with respect to levying excise taxes where the state has not invaded the field. I base this assumption upon the fact that you refer to the taxation of rights, privileges and interests which customarily falls under the classification of excise rather than property taxation. It might be observed, however, in passing, that in so far as property which is taxed according to value is concerned, express authority is conferred upon municipalities to levy such taxes in and by Section 5625-3, supra, subject, however, to the constitutional ten mill limitation contained in Section 2, Article XII of the Constitution, as will hereinafter be more fully discussed. The matter of taxation of personal property which is not taxed according to value under the present laws, that is to say, intangible personal property, will be hereinafter discussed in consideration of your second question.

Coming then to the matter of distinction between municipalities operating under various forms of government in so far as their power to levy excise taxes is concerned, this question has been definitely adjudicated by the Supreme Court.

In the case of *State, ex rel.* vs. *Carrell,* 99 O. S. 220, the syllabus is as follows:

> "1. The State of Ohio, under the provisions of Section 10, Article XII of the Constitution, has authority to levy excise taxes in the form of an occupational tax.
>
> 2. Under the grant of power of local self-government provided for in Section 3, Article XVIII of the State Constitution, the City of Cincinnati, as long as the State of Ohio, through its general assembly does not lay an occupational tax on businesses, trades, vocations and professions followed in the state, may raise revenue for local purposes, through the instrumentality of occupational taxes.
>
> 3. The ordinance of the City of Cincinnati providing that an annual tax shall be laid upon all persons, associations of persons, firms, and corporations pursuing any of the trades, professions, vocations, occupations and businesses therein named, is a valid exercise of the legislative power of such city."

The foregoing case involved the power of a city which had adopted a charter under the so-called home rule provisions of the Constitution, but in the case of *Foundry Co.* vs. *Landes,* 112 O. S. 166, the court was concerned with the power of the City of Marion to levy an occupational tax imposed by ordinance enacted on the 10th of March, 1924, at which time such city was operating under general laws rather than under charter adopted pursuant to Article XVIII of the Constitution. In this case

the court applied and followed the principles laid down in the Carrell case, supra, thereby putting at rest any question as to differentiation between charter cities and non-charter cities. See also *Firestone* vs. *Cambridge*, 113 O. S. 57.

In view of the foregoing, it is my opinion that municipalities, whether operating under a charter adopted pursuant to Article XVIII of the Constitution of Ohio or otherwise, have authority to levy excise taxes to the extent that the state has not occupied the field by the imposition of a tax upon the subject, right or privilege sought to be so taxed locally.

Your second question is exceedingly broad in scope. Consideration will be given to this matter as applicable to the various forms of taxation.

It is believed that little comment is necessary as to the established authority of municipalities to levy taxes upon land and improvements thereon, as well as upon tangible personal property which under the present law is locally taxed according to value. Section 2, Article XII of the Constitution provides that "No property, taxed according to value, shall be so taxed in excess of one per cent of its true value in money for all state and local purposes. * * * " This ten mill limitation, generally speaking, is applicable, of course, to land and improvements thereon since such property is required by such Section 2, Article XII to be taxed by uniform rule according to value. This limitation is likewise applicable to any other property which is taxed according to value under authority of the legislature, such, for instance, as tangible personal property under our present scheme of taxation. It may, however, be observed that there is no constitutional mandate to the effect that personal property, whether tangible or intangible, shall be taxed either by uniform rule or according to value and it therefore follows in my judgment that should the General Assembly see fit to tax tangible personal property by some other rule than according to value, as is the case with intangible personal property, it must follow that the so-called ten-mill limitation contained in the Constitution would have no application.

I shall consider next the matter of the power of the General Assembly under the Constitution to authorize municipalities to levy excise taxes upon rights or privileges notwithstanding the fact that the state may have invaded the field by the levy of such taxes and provided for the distribution of the proceeds thereof in whole or in part among the various municipalities of the state.

The constitutional provisions which expressly recognize municipal power of taxation in general are Section 6 of Article XIII and Section 13 of Article XVIII. Section 6 of Article XIII provides as follows:

"The General Assembly shall provide for the organization of cities, and incorporated villages, by general laws; and restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent the abuse of such power."

This provision was, in substantially the same form, carried into the Constitution by amendment in 1912 in Section 13, Article XVIII, which reads:

"Laws may be passed to limit the power of municipalities to levy taxes and incur debts for local purposes, and may require reports from municipalities as to their financial condition and transactions, in such form as may be provided by law, and may provide for the examination of the vouchers, books and accounts of all municipal authorities, or of public undertakings conducted by such authorities."

In addition to the foregoing constitutional provisions, the courts have construed Section 3 of Article XVIII, authorizing municipalities "to exercise all powers of local self-government," as conferring the taxing power. This constitutional provision, however, as conferring the general power of taxation has been narrowly construed. In *State, ex rel.* vs. *Cooper,* 97 O. S. 86, the first three branches of the syllabus read as follows:

"1. Municipalities that have adopted charters under Section 7, Article XVIII of the Amendments to the Constitution, adopted September 3, 1912, have not the absolute and unrestricted power to levy taxes for local purposes.

2. The power of all municipalities to levy taxes may be limited or restricted by general laws. Such limitations or restrictions are warranted by Section 6, Article XIII, adopted in 1851, and by Section 13, Article XVIII of the Amendments adopted September 3, 1912.

3. Taxation is a sovereign function. The rule of liberal construction will not apply in cases where it is claimed a part of the state sovereignty is yielded to a community therein. It must appear that the people of the state have parted therewith by the adoption of a constitutional provision that is clear and unambiguous."

There is little question in my mind but that there is much force to

the contention that the courts will scrutinize closely any assumption of the power of taxation generally by municipal corporations in the absence of express legislative authority therefor, notwithstanding the fact that there was an absence of such authority for the levy of occupational taxes considered and upheld in the Carrell case, supra, as well as in subsequent decisions of the Supreme Court upon this point.

It becomes necessary, however, to give careful consideration to the basis for the limitation laid down by the Supreme Court in the Carrell case as to municipal power to levy excise taxes, to wit, that the state has not invaded the field. This point was discussed in the case of *Cincinnati* vs. *A. T. and T. Co.*, 112 O. S. 493, which affirmed and followed the Carrell case. The syllabus is as follows:

> "1. Sections 5483, 5485 and 5486, respectively, lay an occupational tax upon telephone companies, telegraph companies, and railroad companies.
>
> 2. The power granted to the municipality by Section 3, Article XVIII, of the Constitution of the State of Ohio, to lay an occupational tax in the exercise of its powers of local self-government, does not extend to fields within such municipality which have already been occupied by the state."

On pages 497, 498 and 499, the court speculated upon the bases for the decision of the Carrell case, but did not determine the same. The language is as follows:

> "Whether the court reached the decision that the levying of an excise tax upon an occupation by the state operated as a limitation upon the right of the municipality to levy an excise tax on the same subject, by analogy to the rule declared by the United States Supreme Court upon the interstate commerce clause of the federal Constitution, to the effect that, with reference to the subjects that are intrastate as well as interstate, a state may enact laws only so long as Congress fails to act, but that when Congress has legislated upon the subject the sovereignty of the state is superseded by the superior sovereignty of the United States, or whether the decision was arrived at upon the theory that the limitation exists because of the fact that Section 3, Article XVIII, grants to municipalities only such 'powers of local self-government * * * as are not in conflict with general laws,' and that when the state has enacted general laws, such as Sections 5483, 5485, and 5486, General Code, an ordinance attempting to tax an occupation for the

privilege of doing a thing for which the state has already taxed it is for that reason in conflict with general laws, or whether the court reached the conclusion that the enactment of Sections 5483, 5485, and 5486, General Code, operates as a restriction on the power of taxation by the municipality, under the provision of Section 6, Article XIII, of the Constitution, the opinion does not disclose.

It is sufficient to say that the decision in the Carrell case, supra, declaring the right of the municipality to levy an excise tax at all, was arrived at by an interpretation of the Constitution rather than by apt words therein found, and was then and since has been a subject of some doubt. That doubt having been resolved in favor of the power to the extent defined in that case, and that decision having been since approved and followed by this court in the case of *Globe Security & Loan Co.* vs. *Carrell, Aud.,* 106 Ohio St., 43, 138 N. E., 364, and the cases of *Marion Foundry Co.* vs. *Landes* and *Clawson* vs. *Landes,* 112 Ohio St., 166, 147 N. E., 302, it should now be regarded as the settled law of the state. The majority of this court are neither disposed to unsettle the law by overruling that case, nor to extend the power of municipalities in that respect by a further interpretation removing the limitation therein expressed."

Whatever view may be taken as the basis for the rule laid down in the Carrell case, which has been since followed and adhered to by the Supreme Court, the case is in no wise dispositive of the question of constitutional power vested in the legislature to authorize municipalities to levy taxes where the state has invaded the field. If, for instance, the Carrell case were to rest upon the theory that the state levy operates as an implied restriction upon municipalities so to do, it is perfectly apparent that the General Assembly could remove such implication by apt language. If the Carrell case were said to rest upon the theory that a state levy upon a certain privilege, for instance, would serve to render a local levy upon such privilege "in conflict with general laws" and hence beyond the home rule power, it is equally apparent that the General Assembly could by apt language dispel such conflict. Finally, if it were contended that municipalities are precluded from invading the field of excise taxes or taxes upon personal property not taxed according to value in cases where the state has preempted the field on the federal theory that the superior sovereignty supersedes the inferior, a consideration of federal authorities upon this point discloses no indication of lack of power in the General Assembly to authorize an invasion of the field by the inferior sovereignty in the absence of constitutional re-

striction. I find no such restriction in the Ohio Constitution and in the absence of constitutional restriction prohibiting double taxation of rights and privilages, as well as of property not required to be taxed by uniform rule according to value, it seems to be well established that double taxation by different authorities is not violative of any rights guaranteed by the Constitution, state or federal. In the case of *Carley and Hamilton* vs. *Snook,* 281 U. S. 66, 74 L. Ed. 704, the court considered the constitutionality of an act of the State of California imposing a tax on the operation of motor vehicles in that state wherein municipalities imposed so-called registration fees upon motor vehicles varying from five to forty-two dollars per motor vehicle which the court held to be in fact excise taxes on the privilege of operating motor vehicles. In the course of the opinion, speaking through Mr. Justice Stone, the court said:

> "The objection that the appellants should not be required to pay the challenged fees because they are already paying the city license tax is but the familiar one, often rejected, that a state may not, by different statutes, impose two taxes upon the same subject-matter, although, concededly, the total tax, if imposed by a single taxing statute, would not transgress the due process clause. See *Swiss Corp.* vs. *Shanks,* 273 U. S. 407, 413, 71 L. ed. 709, 713, 47 Sup. Ct. Rep. 393; *St. Louis Southwestern R. Co.* vs. *Arkansas,* 235 U. S. 350, 367, 368, 59 L. ed. 265, 273, 35 Sup. Ct. Rep. 99; *Shaffer* vs. *Carter,* 252 U. S. 37, 58, 64 L. ed. 445, 459, 40 Sup. Ct. Rep. 221; *Ft. Smith Lumber Co.* vs. *Arkansas,* 251 U. S. 532, 533, 64 L. ed. 396, 398, 40 Sup. Ct. Rep. 304."

There are other instances in which the Supreme Court of the United States has recognized double taxation not only by one and the same state but by two states upon identical property interests falling within the jurisdiction of both. In *Citizens National Bank* vs. *Durr,* 257 U. S. 99, 66 L. ed. 149, the court said:

> "Nor is plaintiff's case stronger if we assume that the membership privileges exercisable locally in New York enable that state to tax them even as against a resident of Ohio. (See *Rogers* vs. *Hennepin County,* 240 U. S. 184, 191, 60 L. ed. 594, 599, 36 Sup. Ct. Rep. 265). Exemption from double taxation by one and the same state is not guaranteed by the 14th Amendment. (*St. Louis Southwestern R. Co.* vs. *Arkansas,* 235 U. S. 350, 367, 368, 59 L. ed. 265, 273, 274, 35 Sup. Ct. Rep. 99);

> much less is taxation by two states upon identical or closely related property interests falling within the jurisdiction of both forbidden (*Kidd* vs. *Alabama,* 188 U. S. 730, 732, 47 L. ed. 669, 672, 23 Sup. Ct. Rep. 401; *Hawley* vs. *Malden,* 232 U. S. 1, 13, 58 L. ed. 477, 483, 34 Sup. Ct. Rep. 201, Ann. Cas. 1916C, 842; *Fidelity & C. Trust Co.* vs. *Louisville,* 245, U. S. 54, 58, 62 L. ed. 145, 148, L. R. A. 1918C, 124, 38 Sup. Ct. Rep. 40)."

An examination of Ohio authorities discloses no judicial pronouncements to the effect that the Ohio Constitution precludes double taxation except as to property required to be taxed by uniform rule, in which event the same taxing authorities appear to be precluded from exercising such power, but this principle is clearly not applicable under the present provisions of Section 2 of Article XII of the State Constitution to other taxation than that levied by uniform rule according to value upon land and improvements thereon or perhaps upon other property taxation based upon value. The text in 38 O. Jur. 895 and 896, is as follows:

> "Double taxation which, in a legal sense, does not exist unless a double tax is levied upon the same property within the same jurisdiction, is not permissible under a Constitution which requires equality and uniformity, and the Ohio Constitution requires both equality and uniformity. And in construing a tax law it will be assumed, at least until it is controverted, that the legislature did not intend to impose double taxation. Moreover, in a system like that in Ohio, where intangible as well as tangible property is taxed, 'some forms of double taxation are unavoidable; but the object should be—and such seems to have been the general aim of all our late legislation upon the subject—to avoid double taxation whenever it is practicable, and, as nearly as may be, to tax all according to their actual wealth.'"

In support of the statement contained in the footnote to the above text that there is no prohibition in the Ohio Constitution against double taxation as such, the case of *Braden* vs. *Senior,* 16 O. L. Abs. 193, 48 O. App. 255, affirmed 128 O. S. 597, is cited. While this case was reversed by the Supreme Court of the United States, 295 U. S. 422, 79 L. Ed. 1520, the reversal was upon other grounds.

Concluding as I do, in view of the foregoing, that the General Assembly of Ohio has constitutional power should it, in the exercise of its discretion, see fit to authorize municipalities to levy excise taxes, as

well as personal property taxes upon such personalty as is not taxed according to value, notwithstanding the fact that the state has invaded the field of such taxation, comment should be made upon the fact that such power could not be exercised by municipalities after having been so conferred by the General Assembly without regard or restriction as to the value of the privilege or franchise taxed in the case of excise taxes, nor could such power be exercised without regard to the value of the personal property taxed even though such property is not taxed by a rule according to value. A hard and fast rule as to the extent to which municipalities could exercise such powers under appropriate legislative authorization could not be laid down. It is sufficient here to direct attention to the language of the Supreme Court in the case of *Saviers* vs. *Smith,* 101 O. S. 132, wherein the court said at pages 136 and 137:

> "It is well settled that the provisions of Section 2, Article XII, are limitations upon the general power granted by Section 1, Article II, so that when it comes to taxing property it is required to be taxed by a uniform rule at its true value in money. But upon the power to tax privileges and franchises there is no express limitation in the constitution. However, in *Southern Gum Co.* vs. *Laylin,* supra, it was held that in the absence of an express limitation on the power of the general assembly to tax privileges and franchises such power is impliedly limited by those provisions of the constitution which provide that private property shall ever be held inviolate but subservient to the public welfare, that government is instituted for the equal protection and benefit of the people, and that the constitution is established to promote the common welfare; that by reason of these constitutional safeguards a tax on privileges and franchises cannot exceed the reasonable value of the privilege or franchise originally conferred or its continued annual value thereafter. The determination of such values rests largely in the general assembly, but finally in the courts. So that it may be said to be the settled law of this state that under our constitution when property is taxed it must be taxed at its true value in money, by a uniform rule, and when a privilege is taxed it is required that it should be taxed at its reasonable value. It would be wholly impracticable, if not impossible, to prescribe any general rule for the valuation of a franchise or a privilege. Therefore, the reasonable value in each set of circumstances should be fixed."

In addition to your request for my opinion herein above considered,

I have received a resolution from the House Taxation Committee requesting a written opinion upon the following three questions:

> "1. To what extent have the municipalities of the State of Ohio power to levy taxes for emergency poor relief either under existing statutes or by virtue of existing home rule charters?
>
> 2. Have the various municipalities, either under home rule charters or existing statutory provisions the right to use operating funds for emergency poor relief?
>
> 3. Have the municipalities the right to use surplus revenues from municipally owned public utilities for emergency poor relief?"

The first two questions submitted by the Taxation Committee are answered in my consideration of the questions submitted by House Resolution No. 183.

With respect to the power of municipalities to use surplus revenues from municipally owned public utilities for current operating expenses, which as above pointed out includes poor relief, this question is answered by the recent decision of the Supreme Court in the case of *City of Niles* vs. *Ice Corp.*, 133 O. S. 169, Ohio Bar January 24, 1938. The first and third branches of the syllabus are as follows:

> "1. The provisions of Section 5625-13a, General Code, relate to the transfer of funds of a political subdivision, whether tax-derived or not, and include, in their authorization to transfer, funds derived from the maintenance and operation of an electric light and power system, but do not apply to waterworks funds by reason of the provisions of Section 3959, General Code. (Paragraph 2 of the syllabus in the case of *City of Lakewood* vs. *Rees,* 132 O. S., 399, modified in part.)
>
> 3. Section 5625-13a, General Code, permitting political subdivisions to transfer 'any public funds under its supervision' to another fund, does not release municipal corporations from the limitations upon their taxing power, imposed by the Constitution."

Respectfully,

HERBERT S. DUFFY,

Attorney General.