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1. MUNICIPALITY — MAY NOT BY ORDINANCE OR RESOLUTION OF COUNCIL REQUIRE ITS WATER REVENUE FUND TO BE CHARGED ANNUAL SUM OF MONEY, COST OF GENERAL OVERHEAD SERVICE OF GENERAL OFFICERS, I. E., LAW DEPARTMENT, FINANCE DEPARTMENT, ETC., OR PROBABLE COST OF RENTAL OF OFFICE SPACE, HEAT, LIGHT, ETC. — SECTION 3959 G. C.

2. MUNICIPALITY MAY PAY OUT OF WATERWORKS' REVENUES INTO MUNICIPAL TREASURY REASONABLE VALUE OF OFFICE SPACE, HEAT AND LIGHT, FURNISHED TO DEPARTMENT BY CITY — PART OF NECESSARY EXPENSE TO CONDUCT AND MANAGE WATERWORKS — SECTIONS 280, 3959 G. C.

SYLLABUS

1. Under the restrictions imposed by Section 3959, General Code, a municipality may not through ordinance or resolution of council require that the water revenue fund of such municipality be charged an annual sum of money representing the cost of general overhead service performed by the general officers, such as the law department, finance department, etc., and including the probable cost of rental of office space, heat, light, etc.

2. A municipality may, consistent with Section 3959, General Code, and pursuant to the provisions of Section 280, General Code, out of the revenues of its waterworks pay into the municipal treasury the reasonable value of office space and heat and light therefor, furnished to the water department by the city, such expenditures being a part of the necessary expense of conducting and managing the waterworks.

Columbus, Ohio, March 27, 1944

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen:

I acknowledge receipt of your communication in which you request my opinion, such communication reading as follows:

> "We are inclosing herewith a letter from the Solicitor of the City of Middletown, in which it is shown that said city has been charging its water works revenue fund the sum of Five Thousand Dollars ($5000) per year to cover the estimated cost of rent, light, heat, bookkeeping and supervision; in other words, the said charge is made in favor of the General Fund, as a general overhead for services rendered by the general officers of the city to the Water Works Department, and possibly for space occupied in the city hall by the office, for water revenue collections.
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> The Examiners of this Bureau have rendered findings against the general fund for the amounts of such arbitrary reimbursements in the past, pursuant to various rulings by the Attorney General.
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> The Solicitor of Middletown now requests that we resubmit this question, in view of the recent decisions of the Supreme Court in the cases of City of Middletown v. Middletown City Commission, 138 O. S. 596, and Pfau v. City of Cincinnati, 142 O. S. 101.
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> As the answer to the question will be of general interest

to all cities in this state, may we request your consideration and reply to the following question:

> May a city, through ordinance or resolution of council, require that the water revenue fund of such city be charged an annual sum of money representing the cost of general overhead service performed by the general officers, such as Law Department, Finance Department, etc., and including the probable cost of rental of office, heat, light, etc., for space in the City Hall occupied by the waterworks office, and pay said amount, annually, to the general fund of the city?"

The answer to your question seems to turn upon the effect to be given Section 3959 of the General Code. This section reads as follows:

> "After paying the expenses of conducting and managing the water works, any surplus therefrom may be applied to the repairs, enlargement or extension of the works or of the reservoirs, the payment of the interest of any loan made for their construction or for the creation of a sinking fund for the liquidation of the debt. * * *
>
> The amount authorized to be levied and assessed for water works purposes shall be applied by the council to the creation of the sinking fund for the payment of the indebtedness incurred for the construction and extension of water works and for no other purpose whatever."

Except for a proviso contained in the second sentence, which I have omitted as irrelevant to this discussion, Section 3959 has been in effect in almost identical language since the enactment of the municipal code of 1869. In 1912, the people added Article XVIII to the Constitution, granting "home rule" to municipalities. Section 4 thereof reads in part:

> "Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product on 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."

The fundamental question which I have to consider is the conflict between the right on the one hand, of a municipality under the power thus expressly given, to operate its public utilities without legislative interference, and the right on the other hand, of the legislature to con-

trol such operation by dictating the disposition of the income arising therefrom.

Let it be borne in mind that the only powers expressly reserved by the Constitution to the legislature in limiting the exercise of "all powers of local self-government" are (1) to restrict the power of taxation and (2) to restrict the power of borrowing money and contracting debts. (Sec. 6, Art. XIII and Sec. 13, Art. XVIII.) Plainly, the transfer of the revenues in question to the general funds of the municipality does not involve borrowing money or contracting a debt. We are not here concerned with the additional limitation of Section 3, of Article XVIII relative to police and sanitary regulations.

In an opinion rendered shortly after the adoption of Article XVIII, Attorney General Turner was called upon to answer a question as to the right of a city by charter provision to provide for the use of surplus funds from its water system for general municipal purposes, and he held in 1915 Opinions of the Attorney General, page 973:

> "A municipality operating under a charter may lawfully provide in its charter that the surplus revenues arising from the operation of a municipally owned waterworks plant may be used for general municipal purposes."

Although reference was made in the opinion to Section 3959, General Code, the Attorney General did not appear to regard it as worthy of discussion, as affecting a charter city, but developed his opinion on the theory that "home rule" really gave a municipality the right to manage its own affairs, unimpeded by legislative dictation. He says in the opinion, at page 974:

> "Municipal waterworks constitute a municipal utility, managed and conducted by the municipality in its proprietary capacity as distinguished from its governmental capacity. It is clear that the local regulations which are under section 3 of article XVIII of the constitution to be subordinate to the general laws are those of a governmental character only. It follows, therefore, that the provisions of a municipal charter pertaining to the exercise by the municipality of its corporate or business functions are in no way subordinate to or controlled by the provisions of the general laws enacted for the government of municipalities generally. * * *
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> All such questions may be merged into a single question,

> which may be stated as follows: Does the production, by a municipal corporation operating under a charter duly adopted, of a surplus from the operation of a public utility and the devotion of such surplus to the general purposes of such a municpality *violate any provision of the constitution of Ohio or constitute taxation for local purposes*, which is subject to the control of the state legislature?
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> The answer to this question is in the negative."
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> (Emphasis added.)

Subsequent to the rendition of the opinion above referred to, the case of Cincinnati v. Roettinger, 105 O. S., 145, was decided. The first syllabus of this case reads as follows:

> "1. Section 3959, General Code, is constitutional and operates as a valid limitation upon the uses and purposes for which revenues derived from municipally owned waterworks may be applied. By virtue of the provisions of that section, surplus revenues derived from water rents may be applied only to repairs, enlargement or extension of the works, or of the reservoirs, and to the payment of the interest of any loan made for their construction, or for the creation of a sinking fund for the liquidation of the debt."

Marshall, C. J., in the course of the opinion at page 150, pointed out that only the first sentence of Section 3959 General Code, related to income from water rents and that the final sentence related only to taxes that might be levied for the support of waterworks. He says:

> "It will be seen of course that the first half of the section relates to what application may be made of the rents and revenues derived from the sale of water, and that the second half relates to what shall be done with the proceeds of the levy of any taxes upon the real and personal property of the city in the event any levy shall be made for waterworks purposes."

Accordingly, the concluding words of the section, "for no other purpose whatever", refer strictly to moneys arising from a general levy for taxes, and do not relate in any way to the disposition of water rents. The court construed the word "may" as used in the first sentence as meaning "shall", a precedent which has been followed on the authority of this case in a number of subsequent decisions.

The court, however, was evidently conscious of the fact that nothing

in the Constitution either expressly forbade a municipality from using the surplus revenues arising from the operation of its waterworks or other utilities in such manner as it saw fit, or granted to the legislature any power to control the disposition of such revenues. And the court had, therefore, to lay down the proposition that any revenue from a municipal utility in excess of the cost of operation was in effect a tax and therefore Section 3959 was an exercise of the power given by the Constitution to the legislature to restrict the levy of municipal taxes. Judge Marshall, accordingly proceeds with a somewhat elaborate argument to show that any revenue above the cost of operation amounts to a tax. He says at page 153 of the opinion:

> "While it is universally conceded that rates and charges not in excess of the amount necessary to meet such purposes are not classed as taxes, it does not follow that such excessive amount would not be classed as taxes. While it is quite well settled that charges for service and conveniences rendered and furnished by a municipality to its inhabitants are not taxes, yet where the charge is in excess of the entire cost of the service and convenience, the reason for the rule no longer prevails."

Again, at page 154:

> "It is apparent that any effort on the part of any municipality to deliberately impose rates and charges for a water supply, not for the purpose of covering the cost of furnishing and supplying the water, but for the purpose of making up a deficiency in the general expenses of the municipality, and which cannot be met within the limits of taxation otherwise provided, is to that extent an effort to levy taxes, and, to the same extent, an effort to evade the statutory and constitutional limitations upon that subject. * * *
>
> If the ordinance under consideration in this case amounts to an effort to levy taxes for general municipal purposes, and if the taxing power is legislative in its nature, then the legislature has the power to place such restrictions thereon as have in fact been provided in Section 3959, General Code."

It appears to me that the Roettinger case was grounded strictly on the theory that the profits from the waterworks amounted to a tax and that Section 3959 was a legitimate restriction on the levy of such tax. The case was expressly approved and followed in Realty Company v. Cleveland, 128 O. S., 583, where it was held:

"1. The provisions of Section 3959, General Code, prescribing and limiting the use of funds created by water rentals, prevent the diversion thereof to a use for any purpose other than therein enumerated. (City of Cincinnati v. Roettinger, a Taxpayer, 105 Ohio St., 145, approved and followed.)

2. The appropriation of such waterworks funds to the construction or maintenance of a sewage disposal plant may not be validated by the enactment of a city ordinance providing that 'the operation of sewage disposal plants shall be treated and construed as being part of the operation of water purification.'

Again, in Lakewood v. Rees, 132 O. S., 399, it was held:

"Revenues derived from municipally owned and operated waterworks may not be transferred to the general revenue fund of such municipality and be used to meet general governmental expenses and municipal obligations. (City of Cincinnati v. Roettinger, a Taxpayer, 105 Ohio St., 145, and Hartwig Realty Co. v. City of Cleveland, 128 Ohio St., 583, approved and followed.)"

In both of the cases last above cited emphasis was placed on the proposition that Section 3959 was an appropriate exercise of the power to restrict the municipality in the levy of a tax.

In the case of Niles v. Union Ice Corporation, 133 O. S., 169, the court had before it the right of a municipality to transfer to its general fund excess income or profit arising from its electric plant, and held that such transfer could be lawfully made by compliance with the procedure outlined in Sections 5625-13a to 5625-13g, inclusive which involves an application to the court and which, as decided by the court, authorizes the transfer of moneys *whether derived from taxation or not*. In this case the court in its opinion took apparent pains to riddle the argument of Judge Marshall in the Roettinger case, to the effect that surplus receipts from a municipal utility had the character of taxes. The court, after stating emphatically that a municipality had a right to make a profit from the operation of its utilities, said at page 182:

"The rate charged in excess of cost is not a tax or in the nature of a tax, regardless of how the fund derived therefrom is ultimately used. A municipality, acting in a proprietary capacity, cannot impose taxes. While thus engaged, it is en-

gaged in business but not in the business of government. A municipality may impose and collect taxes only when acting as an arm or agency of the state, but when engaged in business, it does not so act. A tax is a tribute levied for the support of government. 38 Ohio Jurisprudence, 714, Section 3. A rate charged for a public utility service or product is not a tax, but a price at which and for which the public utility service or product, is sold (27 Ruling Case Law, 1436, Section 52; 67 Corpus Juris, 1236, Section 784; Traville v. City of Sioux Falls, 59 S. D., 396, 240 N. W., 336) and the excess charged over and above cost, as a profit, enters into and becomes a part of the price. Payment of a tax is an obligation imposed. Payment of a price for a utility product or service furnished by a municipality is voluntarily assumed. Payment of the one is involuntary (38 Ohio Jurisprudence, 716, Section 6); pay of the other entirely voluntary. The obligation in the one case arises by operation of law, while in the other it arises out of contract, express or implied. * * *

Since the rate charged is not a tax in its inception, ultimate use of surplus funds derived therefrom for the support of municipal government will not convert it into taxes or cause it to assume the nature of taxes."

However, it is notable that while the theory on which the Roettinger case rested was completely refuted by the argument in the Niles case, yet the court did not see fit to overrule or even comment on the Roettinger case, presumably because the case before it did not involve revenue from waterworks and did not bring into question the validity of Section 3959, General Code. The court did, however, make reference to Section 3959, as controlling the disposition of waterworks funds. From which it may be inferred that the court did not intend to establish any new rule in the matter of waterworks revenues or to pass on the validity of Section 3959 unless and until those questions were directly presented to it.

It is not easy to reconcile the principle of the Roettinger case in holding Section 3959 to be within the power reserved to the legislature to restrict municipalities in the levy of taxes, with the repeated holdings by the court both before and after the decision in the Roettinger case, declaring the powers granted by Section 4, Article XVIII of the Constitution to be "plenary" and *beyond the power of the legislature* to limit. There is no doubt of the meaning of the word "plenary". It is defined by Webster as synonymous with "full; complete; absolute; unqualified."

In the case of Dravo-Doyle v. Orrville, 93 O. S., 236, the court said in the first branch of the syllabus:

> "Section 4, Article XVIII of the constitution, confers plenary power on 'any municipality' to acquire, construct, own, lease and operate any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and to contract with others for any such product of service."

Like expressions are found in the cases of:

Power Company v. Steubenville, 99 O. S., 421; Lima v. Public Utilities Company, 100 O. S., 416; State, ex rel. v. Weiler, 101 O. S., 123; Link v. Utilities Commission, 102 O. S., 336; Middletown v. City Commission, 138 O. S., 596; Pfau v. City of Cincinnati, 142 O. S., 101.

In the case of Dravo-Doyle v. Orrville, supra, the court had before it Section 3990 of the General Code, which authorized a municipality to erect or acquire gas or electric works, but contained a proviso that in villages where such works had already been erected by any person, company or corporation, council must before proceeding procure the consent of the owner of such private utility. It was held that that proviso was unconstitutional and void by reason of the provisions of Article XVIII, section 4, above quoted. The court, in the course of its opinion, referring to the limitations contained in the statutes, said:

> "This limitation is wholly inconsistent with the plenary grant of power contained in the article of the constitution referred to, and the statute, so far as this inconsistent provision is concerned, fell simply because it was inconsistent. *Authority given by the constitution cannot be lessened by statute. There is no equivalent for a constitutional provision.*"
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> (Emphasis added.)

In the case of Power Company v. Steubenville, supra, the court, laying down the proposition that the Public Utilities Commission has no authority to change or alter a rate for municipal services which had been fixed pursuant to Section 4, of Article XVIII of the Constitution, said:

> " * * * and if there were any conflict between the provi-

sions of the Constitution and the provisions of any statute of this state existing at the time or enacted since this constitutional amendment was adopted such statute must fall."

In the case of State, ex rel. v. Weiler, supra, the court, referring to the proposition that bonds issued on the sole security of the property and revenues of the public utility were not subject to limitation by the legislature, said:

> "The purpose to grant to the municipalities of the state *full and complete power* with reference to the acquirement, ownership *and operation* of public utilities was clearly manifested by the members of the constitutional convention in their discussion of the provisions in question as well as by the express language of the constitutional amendments then under consideration and subsequently adopted."
>
> (Emphasis added.)

In the case of Middletown v. City Commission, 138 O. S., 596, being one of the cases to which you have called my special attention, the court again recognizes the principle which characterizes the cases above referred to, of the complete independence of the municipalities in the exercise of the powers conferred by Article XVIII of the Constitution relative to the acquisition and operation of public utilities.

In the fourth branch of the syllabus the court holds:

> "Section 12, Article XVIII of the Constitution, is self-executing and self-sufficient, and utility mortgage bonds created and issued strictly within its terms are not affected by other parts of the Constitution or by the Uniform Bond Act (Section 2293-1 et seq., General Code)."

But the case related only to a bond issue, and had nothing to do with waterworks or the revenue therefrom and I can see nothing in the case that directly or indirectly bears on the attitude of the court relative to the disposition of income from waterworks, as laid down in the case of Cincinnati v. Roettinger, supra.

You also direct my attention to the case of Pfau v. Cincinnati, 142 O. S., 101. Here, again, the court reiterates in almost identical words its conception as to the comprehensive and final character of the constitu-

tional provisions relative to municipal utilities, to which I have already called attention. The syllabus reads in part:

> "1. Under the provisions of Section 4, Article XVIII, of the Constitution of Ohio 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.
>
> 2. These provisions are self-executing, and the powers therein enumerated are not subject to restriction by the General Assembly. (Paragraph 3 of the syllabus in the case of Board of Education of City School Dist. of Columbus v. City of Columbus, 118 Ohio St., 295, approved and followed.)
>
> 3. Nor are these powers impliedly subject to the limitation contained in Section 3 of the same Article as to conflict with general laws."

In the opinion the court points out that the only question which it had to consider was whether the council of the defendant city possessed the power to adopt the ordinance which was before the court, whereby it was provided:

> "Any owner of real estate premises installing or maintaining water service connections shall be considered as accepting the provisions of all lawful rules and regulations of the department of waterworks and as agreeing, in particular, to be liable for all water and service charges for such premises, whether the accounts for such premises are carried in the name of such owner or in the name of tenants or other persons."

The court quoted with approval its third syllabus in the case of Board of Education v. City of Columbus, 118 O. S., 295:

> " 'Municipalities derive the right to acquire, construct, own, lease and *operate* utilities the product of which is to be supplied to the municipality or its inhabitants, from Section 4 of Article XVIII of the Constitution and *the Legislature is without power to impose restrictions or limitations upon that right*'."

The question before the court in the Pfau case is indicated and decided in the fourth syllabus which reads:

> "In the exercise of these powers a municipality may adopt an ordinance making an owner of real estate liable for all

> charges for service and water supplied by such municipality through connections installed or maintained on the premises by such owner."

I still can not see in this case any express intention on the part of the court to overrule the Roettinger case, and I am therefore compelled to hold in accordance with that case and a number of previous rulings of this department and as I held in 1939 Opinions of the Attorney General, p. 2248:

> "A city which operates a municipal waterworks, may not use the funds derived from the operation thereof in payment of a portion of the salaries of the mayor, director of law, director of finance of such city, and may not use such funds in payment of the operating expense of such municipal departments. (2 O. A. G., 1937, p. 1835 approved.)"

In that opinion I stated:

> "* * * the salaries of the salaried officers of the city, such as mayor, law director and director of finance, and the expense of the operation of their departments, are a part of the general operation expense of the city rather than of the municipal waterworks, even though some portion of their efforts may be expended in promoting the welfare of such utility, and are payable only from the general fund of the city."

A similar holding was made in an opinion which I rendered relative to the profits arising from the Cleveland transit system (1943 Opinions, Attorney General, No. 6569,) where it was held:

> "A municipality may not legally pay from the operating revenues or profits of its transit system into the general funds of the city a stipulated sum for the general services of the council, mayor or other governmental agencies or departments of the city, but may, if duly authorized by proceedings under Section 5625-13 et seq. General Code, transfer such profits to its general fund."

In the same opinion it was held that a municipality could legally pay out of the revenues of its transit system as a part of the operating expense of such system, to any other administrative department of the city, the full value of any service rendered or material furnished by such other department to the transit system. Accordingly, it appears to me that while a municipality may not legally pay out of its water

revenue fund a lump sum annually, as stated in your question, covering the general overhead services performed by the general officers, and including also the cost of rental space, heat, light, etc, used by the waterworks department, still, it would, in my opinion, be legal for these latter expenses which are clearly a direct and necessary part of the operating expense of the waterworks, to be paid for out of the waterworks revenue. If such items as rent, heat and light are procured from someone other than the city, their cost would certainly be a legitimate element of expense "in conducting and managing the waterworks" and under the express provisions of Section 3959, General Code, would be payable out of this revenue.

Almost the identical question here involved was considered by one of my predecessors, and he held that the water works department of a city may enter into an agreement with the city to pay rental for office space occupied by said department in a public building under the control of the city. See 1922 Opinions, Attorney General, p. 1109.

Section 280 of the General Code, appears to contemplate and to require that one department of a municipality should reimburse any other department for service rendered or property transferred to it.

That section reads as follows:

> "All service rendered and property transferred from one institution, department, improvement, or public service industry, to another, shall be paid for at its full value. No institution, department, improvement, or public service industry, shall receive financial benefit for the support of another. When an appropriation account is closed, and unexpended balance shall revert to the fund from which the appropriation was made."

True, it has been held that a charter city is not bound by the provisions of Section 280, to make the payments required by that section (1927 Opinions, Attorney General, p. 2594; 1937 Opinions, Attorney General, p. 2247). Without undertaking to discuss the soundness of those opinions, I find, nevertheless, in Section 280, General Code, abundant authority for a municipality to pay out of the funds applicable to one of its departments for services or materials furnished by another department, and it is therefore my opinion that a municipality may legally pay out of the revenue of its waterworks for the cost or value

of rental space, heat and light furnished by the municipality.

Specifically answering the question you have submitted, it is my opinion:

1. Under the restrictions imposed by Section 3959, General Code, a municipality may not through ordinance or resolution of council require that the water revenue fund of such municipality be charged an annual sum of money representing the cost of general overhead service performed by the general officers, such as the law department, finance department, etc. and including the probable cost of rental of office space, heat, light, etc.

2. A municipality may, consistent with Section 3959, General Code and pursuant to the provisions of Section 280, General Code, out of the revenues of its waterworks pay into the municipal treasury the reasonable value of office space and heat and light therefor, furnished to the water department by the city, such expenditures being a part of the necessary expense of conducting and managing the waterworks.

Respectfully,

THOMAS J. HERBERT

Attorney General