

2947.

STREET RAILROAD COMMISSIONER—APPOINTMENT—MATTERS RELATING THERETO DISCUSSED.

SYLLABUS:

Discussion of matters relating to the appointment of a Railroad Commissioner in Youngstown.

COLUMBUS, OHIO, February 16, 1931.

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

GENTLEMEN:—This will acknowledge receipt of your request for my opinion, which reads as follows:

"We are submitting herewith for written opinion, questions arising in connection with the appointment of a Street Railroad Commissioner by the Council of the City of Youngstown, as follows:

Question 1. Did council overstep its authority as granted under Section 8 of the Charter in directly naming this individual to such office, such body presumably assuming the Street Railway Commissioner to be an officer or employee of council?

Question 2. If such powers are conferred on council by Section 8, does not Section 88 still limit its authority, in that the creation of any new department or office must be approved by referendum vote of the electors, thus the creation of such department and fixing of salaries for same by Ordinance No. 24135 would appear in itself to be illegal?

Question 3. If the aforementioned two sections of the charter do not void council's action, would Section 28 have any bearing, in that same provides that the Commissioner of Engineering shall enforce all the obligations of privately owned or operated public utilities enforceable by the city?

Question 4. Does the action of council in passing emergency ordinance of January 1, 1931, by a vote of five to two immediately void this particular ordinance entirely, since same did not receive the six votes as required in the emergency clause of Section 11 of the Charter, or will this ordinance become automatically effective at the end of the thirty day period?

We are enclosing herewith copy of letter received from our examiner, together with copy of Youngstown Charter, and also copy of Ordinance, referred to in Question 4, relative to the salaries of the officers and employees of the Street Railway Commissioner's Office, all for your information."

In a later communication you submit for my information, copies of the present existing franchise Ordinance No. 33370 of the City of Youngstown, passed in council May 22, 1929, under which the street railways are now being operated in the said city, and of franchise Ordinance No. 21945 in effect prior to the present franchise, which latter franchise ordinance was passed in council December 14, 1918. In the earlier of these franchise ordinances the position of Street Railroad Commissioner was created and provision was made therein for his appointment and removal together with an outline in a general way of his duties in connection with the operation of the franchise. In the later franchise the position of Street

Railroad Commissioner is not, by force of the ordinance itself, created. By the terms of the ordinance, however, the appointment of a Street Railroad Commissioner is authorized and his duties are outlined therein, if one is appointed. The terms of this latter ordinance with reference to the appointment of a Street Railroad Commissioner, as contained in Section 2-B thereof, are not mandatory, the language with reference thereto being:

"Upon the taking effect of this Ordinance the City may in any lawful manner suitable to Council designate a City Street Railroad Commissioner."

The corresponding provision of the earlier ordinance, in Section 8 thereof, read:

"Immediately upon the taking effect of this ordinance, there shall be designated by the City a Street Railroad Commissioner, which appointment shall be made by the Mayor of the city and shall be confirmed by the city council."

There are other pertinent differences in the provisions of the two franchise ordinances referred to above, which, in my opinion, are significant in the determination of the questions submitted, as will hereafter appear. I refer particularly to the fact that, under the former franchise, the expense of maintaining the Street Railroad Commissioner, including his salary and that of his assistants and office help and the other expenses of his office was to be borne by the Street Railway Company, the amount thereof to be fixed by the Council of the City of Youngstown within certain limitations, while under the latter franchise, if a Street Railway Commissioner is appointed at all, the expense connected therewith is to be borne by the city after January 1, 1930. Section 2-C of the latter franchise ordinance, reads as follows:

"On and after January 1, 1930, all expense in connection with the office of the Street Railroad Commissioner, including the salary of the Commissioner and any employees of his office, shall be borne and paid by the City."

Another material difference in these two ordinances exists with reference to the definition of the words "the city," as used in said ordinance. Under Section 1, of the first franchise ordinance entitled "Definitions," there appears the following:

"Whenever the words 'the city' are used, they shall be held to mean and include the Council of the City of Youngstown."

In the later franchise ordinance, Section 1, "Definitions," there appears:

"Whenever the words 'the city' are used, they shall be held to mean and include the City of Youngstown, Ohio, and the City Council of the City of Youngstown, Ohio."

Accompanying your inquiry is a letter from your Examiner at Youngstown, which is as follows:

"I herewith present the following information in connection with

Youngstown which I believe will have direct bearing upon the questions I am presenting at the close of this letter:"

(Then follows reference to, and recitals of certain franchise provisions, including those noted above.) The letter continues:

"On December 23, 1929, Council passed Ordinance No. 34102 making appropriation for the current expenses of the City of Youngstown during the fiscal year ending December 31, 1930, which ordinance was approved by the Mayor on December 24, 1929. Section two of that ordinance reads as follows:

'SECTION 2. That there be appropriated from the General Funds:

Council	\$5,051.00
Clerk of Council.....	10,760.00
Mayor	10,321.00
Finance Department	24,760.00
Law Department	29,990.00
Board of Elections	25,244.67
Vice Squad	25,600.00
Railway Commissioner	14,800.00

Total General Fund.....\$146,526.67'

On December 31, 1929, Council passed Ordinance No. 34135 providing for salaries for the Street Railway Commissioner reading as follows:

'Be it ordained by the Council of the City of Youngstown, Ohio:

SECTION 1: That for the year 1930 the salaries of the employes of the Street Railway Commissioner's Office shall be as follows:

1—Street Railway Commissioner	\$6,000.00 per year
1—Deputy Street Railway Commissioner.....	3,600.00 per year
1—Auditor for the Street Railway Commis- sioner's Office	2,400.00 per year

SECTION 2: Said salaries shall be paid out of the appropriate fund therefor at the time and in the manner that salaries of other employes of the City are paid.

SECTION 3: This ordinance is hereby declared to be an emergency measure, the emergency being the necessity of putting this ordinance into operation before the beginning of the year 1930, and shall take effect and be in force upon its passage and approval by the Mayor.'

This ordinance was vetoed by the Mayor on December 31, 1929, and reconsidered and passed by the Council over the veto of the Mayor on January 13, 1930.

Section 14 of the Home Rule Charter of the city of Youngstown, approved by the people on Tuesday, May 15, 1923, reads as follows:

'When the Mayor refuses to sign an ordinance or resolution, or part

thereof, and returns it to Council with his objections, the Council shall, after the expiration of not less than one week, proceed to reconsider it; and, if upon reconsideration, the ordinance or resolution, or part or item thereof, disapproved by the Mayor, be approved by the Council by a two-thirds vote of all members thereof, it shall take effect without the signature of the Mayor; provided, however, that no ordinance or resolution providing for the expenditure of more than Five Thousand (\$5,000.00) Dollars, which has been disapproved by the Mayor, shall take effect after such reconsideration and approval by such two-thirds vote, unless it shall be submitted by Council to a referendum of the electors of the City at the next general election held throughout the City, more than sixty (60) days thereafter, and be approved by a majority of these voting thereon.'

Section 28 of the Charter is as follows:

'The Division of Engineering, Construction, Maintenance and Repairs, shall be in charge of a Commissioner of Engineering, who shall be the Chief Engineer of the City, and shall be the Deputy Director of Public Works. He shall manage and supervise all public improvements, works and undertakings of the City except as otherwise provided in this Charter. He shall have charge of the construction, improvement, repair and maintenance of streets, sidewalks, alleys, lanes, bridges, viaducts and other public highways; of drains, ditches, culverts, streams and water courses; he shall have charge of the collection and disposal of garbage; he shall manage and control municipal market houses, and public utilities supported in part or in whole by taxation; he shall enforce all the obligations of privately owned or operated public utilities enforceable by the City. He shall have charge of the making and preservation of surveys, maps, plans, drawings and estimates for all public work; the cleaning, flushing and lighting of streets and public places; the preservation of contracts, papers, plans, tools and appliances belonging to the City and pertaining to the functions of this Department.'

Section 88 of the Charter is as follows:

'Council shall have the power to consolidate Departments, Division or offices, provided for by this Charter, and prescribe by ordinance additional duties for any Department, Division or office, but any ordinance creating any new Department, Division or office, shall not become effective until approved by the electors of the City at a referendum election, as provided by this Charter. Council may, by a resolution adopted by a two-thirds vote of all its members, submit this ordinance to a referendum vote at the next general election throughout the City, more than sixty (60) days thereafter.'

Further in such connection we direct attention to the following:

Under meeting date of February 6, 1930, council meeting as a Committee of the whole. Mr. Crawford nominated Mr. H. Engle to the position of Street Railway Commissioner as of January 1, 1930. No other name being placed in nomination Mr. Crawford moved that Mr. H. Engle be elected Street Railway Commissioner as of January 1, 1930. Seconded by Mr. Evans. Motion carried and President Buchanan declared Mr. H.

Engle to be the duly elected Street Railway Commissioner for the ensuing term.

It is evident from the above the council proceeded under Section No. 8 of the charter which reads as follows:

'The Council shall appoint a clerk, who shall be known as the City Clerk, and such other officers and employees of Council as may be necessary. * * *'

The question now comes before us, in view of the fact that salary has been paid Mr. Engle in full from January 1, 1930, to and including December 31, 1930—"

(Then follow three questions which are the same as the first three submitted by you in your inquiry.)

Another letter from your Examiner, which is submitted with your inquiry reads as follows:

"In council meeting of January 12, 1931, an ordinance (No. 35289) providing for the salaries of the officers and employees of the Street Railway Commissioner's Office was read a second time, and upon motion of Mr. Brown the resolution requiring the reading on three different dates was suspended by a vote of six yeas and one nay. The ordinance was then placed upon its final passage by a vote of five yeas and two nays. You will note from the enclosed copy of this ordinance that same was passed as an emergency measure. I now direct you to Section No. 11 of the charter which in part reads as follows:

'All ordinances and resolutions shall be in effect from and after thirty days from the date of their passage by the council except as otherwise provided in this charter. The council may, by a vote of six of its members, pass emergency measures to take effect at the time indicated therein.'

Will you now kindly pass upon the following questions:

Does the action of council in passing this emergency ordinance by a vote of five to two immediately void this particular ordinance entirely, since same did not receive the six votes as required in the emergency clause of Section No. 11 of the charter, or will this ordinance become automatically effective at the end of the thirty day period?"

Said ordinance No. 35289, referred to in the last letter quoted above, a copy of which ordinance I have before me, is entitled:

"An ordinance providing for the salaries of the officers and employees of the street railways commissioner's office."

This ordinance appears on its face to have been passed as an emergency measure on January 12, 1931, and was approved by the mayor on January 17, 1931.

No information is submitted as to how, if at all, the Street Railroad Commissioner was paid from the time of the passage of the last franchise ordinance on May 22, 1929, and January 1, 1930. If he was on duty during that time, he and his assistants were probably paid by the Street Railroad Company. Council, however, provided funds for the payment of a Street Railroad Commissioner, his deputy and assistants, from city funds after January 1, 1930, by including in its

appropriation ordinance of December 23, 1929, an appropriation to a "Street Railway Commissioner." Later, an ordinance was passed on January 13, 1930, over the mayor's veto, fixing a salary for a Street Railway Commissioner, Deputy Street Railway Commissioner and Auditor for the Street Railway Commissioner's Office, the aggregate sum of these yearly salaries, as fixed in said ordinance, being \$12,000.00.

As no appointment of a railroad commissioner or a deputy or an auditor for his office had been made under the franchise ordinance of May 22, 1929, and no payment of salary in accordance with the salary ordinance referred to above could lawfully be made until a railroad commissioner was appointed, council took it upon itself to appoint a railroad commissioner, and did so, by motion, in a meeting which, as stated by your examiner, was a meeting of the members of council as a committee of the whole, on February 6, 1930.

In this committee meeting Mr. H. E. was nominated to the position of Street Railroad Commissioner as of January 1, 1930, by one of the members of council present. No other nomination was made and it was moved Mr. H. E. be elected Street Railroad Commissioner as of January 1, 1930. This motion was seconded and passed. Whereupon, Mr. B., the President of Council apparently acting as chairman of the committee meeting, declared Mr. H. E. to be the duly elected Street Railroad Commissioner for the ensuing term.

Apparently no reference was made back to council of the action of the committee of the whole in this matter and no other or further action was taken by council or anyone else with reference to the appointment of a Railroad Commissioner. Mr. H. E. has been functioning since that time, as Railroad Commissioner, in pursuance of the action taken by council on February 6, 1930, while sitting as a committee of the whole.

The above state of facts suggests several pertinent questions :

1. Is the ordinance of December 31, 1929, No. 34135, a valid ordinance of the City of Youngstown, since it provided for the expenditure of more than \$5,000, was disapproved by the mayor, reconsidered by council and approved by a two-thirds vote thereof, but was not submitted by council to a referendum of the electors and approved by a majority of those electors as directed by Section 14 of the city's charter?
2. Assuming that council was empowered to appoint a Street Railway Commissioner under the franchise and the charter of the city, was the appointment of a Street Railway Commissioner by the members of council, upon motion, while said members were in session as a committee of the whole valid?
3. Is it within the power of council to appoint a Railroad Commissioner at all, in view of the charter of the City of Youngstown, and the provisions of the present existing franchise ordinance?
4. Is the ordinance of January 12, 1931, No. 35289, fixing salaries for a Railway Commissioner and his assistants, passed as an emergency measure by a vote of five yeas and two nays, a valid ordinance of the City of Youngstown, and if so, did it go into immediate effect or did it not go into effect until thirty days after the date of its passage?

I will consider these questions in their order.

1. The language of Section 14 of the home rule charter of the City of Youngstown quoted by your examiner in his letter is clear and unambiguous, to the effect that no ordinance providing for the expenditure of more than \$5,000.00 shall become effective upon reconsideration and approval by a two-thirds vote

of council, after the same had been disapproved by the mayor, unless it is submitted to referendum and approved by a majority of the electors.

The right of a municipality to make such a provision by charter, under the home rule provisions granted to municipalities by Article XVIII of the Constitution of Ohio, has never been questioned. I do not deem it necessary to burden this opinion with a general discussion of the home rule powers of municipalities, or with the citation of authority supporting the right of a municipality to provide by charter the manner of enacting legislation by its legislative body. It is sufficient for our present purpose, to say that the home rule powers of a municipality granted by the Constitution, and discussed in a long line of decisions of our courts and in numerous opinions of this office, are broad enough, in my opinion, to permit the adoption by a municipality of a charter provision such as Section 14 of the charter here under consideration.

This question presents no little difficulty, however, by reason of the doubt that exists as to whether the fixing of salaries to be paid over a period of time in the future, which in the aggregate would eventually amount to more than \$5,000 is "an expenditure of more than \$5,000," as the expression is used in the charter. In view of the questions submitted, I do not think it necessary for me to pass on the question.

2. A committee of the whole of a legislative assembly is defined in the Century Dictionary, as follows:

"A committee of a legislative body consisting of all the members sitting in a deliberative rather than a legislative character, for formal consultation and preliminary consideration of matters awaiting legislative action."

After considerable search, I have found no court decisions or opinions of this office where a question such as the one here presented has been discussed. It is well settled as a general proposition of law, that members of a council of a municipality, board or committee cannot separately and individually, or jointly outside of regularly convened meetings, enter into a contract, enact legislation, or exercise powers of government entrusted to it as a body, which will bind the municipality, but they must act as a body at a regular or special meeting of which such notice shall be given as required by law. *McCorkle v. Bates*, 29 O. S., 419; 33 L. R. A. 86n; McQuillan on Municipal Corporations, Section 1279. R. C. L., Volume 19, page 884; C. J., Volume 43, page 497.

Aside from the question of whether or not the determination of a matter so important to the municipality as the exercising of an option to appoint a Street Railroad Commissioner, as such, and the making of the appointment, may be done by a mere motion when the charter provides, as it does in Section 9 thereof, that "council shall by ordinance determine the number of officers and employes in each department of the city government" unless otherwise provided in said charter, a more serious question arises in this connection, with respect to its being done in a meeting of council as a committee of the whole.

In regular parliamentary practice, the rule is consistently followed that when a committee of the whole rises, it must at once report its conclusions to the main body and that body either rejects, approves or modifies any matter reported to it. Roberts' Rules of Order, Section 32; Hughes American Parliamentary Guide, Section 966, et seq.

It is quite true, of course, that since a majority of the committee is also gen-

erally a majority of the whole body, any matter agreed to in the committee of the whole will likely be agreed to when it comes before the main body.

I do not have before me the rules adopted by the Youngstown City Council for its government, nor am I advised whether or not, February 6, 1930, the date of the meeting of the committee of the whole at which time the action here in question was taken, was the same as the date of a regular meeting of council and the council simply resolved itself into a committee of the whole, nor whether all the members of council were present at this meeting, nor whether the matter had been previously referred to a committee of the whole.

If all the members of council were not present, and no notice in writing had previously been given, as for a special meeting (Section 7, City Charter) there is little doubt that the attempted appointment of a Railroad Commissioner in the manner in which it was done, was irregular and of no effect whatever, even if it be conceded that council had the power to make the appointment. It does appear that the president of council presided at this meeting and the clerk apparently recorded the proceedings and if all the members were present and participated in the meeting there would be some question as to how the courts would treat the effectiveness of the action taken, in the face of the rule stated by Cushing in his work on Law and Practice of Legislative Assemblies, page 1009, which rule is cited with approval by the Supreme Court of Utah, in the case of *Acord v. Booth*, 33 Utah, 279, at page 281. This observation of Cushing is as follows:

“Except that it provides an occasional relief to the speaker and that members are allowed in committee to speak more than once to the same question, it is difficult at the present day to perceive any other difference between the house and the committee of the whole than that the speaker presides in the former and a chairman in the latter.”

At any rate, I do not believe it necessary to definitely pass on this question, in view of the specific questions submitted by your examiner and my conclusions with respect to them.

3. Apparently, the question uppermost in the mind of your examiner is whether or not the city council possesses the power of appointing a Street Railroad Commissioner under the present existing franchise ordinance read in the light of the municipal charter of the city of Youngstown which was in force at the time of the passage of said ordinance.

The present charter of the City of Youngstown was submitted to the voters and adopted May 15, 1923, to become effective for all purposes here under consideration on the first day of January, 1924. (Section 119.)

In its general tenor this charter prescribes a modified federal plan of government for the city. It provides in Section 5 thereof, that the legislative power of the city, except as reserved to the people through the right of initiative and referendum, is reposed in a Council of seven members elected by wards. In Section 82, it provides that the provisions of the General Code as to initiative and referendum shall prevail except as to the number of electors necessary for the filing of initiative and referendum petitions.

It creates seven administrative departments, to-wit: Law, Finance, Public Works, Health and Public Welfare, Water and other Public Utilities, Fire and Police, to be administered by a solicitor, director or chief appointed by the mayor.

The mayor, as chief executive officer of the city, is designated as ex-officio Director of the Department of Public Works, the Department of Health and Public Welfare, and of the Department of Water and Public Utilities.

Section 22 of the said charter provides that the work of the several departments shall be distributed among such divisions thereof as are established by the charter. There shall be a Commissioner or head of each division to be appointed and removed by the Director of the Department, with the consent of the Mayor, in conformity with the Civil Service provisions of the charter. The Commissioner, or head of each division, with the approval of the Director of the Department, shall appoint and may remove all officers and employes therein in conformity with the Civil Service provisions of the charter.

Section 43 provides that the Director of Water and other public utilities shall control and supervise all *non-tax* supported public utility undertakings of the city including all water, lighting or other utility enterprises now owned or afterwards acquired by the city. This department has nothing whatever to do with public utilities other than municipally owned utilities not supported in whole or in part by taxation.

The Department of Public Works is to consist of four divisions:

1. Engineering, Construction, Maintenance and Repair.
2. Public Buildings and Grounds.
3. Parks and Public Playgrounds.
4. Building, Plumbing and Wiring Construction.

The first of these divisions, that of Engineering, Construction, Maintenance and Repair is to be in charge of a Commissioner of Engineering, who shall be the Chief Engineer of the city and Deputy Director of Public Works. His duties are set forth in Section 28 of the charter, quoted by your examiner. Among other things, it provides as will be noted:

"He shall manage and control municipal market-houses and public utilities supported in part or in whole by taxation; *he shall enforce all the obligations of privately owned or operated public utilities enforceable by the city.*" (Italics, the writer's.)

The present existing franchise ordinance referred to above grants a franchise for the operation of a transportation system in the city on what is known as a "Service at Cost Plan." It purports to grant to the Youngstown Municipal Railway Company a franchise to operate a system of Street Railways and passenger busses for hire over and along certain streets in said city. It provides a sliding scale of fares to be charged, dependent on earnings of the company, and contains many provisions as to the quality and quantity of service to be rendered.

A limited supervision over the management and operation of the transportation system is reserved to the city, under the terms of the franchise, to the end that it be managed and operated most economically, consistent with the quality and quantity of the service required. It authorizes but does not direct the appointment of a Street Railroad Commissioner to check on the management and operation of the system, advise with the Council of the city and officials of the company with respect to matters affecting the operation of the transportation system under the franchise, enforce the obligations of the company with respect to its manner of vouchering its expenditures and keeping its accounts, approve temporary changes in schedules and routes of street cars and busses until such times as council approves or otherwise directs, and to meet emergencies, and generally to act as an intermediary between the transportation company and the city in all matters affecting the operation of the franchise.

The manner of appointment of a Railroad Commissioner, if it be determined that such a person be appointed by that title, is not fixed by the terms of the

franchise ordinance, nor is the manner of the appointment of a Street Railroad Commissioner by that title fixed by the charter. Council of the city, apparently in the belief that it had the power to appoint, presumed to appoint a Street Railroad Commissioner, as stated above, although the appropriation made by council for the maintenance of the commissioner was made as though it were to a separate department. Council's power with respect to appointments is set forth in Section 8 of the charter. Said Section 8, only a part of which is quoted by your examiner, reads as follows:

"The Council shall appoint a clerk, who shall be known as the City Clerk, and such other officers and employes of Council as may be necessary. * * Council shall exercise no power of appointment except as herein expressly provided."

From the above charter provisions, it clearly follows that, unless the Railroad Commissioner is an employee of Council, the Council lacks the power of making his appointment.

The franchise ordinance provides, with respect to this appointment, in Section 2b, thereof:

"Upon the taking effect of this ordinance the city may in any lawful manner suitable to Council designate a Street Railway Commissioner."

The fact that "the city," which words are defined in the ordinance as meaning and including the City of Youngstown and the City Council of the City of Youngstown, is empowered under the ordinance to make the appointment, and in the same sentence it is provided that the appointment shall be suitable to Council, clearly indicates that it was not the intention of the ordinance to repose in Council the power of making this appointment.

Be that as it may, however, as between an intention expressed in this ordinance, whatever it may be, and the express terms of the charter then in force, the charter provision must prevail. No matter what intention may be gathered from the ordinance with respect to this appointment, the duties reposed in a so-called Railroad Commissioner, by the ordinance, are, and were at that time, expressly delegated to the Commissioner of Engineering in Section 28 of the charter, wherein it is provided that he shall enforce *all* the obligations of privately-owned and operated public utilities.

In my opinion, the duties with which a Railroad Commissioner is entrusted under the franchise ordinance in question properly comes within the province of the Commissioner of Engineering under the charter of the City of Youngstown, and if no appointment of a Railroad Commissioner as such were made, must, if not all, of the duties fixed in the ordinance to be performed by a Railroad Commissioner would necessarily devolve upon the Commissioner of Engineering, or an employe of the city in the Division of Engineering. If such an appointment is made he functions as an employe of the Division of Engineering and his appointment should be made as such employe, that is, by the Commissioner of Engineering, with the approval of the Mayor as Director of the Department of Public Works, in accordance with Section 22 of the charter referred to above.

In this connection, I am not unmindful of the decision of the case of *Engle v. Hefernan*, Mayor, and the Opinion of Judge Pollock of the Court of Appeals of the Seventh District in that case.

While the earlier of the franchise ordinances referred to herein was in operation, the Mayor of Youngstown undertook to remove the Railroad Commissioner who had been appointed in conformity with the said ordinance. After his attempted removal by the Mayor, suit was instituted by the Commissioner in the Common Pleas Court of Mahoning County, whereby it was sought to enjoin the Mayor from interfering with him in the conduct of his office. Upon appeal, the Court of Appeals held with the Commissioner and granted the injunction on the ground that the Commissioner could not lawfully be removed at the will of the Mayor without the consent of Council.

The Court, after reciting the question to be determined, observed that it "must be determined from the provisions of the ordinance."

Later in the opinion the Court said:

"We think the provisions of the charter now control the appointment and removal of the officers or employes under this ordinance, notwithstanding the ordinance was in force prior to the adoption of the home rule charter."

The decision is bottomed, however, flatly on the construction of the wording of the ordinance without any consideration being given to the terms of the charter as will appear from the following quotation from the body of the opinion:

"Under Section 1, which is headed 'Definitions', the following appears:

'Wherever the words "The City" are used, they shall be held to mean and include the Council of the City of Youngstown.'

In Section 8, which is entitled 'Commissioner', the provision for the appointing and removal of the Street Railroad Commissioner is provided. It reads as follows:

'Immediately upon the taking effect of this ordinance, there shall be designated by the city a Street Railway Commissioner, which appointment shall be made by the Mayor of the City, and shall be confirmed by the City Council. The city reserves the right at any time, and from time to time, to remove the Commissioner so appointed, such removal to be by the mayor, and to fill the vacancy in the manner provided for original appointment.'

In construing this section we must remember the first provision referred to; that is, when the words 'The City' are used, they mean and include the council of the City of Youngstown. * * * * *

We are not concerned with the appointment of a Commissioner at this time. It is the next provision, providing for the removal. The ordinance provides that the city, which means the council thereof, reserves the right at any time to remove the commissioner so appointed, such removal to be by the Mayor, and then the vacancy must be filled as above provided. In construing this sentence, we should attempt to give force and effect to its entire provisions. To hold that the Mayor had the right at any time and without any order by the Council to remove the street railroad commissioner, would wholly ignore the first part of this sentence. We think a proper construction of this sentence is that the City Council must first pass a resolution that the street railroad commissioner should be removed, and direct that such removal be by the Mayor. Then the Mayor should issue an order removing the Commissioner and name someone to succeed him, whose appointment must be confirmed by

council before he becomes commissioner. It follows that under this construction the Mayor had no right to remove the Street Railroad Commissioner or interfere with him or his employes performing the duties required under the ordinance."

From the foregoing, it will be observed that the court based its decision wholly on the construction it placed on the wording of the ordinance and particularly on the definition of the words "the city" which the court evidently took to mean the Council only.

This decision was rendered May 6, 1929. Sixteen days later a new franchise ordinance was passed in Council with the significant changes noted above with reference to the definition "the city" and the manner of appointing a Railroad Commissioner, if an employe by that designation was to be employed at all. The differences in the wording of the new ordinance from the old, in the above respect, were no doubt done advisedly with the opinion of the court in the above case fresh in mind. At no place in the opinion did the court say that the Commissioner was an employe of Council. It commented on his being an adviser of council and stated that it did not consider him an officer of the municipality but an "employe to see that the provisions of the ordinance and the requirements of council be carried out by the municipal railway company," thereby recognizing that the Commissioner was more than an adviser of council, in that he was charged with the performance of certain administrative duties on behalf of the municipality in enforcing the obligations of the Street Railway Company under the franchise. The duties of a Railroad Commissioner under the new franchise are practically the same as under the old, and I am convinced the observation of the court with reference to the administrative functions of the Commissioner under the old ordinance would be equally pertinent with reference to a Commissioner under the new ordinance.

The opinion of the court referred to above, has not been officially reported, and probably will not be. A copy, however, of the opinion will be found in the files of the Clerk of the Supreme Court of Ohio in cause No. 21760.

I am unable to see the force of the contention that a Railroad Commissioner, if one is appointed under this ordinance, is an employe of council from the mere fact that he is an adviser of council, or for any reason. All officers of the city are advisers of council. The charter provides in Section 17 that the Mayor and heads of departments shall be entitled to seats in Council and may take part in the discussion of all matters coming before Council.

Neither am I impressed with the contention that the appointment of a Railroad Commissioner creates a new division or department and that therefore Section 88 of the charter is controlling. It is not necessary, as I view the matter, to create a new department or division for a Railroad Commissioner as the charter provides, in Section 28 thereof, for the performance of the duties fixed by the ordinance for a Railroad Commissioner, within the Division of Engineering.

4. The ordinance of January 1, 1931 (No. 35281) passed as an emergency ordinance by the affirmative vote of only five members of council instead of six, as required by Section 11 of the charter, did not go into immediate effect, but was not for that reason, void. It became effective in thirty days after its passage. The tenth branch of the syllabus of the case of *Miami County, v. Dayton*, 92 O. S. 216, is controlling. This syllabus reads as follows:

"An act of the General Assembly purporting to be an emergency act but which failed to receive the two-thirds majority in one branch of the

General Assembly as required by the Constitution for an emergency act, becomes at the end of the ninety-day referendum period a valid act of the general assembly if otherwise constitutional."

The principle above stated is, in my opinion, applicable to municipal ordinances.

Based on the foregoing discussion, I am of the opinion in specific answer to your questions:

1. The Council of the City of Youngstown is not empowered, under the city charter and present existing Street Railway franchise, being Ordinance No. 33370, to appoint a Street Railway Commissioner, and the pretended appointment; made as it was, is void.

2. The appointment of a Street Railroad Commissioner in the City of Youngstown, under the present existing Street Railway franchise ordinance, is not controlled by Section 88 of the charter.

3. If a Street Railroad Commissioner, as such, is appointed in the City of Youngstown, by authority of the present existing Street Railway franchise ordinance No. 33370, the appointment should be made as of an employe within the Division of Engineering, Department of Public Works, by authority of Section 28 of the charter, and in the manner provided for the appointment of such an employe, in accordance with Section 22 of the charter.

4. Ordinance No. 35289, passed by the Council of the City of Youngstown on January 12, 1931, did not go into immediate effect as an emergency measure but became effective upon the expiration of thirty days after its passage, in accordance with Section 11 of the charter of said city.

Respectfully,
GILBERT BETTMAN,
Attorney General.

2948.

SHERIFF'S BOND—LIQUIDATION OF SURETY COMPANY CANCELS
SUCH BOND—NEW BOND REQUIRED—PREMIUM PAID BY
COUNTY.

SYLLABUS:

1. *Where a sheriff gives a bond upon which a surety company authorized to do business in Ohio appears as surety, which is approved by the county commissioners and the premium paid for from the county treasury, and the surety company later is taken over for liquidation under facts and circumstances in which there is no protection to the county under the bond, the county commissioners should require a new bond.*

2. *Under such circumstances the county may properly present a claim to the liquidating agent for the unearned premium.*

3. *In the event a new surety bond is given to the satisfaction of the commissioners the premium therefor may be allowed and paid by the county.*

COLUMBUS, OHIO, February 16, 1931.

HON. L. E. HARVEY, *Prosecuting Attorney, Troy, Ohio.*

DEAR SIR:—Acknowledgment is made of your recent communication requesting my opinion, as follows: