of a waterworks does not include the extension of such a waterworks already erected or purchased and that supplying water to persons outside of a municipal corporation is not "supplying water to the corporation and the inhabitants thereof." This section is not ambiguous and, as said in Hough vs. Dayton Co., 66 O. S., 435, "in such case there is no room for construction."

Therefore you are advised that municipal bonds for extension of waterworks beyond the corporate limits for supplying water to persons outside such limits may not be legally issued under section 3939 G. C.

Respectfully,
JOHN G. PRICE,
Attorney-General.

930.

AGRICULTURE—FLAVORING EXTRACTS—"ADULTERATED" IN SECTION 5779 G. C. CONSTRUED AS APPLICABLE TO ARTIFICIAL OR IMITATION EXTRACTS—WHEN FORMULA NOT REQUIRED TO BE PRINTED ON LABEL—ALCOHOLIC CONTENT IN TERMS OF PERCENTAGE BY VOLUME SATISFIES REQUIREMENT CONTAINED IN SUBSECTION 4 OF SECTION 5785 G. C.

1. *An artificial or imitation flavoring extract is not "adulterated" within the meaning of section* 5779 *and related sections of the General Code of Ohio, merely because it is an artificial or imitation flavoring extract.*

2. *The statutes of Ohio do not now require the formula for flavoring extracts or compounds for which no standard exists, to be printed upon the label of the bottle, package or other container of same; nor has the secretary of agriculture the authority at the present time to make and enforce a departmental rule to that effect.*

3. *A statement of alcoholic content in terms of percentage by volume satisfies the requirement contained in subsection* 4 *of section* 5785 *G. C. as amended by H. B. No.* 225 (108 *O. L.* 460).

COLUMBUS, OHIO, January 12, 1920.

HON. THOMAS C. GAULT, *Chief, Bureau of Dairy and Foods, Department of Agriculture of Ohio, Columbus, Ohio.*

DEAR SIR:—Receipt is acknowledged of your letter reading as follows:

> "Will you please advise me as to the proper labeling of flavoring extract or compound for which no standard exists, since the amendment of section 5785, giving consideration also to section 5779 and section 1177-12, General Code, and to ruling No. 3 in the enclosed department rulings?"

In personal conference it is learned that the specific points upon which you desire the opinion of this department are:

First: Whether an artificial or imitation flavoring extract is "adulterated" within the meaning of section 5779 and related sections of the General Code of Ohio, merely because it *is* an artificial or imitation flavoring extract.

Second: Whether the formula for flavoring extracts or compounds, for which no standard exists, must be printed upon the label of the bottle, package or other container of same.

Third: As to what is meant by the words found in subsection 4 of section 5785 G. C. (108 O. L. 460), to wit:

"the quantity by volume of alcohol in said extract".

(1) Section 5779 G. C., so far as here material, says:

> "A flavoring extract is adulterated within the meaning of this chapter * * * (4) *if it is an imitation of, or is sold under the name of another article.*"

Unquestionably the above quoted provision is susceptible of a construction which, if adopted, would furnish an affirmative answer to your first question. The effect of such an answer would be to prevent in Ohio the sale or manufacture for sale, of all flavoring extracts or flavors not produced from the natural fruits, including all artificial or imitation extracts or flavors produced by the synthetic combination of fruit ethers.

The provisions of what is now known as section 5779 G. C. became law in 1909 upon the passage of S. B. 112, 100 O. L. 105. The title to that measure was: "An act to amend section 3 of an act entitled * * *, *by adopting the federal standards for flavoring extracts.*" Upon reference to the federal food and drugs act, effective June 30, 1906, it is plain to be seen that section 5779 G. C., and in fact many other sections of the Ohio pure food law, are copied from the federal law. For example, where section 5779 G. C. says:

> "A flavoring extract is adulterated within the meaning of this chapter * * * if it is an imitation of, or is sold under the name of another article,"

the federal act (section 8) says:

> "That for the purposes of this act an article shall also be deemed to be misbranded: In case of food: First. If it be an imitation of or offered for sale under the distinctive name of another article."

The word "food" in the federal act includes flavoring extracts (See section 6).

It will be seen that the one law (the state law) calls the unlawful act "adulteration," while the other law (the federal law) calls it "misbranding." It is not perceived, however, that this difference is of any significance in this connection, as each act punishes both adulteration and misbranding.

Inasmuch as section 5779 G. C. was apparently copied from the federal food and drugs law, we regard as very persuasive the federal view of the point in question. Without doubt the federal authorities consider lawful, under the federal food and drugs act, artificial or imitation flavoring extracts, provided certain conditions are met—among them, that such extracts are designated in such a way as to indicate the fact of imitation. For instance, in Food Inspection Decision No. 47, promulgated December 13, 1906, by the federal secretary of agriculture, the following appears:

> "Numerous inquiries are received regarding the proper designation of products made in imitation of flavoring extracts or in imitation of flavors. Such products include 'Imitation vanilla flavor,' which is made from such products as tonka extract, coumarin, and vanillin, with or without vanilla

extract. They may also include numerous preparations made from synthetic fruit ethers intended to imitate strawberry, banana, pineapple, etc. Such products should not be so designated as to convey the impression that they have any relation to the flavor prepared from the fruit. Even when it is not practicable to prepare the flavor directly from the fruit, 'imitation' is a better term than 'artificial.'

These imitation products should not be designated by terms which indicate in any way by similarity of name that they are prepared from a natural fruit or from a standard flavor. The term 'venallos', for instance, would not be a proper descriptive name for a preparation intended to imitate vanilla extract. Such products should either be designated by their true names, such as 'vanilla and vanillin flavor,' 'vanillin and coumarin flavor,' or by such terms as 'imitation vanilla flavor' or 'vanilla substitute'."

In the case of United States vs. McConnon & Co., (see p. 654, Gwinn's Compilation Federal Food and Drugs Act Decisions), Morris, district judge, in charging the jury said, with reference to the federal food and drugs act, what with equal propriety may be said of the Ohio act:

"The object of the act * * * is two-fold. First, to prevent people who have articles to sell from placing in them ingredients that are injurious or deleterious to the health of the people, and causing them to buy without knowing that fact. * * * The second object of the statute is to prevent people from so labeling an article that a man buying it will think that he is buying one thing, when in reality he is buying another."

In the case just cited, the defendant was charged with misbranding for the reason (p. 655) that

"the product * * * purported to be, and was represented to be, an extract of vanillin and coumarin, whereas in truth and in fact it was a compound of said substances with burnt sugar color and prepared in imitation of vanilla extract *and was offered for sale without being labeled as an imitation of vanilla extract.*"

Speaking of this charge, the court said (p. 656):

"As to the misbranding; is that article so branded, first, that it is an imitation of vanilla extract; that people buying it and looking at the brand, and looking at the article would think that it was vanilla extract?"

Further illustrative of the federal view is the case of *Hudson Mfg. Co.,* vs. *United States,* 192 Fed., 920. The per curiam says:

"Where there is no proof that the words 'Hudson's Extract' have a well-known trade meaning, an imitation of vanilla marked 'Hudson's Extract', without giving any indication of what the article is composed, shows a clear case of misbranding under the pure food law."

Some meaning must of course be ascribed to the language found in section 5779 G. C.,

"if it is an imitation of, or is sold under the name of another article."

It was quite evidently intended to serve some purpose. What purpose?

Upon reflection, it seems to me that the purpose of the language appears by substituting the word "and" for the word "or", thus causing the phrase to read,

"if it is an imitation of, *and* is sold under the name of another article."

That it is permissible to make such a substitution, where the sense demands, is, of course, a familiar rule of statutory construction.

Barrow vs. Williams, 12 O. N. P. (n. s.) 518; 29 Cyc., 1505;
Black on Interpretation of Laws, p. 153.

Such a construction is consistent with the view taken in the case of *United States* vs. *Five Cases of Champagne,* 205 Fed. 817, of the analogous section of the federal law heretofore quoted, to-wit:

> "* * * an article shall also be deemed to be misbranded: * * * In the case of food: First. If it be an imitation of or offered for sale under the distinctive name of another article."

The syllabus shows that the facts in the case cited were these:

> "A wholesale liquor dealer in New York ordered four cases of champagne from S. & Co., in Illinois. The order was filled with cases, the outside of which were marked with designs to represent cases of champagne and contained bottles of the same shape and made to imitate an ordinary champagne bottle. The bottles were corked and dressed about the neck the same and in very close imitation of ordinary champagne bottles, having the same style of label and seal, both attached in the same manner, and on the label was the name 'Special Gold Cabinet, Superior Quality,' with a coat of arms on one side and the initials 'H. H. S. & C.' and on the other certain figures, but without the word 'champagne.' The contents of the bottles was a very cheap, ordinary, low grade of carbonated white wine. The boxes were also marked with the words 'Extra Dry,' when in fact the contents were not 'Extra Dry.'"

The court rendered a judgment of condemnation, saying at p. 819:

> "This wine in question was and is an imitation of genuine imported champagne, and was and is so labeled and branded as to deceive and mislead both the purchaser and users into the belief that it is genuine champagne. Is it within the proviso or exception quoted? It contains no added poisonous or deleterious ingredient or ingredients. It was not and is not offered for sale under the distinctive name 'Champagne,' as that word is not on either bottle, label, or package, if the statute means, by 'offered for sale under the distinctive name of another article,' that it must be so advertised, or bear on the package containing it the distinctive name of some other article. Even if it has a distinctive name 'Special Gold Cabinet,' still it is 'an imitation of' and was actually 'offered for sale' under the name 'champagne,' which is the distinctive name of another article, that is, 'champagne' was ordered, and the seller sent this article as and for champagne, thus not only offering it for sale as champagne, but selling it as champagne. By his acts he represented it to be champagne.

Hence this carbonated wine contained in these bottles and packages is not within the proviso or exception, and must be held to be *misbranded* and subject to seizure and condemnation."

You are therefore advised that an artificial or imitation flavoring extract is not "adulterated" within the meaning of section 5779 and related sections of the General Code of Ohio, merely because it is an artificial or imitation flavoring extract.

It seems desirable here to emphasize the point that while artificial or imitation flavoring extracts may lawfully be sold in Ohio, they must not contain any ingredients which are poisonous or injurious to health (See section 5779 G. C., sub. section 6); furthermore, they must be labeled or branded as "imitation" or "artificial" (See section 5785 G. C., sub-section 2).

Further justification for the views above stated might be found in the fact that until quite recently section 5785 G. C. sub-section 4, expressly recognized the lawfulness of artificial or imitation flavoring extracts. In view of the change recently effected in said sub-section by H. B. No. 225 (108 O. L. 460), it is considered preferable to confine the discussion to sub-section 4 of section 5779 G. C.

(2) Your second question is: Whether the formula for flavoring extracts or compound for which no standard exists must be printed upon the label of the bottle, package or other container of same.

In connection with the phrase "flavoring extracts for which no standard exists," sections 5780 and 5785 G. C. need to be considered.

Section 5780 G. C. says:

"A flavoring extract is also adulterated within the meaning of this chapter, if, when sold under or by any one of the following names it differs from the standard hereby fixed therefor: (1) Almond extract shall be the flavoring extract prepared from oil of bitter almonds, free from hydrocyanic acid, and shall contain not less than one per cent by volume of oil of bitter almonds."

(Then follows similar standards for some twenty-two other extracts, which need not here be set forth).

Said section concludes thus:

"All of said flavoring extracts shall be a solution in ethyl alcohol of proper strength of the sapid and odorous principles derived from an aromatic plant, or parts of the plant, and shall conform in name to the plant used in its preparation."

Section 5785 G. C., prior to the amendment thereof which will presently be adverted to, read as follows:

"Food, drink, flavoring extracts, confectionery or condiment shall be misbranded within the meaning of this chapter:

1. If the package fails to bear a statement on the label of the quantity or proportion of morphine, opium, cocaine, heroine, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of such substances contained therein; 2, if it is labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so; 3, if in package form, and the contents are stated in terms of weight or measure, they are not plainly and correctly stated on the outside of the package; 4, in case of a flavoring extract, for which no standard exists, if it is not labeled 'artificial' or 'imi-

tation' and the formula printed in the manner hereinafter provided for the labeling of 'compounds' or 'mixtures' and their formulae; 5, if the package containing it or a label thereon bears a statement, design or device regarding it or the ingredients or substances contained therein, which is false or misleading in any particular; provided, that this section shall not apply to mixtures or compounds recognized as ordinary articles or ingredients of articles of food or drink, if each package sold or offered for sale is distinctly labeled in words of the English language as mixtures or compounds, with the name and percentage, in terms of one hundred per cent of each ingredient therein. The word 'compound' or 'mixture' shall be printed in letters and figures not smaller in height or width than one-half the largest letter upon any label on the package and the formula shall be printed in letters and figures not smaller in height or width than one-fourth the largest upon any label on the package, and such compound or mixture must not contain an ingredient that is poisonous or injurious to health."

It will be noted that sub-section 4 of the above quoted section required two things as to the labeling of flavoring extracts for which no standard exists, namely, that the same be labeled "artificial" or "imitation," and in addition that the label bear the formula of said extracts printed in the manner provided for the labeling of "compounds" or "mixtures."

Some time after the passage of said section 5785 G. C. in the form just set forth, the department of agriculture adopted the rule or regulation referred to in your letter, relative to the labeling of flavoring extracts, said rule being known as "Department Ruling Number 3," reading in part as follows:

"1. All extracts that do not conform to the standards laid down in section 5780 must be labeled as 'compounds' or 'mixtures,' 'artificial' or 'imitation' as the case may be, together with the formula printed in the English language in terms of one hundred per cent and all in proper sized type. This labeling should appear on both the carton and bottle."

The present legislature amended section 5785 G. C. by H. B. 225 (108 O. L. 460), effective August 19, 1919. The only change made was in sub-section 4, which now reads:

"In case of a flavoring extract for which no standard exists there is not printed in English, conspicuously, legibly, and clearly on the label the quantity by volume of alcohol in said extract;".

It will be noticed that the change in sub-section 4 was one of complete substitution. That is to say, the requirement that a no-standard flavoring extract be labeled "artificial" or "imitation" was dropped out, as was also the requirement relative to printing the formula. In place of these requirements, the legislature substituted another, viz., that there be printed in English, conspicuously, legibly, and clearly on the label "the quantity by volume of alcohol in said extract."

There is now, so far as I am aware, no statute which requires the formula for flavoring extracts for which no standard exists to be printed upon the label of the bottle, package or other container of the same.

The question now arises as to the present status of "Department Ruling Number 3," hereinabove referred to. Has the secretary of agriculture the authority at the present time to make and enforce a rule requiring, as does Rule Number 3, that the formula of flavoring extracts be printed in the English language on the carton

and bottle in terms of one hundred per cent and in proper sized type?

The only authority which the legislature appears to have given the secretary of agriculture in the matter of making rules of the character of the one under consideration, is contained in section 1177-12 G. C. That section, so far as pertinent, says:

> "The secretary of agriculture shall make such uniform rules and regulations as may be necessary for the enforcement of the food, drug, dairy and sanitary laws of this state.Such rules and regulations shall, where applicable, conform to and be the same as the rules and regulations adopted from time to time for the enforcement of the act of congress approved June 30, 1906, and amended March 3, 1913, and known as 'the food and drug act.'"

It is evident that under the provisions just quoted the authority of the secretary of agriculture in the matter of making rules and regulations is a dependent and not an independent authority. That is to say, he is not to make any rule or regulation that to him seems proper, but such and such only as are necessary to enforce subsisting food, drug, dairy or sanitary laws, with the further proviso as to conformity with federal rules and regulations. If there is no law of Ohio of the character stated to which any proposed rule is referable, such rule cannot be adopted.

In answer to your second question, you are advised that under the present laws of Ohio, the secretary of agriculture is without authority to require that the formula for flavoring extracts for which no standard exists be printed upon the label of the bottle, package or other container of same.

It is noted that your letter refers not only to the matter of labeling flavoring extract for which no standard exists, but likewise to the matter of labeling "compound" for which no standard exists. Thus far in our discussion no separate consideration has been given to the matter of compounds.

It is assumed that the word "compound" in this connection means a flavoring extract consisting of a union or mixture of two or more extracts or flavors.

Nothing has been found in the statutes which would require a flavoring extract compound for which no standard exists to bear a label showing the formula therefor, merely because it was a compound. The same conclusion may therefore be stated, respecting such compounds, as was stated supra relative to the labeling of flavoring extract for which no standard exists.

It may be well, however, at this point to refer to sub-section 5 of section 5785 G. C., which says:

> "If the package containing it or a label thereon bears a statement, design or device regarding it or the ingredients or substances contained therein, which is false or misleading in any particular; provided, that this section shall not apply to mixtures or compounds recognized as ordinary articles or ingredients of articles of food or drink, if each package sold or offered for sale is distinctly labeled in words of the English language as mixtures or compounds, with the name and percentage, in terms of one hundred per cent of each ingredient therein.
>
> The word 'compound' or 'mixture' shall be printed in letters and figures not smaller in height or width than one-half the largest letter upon any label on the package and the formula shall be printed in letters and figures not smaller in height or width than one-fourth the largest upon any label on the package, and such compound or mixture must not contain any ingredient that is poisonous or injurious to health."

In the case of *The J. M. Sealts Company* vs. *State of Ohio*, an unreported case in the court of appeals of Allen county, decided December 28, 1917, the court, referring to the above quoted language, said:

> "The proviso contained in section 5785 General Code is not a requirement that packages containing mixtures or compounds shall be labeled with the name and percentage in terms of one hundred per cent of each ingredient, as therein specified, *but is an exclusion of such packages from the defined offense of misbranding.*"

The supreme court overruled a motion by the state to certify the record in this case.

The decision in the Sealts case, it may be said in passing, opposes the view taken by the attorney-general in opinion number 1044 found in 1915 Attorney-General Opinions, Vol. 3, p. 2264.

(3) Your third question is as to the meaning of the words

"the quantity by volume of alcohol in said extract"

found in sub-section 4 of section 5785 G. C. (108 O. L. 460). You wish to know whether a statement of alcoholic content in terms of percentage would satisfy the requirement made by the above-quoted language.

The word "volume" is variously defined. According to the Century Dictionary it means:

"an amount or measure of tridimensional space."

Or, as defined by Webster's New International Dictionary, it is

"space occupied, as measured by cubic units, i. e., cubic inches, feet, etc."

In the so-called Sherley amendment to the 1906 federal food and drug act, it is required that each package

> "bear a statement on the label of the quantity or proportion of any alcohol * * *."

Regulation 30 of the federal secretary of agriculture says:

> "In the case of alcohol the expression 'quantity' or 'proportion' shall mean the average *percentage by volume* in the finished product."

That the legislature of Ohio was familiar with the idea of expressing quantity in terms of percentage by volume appears from section 5780 G. C., where it required that certain flavoring extracts contain a certain *per cent by volume* of the essential oils.

It is therefore not unlikely that the legislature had in mind both the federal provisions above quoted and the provisions of section 5780 G. C. at the time subsection 4 of section 5785 G. C. was amended. I am therefore of the opinion that a statement of alcoholic content in terms of percentage by volume will satisfy the provision in question.

Respectfully,
JOHN G. PRICE,
Attorney-General.